OFFICE OF JUDICIAL EDUCATION
7/2024

July 2024

TO: Consumers of Wisconsin Jury Instructions – Civil

FROM: Wisconsin Court System, Office of Judicial Education

Enclosed is Release No. 57 for the 1981 edition of Wis JI-Civil. The release contains material approved by the Wisconsin Civil Jury Instructions Committee through May 2024.

The following material is included in Release No. 57:

New Instructions	Revised Instructions				
5	50	1024	1145	1384	1391
	2500	2511	2750		

Content. The 7/2024 supplement updates the publication on legislative actions and judicial decisions through May 2024.

Information. For information on the status of the Committee's work, please contact Bryce Pierson at bryce.pierson@wicourts.gov.

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OFFICE OF JUDICIAL EDUCATION
7/2024

Wis JI-Civil

(Release No. 57 – July 2024)

Filing Instructions

Remove Old Pages Titled	Insert New Pages Titled
Volume I:	
Title Page (1/2024)	Title Page (7/2024) Supplement
1/2024 Supplement with (Release No. 56) in the right corner	(Release No. 57) in the right corner
Committee List (1/2024)	Committee List (7/2024)
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50 (2022)	50 (7/2024)
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7/2024 Supplement filed by _____, _____.

initials date

FOR QUESTIONS:

If you have any questions about these filing instructions or the civil jury instructions, please contact the Committee's reporter, Bryce Pierson at Bryce.pierson@wicourts.gov.

OFFICE OF JUDICIAL EDUCATION

7/2024

WISCONSIN JURY INSTRUCTIONS

CIVIL

VOLUME I

Wisconsin Civil Jury Instructions Committee

- 7/2024 Supplement (Release No. 57)

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WISCONSIN CIVIL JURY INSTRUCTIONS COMMITTEE (1959-2024)

CURRENT MEMBERS

Hon. Michael Waterman, St. Croix County (Chair)
Hon. William Pocan, Milwaukee County
Hon. Sarah Harless, Eau Claire County
Hon. Michael Aprahamian, Waukesha County
Hon. Emily Lonergan, Outagamie County
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Hon. Eugene Gasiorkiewicz, Racine County

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Hon. Michael J. Barron (1983-1996)
Hon. Dennis J. Barry (1994-1997)
Chief Justice Bruce F. Beilfuss (1959-1964)
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Hon. Patrick Willis (2006-2016)

Reporter: Bryce Pierson, Office of Judicial Education – Wisconsin Court System

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WIS JI-CIVIL

SUMMARY OF CONTENTS

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FOREWORD

Since 1959, the Wisconsin Jury Instructions project has produced over one thousand jury instructions to assist judges, lawyers, and, most importantly, jurors in understanding what the jury must decide at the conclusion of a trial. In 2020, the Jury Instructions project was transferred entirely to the Wisconsin Court System after 60 years as a cooperative effort between the Judicial Conference and the University of Wisconsin Law School. Publication and distribution of the Wisconsin Jury Instructions – Civil is now managed by the Office of Judicial Education with the assistance of the Wisconsin State Law Library. Throughout its sixty-three years of existence, the Wisconsin jury instructions model has proven unique in its longevity, continuity, and orientation toward the trial judge. Despite several structural changes over the last six decades, these distinctive aspects have remained consistent, and the jury instructions model has continued without interruption.

The instructions provided in Wisconsin Jury Instructions – Civil respond to a need for a comprehensive set of instructions to assist judges, juries, and lawyers in performing their role in civil cases. All published jury instructions share the same objective to provide a careful blending of the substantive law and the collective wisdom and courtroom experiences of the Committee members.

This set of instructions has been enriched by valuable suggestions from the judges and lawyers who have used the instructions in preparing trials, as well as presenting cases to juries. The Committee hopes this set will continue to receive the same valuable scrutiny from those who use it. We are proud of this publication and hope those who use it find it valuable.

(September 2021)

Bryce Pierson
Legal Advisor & Committee Reporter
Office of Judicial Education

COMMITTEE HISTORY

Foundation of the Wisconsin Civil Jury Instructions

As it is known today, the Wisconsin civil jury instructions model draws its origins to a 1958 panel discussion on uniform jury instructions sponsored by the Judicial Administration Section of the American Bar Association at its annual convention in Los Angeles. After attending this conference, Hon. Andrew. W. Parnell, Circuit Judge of the Tenth Circuit of Wisconsin and the future Chairman of the Civil Jury Instructions Committee, delivered a paper to the Wisconsin Board of Circuit Judges in which he advocated the necessity for uniform instructions in Wisconsin. In his paper, Judge Parnell urged the Board to initiate the development of uniform civil jury instructions, reminding the Board that:

> The task seems monumental, but it surely is not insurmountable. It is and should be, a function of this Board to set up the original machinery looking to the production, in due course, of uniform jury instructions in civil cases in our state. The arguments for it are patent and predominate. The ideal of progress and improvement in the judicial administration of our state should ever possess us and make us leaders in that field.

In response, the Board of Circuit Judges, in cooperation with the University of Wisconsin Extension Law Department[1], and the University of Wisconsin Law School[2], organized and conducted two seminars oriented around jury instructions in June of 1959. At these seminars, attendees discussed and appraised the necessity and the merits of uniform jury instructions in Wisconsin. As Judge Parnell would eventually note in his introduction to the original 1960 edition of the Wisconsin Jury Instructions-Civil, it was the "interest, desire, and enthusiasm" of the participating members of these two seminars that "ignited the inspirational spark that launched the program."

Although neither of these seminars produced immediate or recognizable model jury instructions, they made apparent the need for a reference resource that could assist the bench and bar of the State of Wisconsin in the preparation of jury instructions. Therefore, it was determined that a comprehensive strategy would have to be formulated to organize, review, develop, approve, produce, and distribute a book of uniform civil jury instructions.

Following the June seminars, the chairperson and the executive committee of each seminar held several meetings to tentatively resolve preliminary details of sponsoring, publishing, authoring, and editing. The resulting conclusions were then presented to the Board of Circuit Judges at its fall meeting in 1959. As a result, the Board established by resolution the Circuit Judges Civil Jury Instructions Committee. The Board also approved the preliminary agreements that provided the Committee would constitute the authoring personnel. Additionally, Professor John E. Conway of the University of Wisconsin Law

School would serve as editor, and the Extension Law Department would sponsor and produce the uniform civil jury instructions publication.

The first meeting of the appointed Circuit Judges Civil Jury Instructions Committee was held in Madison in October of 1959. At this inaugural gathering, the Committee determined the time, frequency, and places of its meetings, the procedures to prepare the meeting agendas, the assignments for authorship, editing details, and the means of publication. The Committee also determined how it would gather submissions for review and the procedure it would follow for approving proposed instructions.

The Committee began its review process by assembling more than two hundred proposed instructions which were submitted by Wisconsin trial judges and members of the State Bar. Assignments of specific proposals for instruction were then provided to individual members of the Committee who were responsible for preparing a draft of each proposed instruction. An accompanying brief, comments, and supporting legal research were also sought. During the meeting, the author presented their prepared material and answered questions from the other participating members. If the Committee determined that amendments or corrections were necessary, the draft would be tabled until revision were made. If the proposed material was tentatively approved, the instruction was submitted to the editor for editing and arrangement and then returned for eventual approval by the whole Committee. The current Civil Jury Instructions Committee still utilizes this review and approval procedure.

Development of the Original Model Instructions

The Circuit Judges Civil Jury Instructions Committee met nine times between 1959 and 1960 and averaged approximately 17 instructions at each meeting. As a result of these efforts, the first edition of Wisconsin Jury Instructions-Civil was published by the University of Wisconsin-Extension Law Department in December 1960 and included 150 approved model instructions[3]. Following the publication of this edition, the Committee continued to meet consistently to maintain a regular record of updating material and producing supplements to the 1960 edition. In 1978, the Committee released a supplement that included a revised preface by Editor John E. Conway. This preface provided advice and expectations for how users should use the instructions. These objectives and explanations remain accurate today.

In 1981, a new edition of the Wisconsin Jury Instructions-Civil was published, which amended the product's format and added 70 new instructions. Supplementation of the 1981 edition has continued on frequent basis, with each new supplement designated "Release No._____." As of April 2021, 52 supplements have been published since the 1981 revised edition.

Court Reorganization and Publication Incorporation into the Wisconsin Court System

In 1978, the Wisconsin court system was reorganized, and the old statutory boards, including the Board of Circuit Court Judges, were abolished. Furthermore, the Circuit Judges Civil Jury Instructions Committee's name was changed to the Civil Jury Instructions Committee.

In 1986, the University of Wisconsin-Extension, Department of Law, was integrated with the University of Wisconsin Law School as its Office of Continuing Education and Outreach. That office was renamed Continuing Education and External Affairs in 2016. In 2021, the University of Wisconsin transitioned its publication responsibilities to the Wisconsin Court System's Office of Judicial Education. That same year, in partnership with the Wisconsin State Law Library, the Office of Judicial Education converted the production of supplemental releases from physical copies to an all-digital format. The entire set of Wisconsin Jury Instructions-Civil is now available at no cost to the user in Word and PDF format at https://wilawlibrary.gov/jury.

Characteristics of the Wis JI-Civil Model

Several characteristics of the civil jury instructions model add significantly to the product's strength and value. First and foremost is the model's orientation toward the trial judge. As the giving of instructions is exclusively a judicial function, a primary focus of the Committee is to assist colleagues on the trial bench who may handle a wide variety of cases. A common point of reference for the Committee when discussing a new or amended instruction is the hypothetical judge faced with a civil trial issue after rotating from a criminal or family law caseload.

Another critical aspect of the model's orientation toward the trial judge is the make-up of the Committee itself. The seven voting members of the Committee are ~~trial court~~ judges, and only they can approve proposed instructions or amendments. Additionally, the Committee's ability to approve and publish model instructions is done without any additional endorsement by the Judicial Conference or the Supreme Court. A direct result of this arrangement is that trial judges are allowed to use model instructions as guides instead of directives. When necessary, a trial judge may depart from the exact language of the instruction if it does not fit the facts of the case or when they believe an improvement to the model can be made. This model is opposed to a model, like that implemented in Missouri, in which instructions are approved by order of the state supreme court order and must be given without change.

Finally, another unique aspect of the civil jury instructions model is its association with the notion of "law in action." This concept examines the role of law, not just as it exists statutorily or in case law, but as it is actually applied in the courtroom. The

incorporation of this concept into the jury instructions model can be drawn back to the original partnership with the University of Wisconsin Law School and its pursuit of the Wisconsin Idea.[4] Utilizing the assistance of experts like Professor John E. Conway, early versions of the Wisconsin jury instructions committees provided an all-inclusive perspective of the law. Over the years, the committees have sought to continue this practice by recruiting member judges from across the state and support from non-voting emeritus members and law school faculty. Although the University of Wisconsin Law School is no longer part of the jury instructions model, the committees and the Wisconsin Court System still strive to achieve the objectives embodied in the "law in action" concept.

How to Use the Model Jury Instructions[5]

Unlike instructions drafted for the purpose of a particular case, each instruction was, necessarily, drafted to cover the particular rule of law involved without reference to a specific fact situation. Therefore, it must be emphasized that in very few cases will it be possible to use these instructions verbatim. They are fundamentally models, checklists, or minimum standards. A distinction must be drawn between general instructions, which may frequently be used without change, and the substantive law instructions, which may often have to be modified to fit the needs of the particular case.[6] The user, therefore, should consider each instruction a model to be examined carefully before use for the purpose of determining what modifications are necessitated by the facts of the particular case. In addition, the effect of the instructions upon each other must be considered.[7]

The general instructions are broken down into descriptive categories and presented in the logical order in which they are usually given within each category. Three-digit numbers are used for the general instructions and four-digit numbers for those dealing with substantive law. In the substantive law areas, they are arranged numerically. The gaps between the numbers have been left purposely to permit the insertion of later material. Where there is no remaining space between two whole numbers (see, numbers 1026 and 1027) and it is necessary to insert another instruction, a decimal number is used (1026.5). Instructions that are alternatives bear the same whole number, with one having an "A" suffixed (see 1325 and 1325A).

It is suggested that the comment and the footnotes appearing below the instruction be read fully and carefully before the instruction is used, in order that the user be informed of any conditions prerequisite to its use, alternative material for particular cases, and of other cautionary information. Editorial directions will appear in the body of the instructions in brackets and centered upon the page. These directions tell the user to, for example, select a proper paragraph, insert a paragraph from a different instruction, or to read the verdict question with which the instruction deals. Words and phrases which are to be used alternatively appear in parenthesis and italics. Alternative paragraphs are denoted by brackets at the beginning and end of each alternative paragraphs. Words and phrases which are not appropriate for every case, but which should be given in some situations, are also in brackets.

The book itself may be cited as "Wis JI-Civil" and each instruction by adding the appropriate number. For example, "Wis JI-Civil 405." It is suggested, however, that these instructions be referred to by their citations only when the user requests that the instruction be given verbatim. If the attorney modifies one of these instructions, it is requested that he or she point out the nature of the change and the reason therefore.

INQUIRIES AND SUGGESTIONS

Inquiries and suggestions from judges and lawyers are among the most important sources of new business for the Committee. It is always informative to receive questions and suggestions from those the Committee is trying to serve. Individuals are encouraged to contact the reporter by phone, mail, or e-mail or to consult with any Committee member. Copies of approved but not published material are available from the reporter, as are working drafts.

A list of all current members is provided, beginning on the following page. A list of all the former judges who served on the Committee follows.

Civil Jury Instructions Committee

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Office of Judicial Education
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Phone: (608) 535-3233
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The Civil Jury Instructions Committee
Current Members and Emeritus Members as of 2023

Judges

Hon. Michael Waterman, Chair	St. Croix Co.
Hon. William Pocan	Milwaukee Co.
Hon. Sarah Harless	Eau Claire Co.
Hon. Michael Aprahamian	Waukesha Co.
Hon. Emily Lonergan	Outagamie Co.
Hon. Kevin Martens	Milwaukee Co.
Hon. Eugene Gasiorkiewicz	Racine Co.

Emeritus Members

Hon. Francis Wasielewski
Hon. Daniel Dillon
Hon. Lisa Stark
Hon. Emily Mueller
Hon. Dennis Moroney
Hon. Michael Schumacher
Hon. Paul Reilly
Hon. Barbara Key
Hon. Michael Fitzpatrick
Hon. William Sosnay

Reporter

Bryce Pierson	Wis. Office of Judicial Education

The Civil Jury Instructions Committee
Members

Judges

Hon. Helmuth F. Arps	(1959-1962)
Hon. M. Eugene Baker	(1959-1975)
Hon. Michael J. Barron	(1983-1996)
Hon. Dennis J. Barry	(1994-1997)
Chief Justice Bruce F. Beilfuss	(1959-1964)
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Hon. Richard J. Dietz	(1997-2006)
Hon. Daniel Dillon	(2005-2018)
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Hon. Michael Fitzpatrick	(2014-2023)
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Hon. Robert Mawdsley	(1997-2007)
Hon. Dennis Moroney	(2010-2020)
Hon. Emily Mueller	(2004-2014)
Hon. Gordon Myse	(1978-1983)
Hon. Harvey L. Neelen	(1959-1977)
Hon. J. Michael Nolan	(1991-2001)
Hon. Daniel Noonan	(2003-2013)
Hon. William I. O'Neill	(1959-1974)
Hon. Richard W. Orton	(1959-1961, 1973-1979)
Hon. Robert J. Parins	(1970-1982)
Hon. Andrew W. Parnell	(1959-1982)
Hon. Robert F. Pfiffner	(1970-1987)
Hon. Paul Reilly	(2005-2018)
Hon. John Roethe	(2003-2007)

Hon. Michael Schumacher	(2011-2021)
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Hon. Lisa Stark	(2001-2011)
Hon. Michael P. Sullivan	(1994-2003)
Hon. Joseph M. Troy	(1994-2003)
Hon. Albert J. Twesme	(1962-1980)
Hon. Clair H. Voss	(1974-1978)
Hon. Francis T. Wasielewski	(1996-2006)
Hon. Patrick Willis	(2006-2016)

Comment

1. The University of Wisconsin Extension Law Department was represented by Professor William Bradford Smith.

2. The University of Wisconsin Law School was represented by Professor John E. Conway.

3. The original 1960 edition included an introduction drafted by Judge Andrew W. Parnell. In that introduction, Judge Parnell provided the following claims and disclaimers made by the Committee concerning its work:

1. This book is the first tangible realization of a long-abiding dream of the Board of Circuit Judges relating to uniform jury instructions.
2. It is but a part of a projected end result.
3. It will be a readily available service to the trial judge in time of pressure of meeting deadlines on preparation of instructions.
4. It may be conveniently employed by the trial judge while the battle still rages about him, in his presence and hearing, deprived, as he then is, of the leisure and tranquility of legal research.
5. It will bring confidence to the new trial judges and remove for them the need of desperately seeking and gathering a disorganized file of prolix, unedited, and miscellaneous instructions from the usual sources of supply.
6. It will be an aid to the trial attorneys in preparing specific and pertinent requests for instructions.
7. It will avoid for the court the almost hopeless task of timely and correctly appraising, evaluating, and avoiding partial, slanted, and incomplete, or inaccurate submitted instructions at the close of trial.
8. It will minimize the ever-present hazards of hasty, ill-considered, or erroneous instructions.
9. It will reduce the frequency of retrials for avoidable errors.
10. It will make a small but fair contribution to the betterment of judicial administration in our state trial courts.

We Forcefully Disclaim that:

1. It its free from error, completely accurate, or a model of perfection in form statement,

or expression.

2. It is presented as a standard of instructions pattern to be blindly and unquestionably followed.
3. It is the final answer to all instructional problems.
4. It will remove all need for the trial judge's industry and ingenuity in the preparation of instructions.
5. It has grown to the full stature of its possibilities.
6. It will lessen the duties if the trial attorneys with respect to the preparation and submission of timely written instructions.
7. It is above criticism.
8. It forestalls any constructive suggestions for it improvement.
9. It is as clear, concise, and correct as it can or ought to be.

4. The Wisconsin Idea is often described as being based on the principle that "the boundaries of the University are the boundaries of the State." It also has a second aspect which recognizes that University faculty and staff who participate in activities like the jury instructions projects use the experience to enrich their teaching, research, and service responsibilities.

5. Much of the language provided in the "How to Use" section comes from both the Preface to the 1962 edition of Wisconsin Jury Instructions-Criminal authored by Editor John H. Bowers, and the Revised Preface to the 1978 edition of the Wisconsin Jury Instructions-Civil authored by Editor John E. Conway. The advice and expectations for how the instructions should be used provided by Mr. Bowers and Mr. Conway remain accurate today.

6. As Justice Currie stated in Sharp v. Milwaukee & Suburban Transport Co., 18 Wis.2d 467, 118 N.W.2d 905, 912 (1963): "While the instructions embodied in Wis JI-Civil - Part 1 are a valuable tool to the trial courts, charges to the jury sometimes require more than a compendium of extracts from these uniform instructions without varying their wording to fit the facts of the particular case at hand."

7. For example, a particular instruction may be limited to one ground of negligence; but in a trial where the evidence warrants submission of several grounds which are related, it may be necessary to modify the instructions suggested here to accommodate not only the facts of the case but also the impact of the two grounds of negligence on each other.

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5 COMMENT: GENDER-NEUTRAL LANGUAGE

This is intended to explain the Committee's approach to the use of gender-neutral language in the Wis JI-Civil and to provide references for users who wish to use gender-neutral language in revising or supplementing the published instructions.

Substantive Gender Bias

The Committee attempts to prepare instructions that are free from substantive gender bias. By substantive bias, we mean statements that indicate that one gender is to be treated differently from the other in applying the law as described in the instructions. An example would be indicating that a witness was less likely to be credible because of gender.[1]

Pronouns

Originally, some instructions adhered to the conventional grammar and statutory drafting norms of the time, employing masculine pronouns to refer to antecedents of mixed or unknown gender.[2] However, starting in 1991, all Wisconsin jury instructions have been drafted or revised to avoid using the masculine form. This has been achieved using several different techniques.[3]

The Committee's current drafting format requires that all new instructions use gender-neutral language.[4] Where a party's name is not appropriate, instructions include reference to "he or she" and "him or her." However, there are exceptions where this format might not be suitable, especially if removing a pronoun changes the specific substantive meaning of the relevant statute. [5]

The Committee has always assumed that the published instructions will be tailored to the facts of each case. This includes modifying all pronouns to match their antecedents, as failure to do so may confuse the jury. See the dissenting opinion in Betchkal v. Willis, 127 Wis.2d 177, 190, 378 N.W.2d 684 (1985). The Committee's current drafting format provides both "he" and "she" pronouns when referring to the specific party. Although this format does not include the singular "they," the Committee acknowledges that trial courts have the discretion to use "they" or "their" in place of "he" or "she" when referring to a single person.[6]

Where users encounter an instruction that has not yet been revised in accordance with these principles, some of the techniques described in the notes below may help with any revision that may be required.[7]

COMMENT

Wis JI-Civil 5 was approved by the Committee in January 2024.

This instruction aims to provide insight into the Committee's drafting guidelines regarding adhering to scholarly consensus and style guides. It also aims to provide techniques for modifying the model instructions to incorporate gender-neutral language.

The 1991 recommendations for revising the uniform jury instructions were made by the Civil Law Subcommittee of the Wisconsin Equal Justice Task Force.

1. No instances of explicit substantive gender bias have been brought to the Committee's attention. To confront the danger of implicit gender bias, the Committee has published Wis JI-Civil 50, which, in giving the jury general instruction on its duties, includes the following statement:

> People make assumptions and form opinions from their own personal backgrounds and experiences. Generally, we are aware of these things, but you should consider the possibility that you have biases of which you may not be aware which can affect how you evaluate information and make decisions.

2. Wis. Stat. Section 990.001(2) provides: "Words importing one gender extend and may be applied to any gender."

3. Some of the common techniques are:

- rewriting to avoid the problem. Often, the pronoun or the phrase in which it appears can simply be dropped. Or the sentence can easily be rewritten to make the pronoun unnecessary.

- substituting nouns for pronouns. The instructions often suggest using the name or title of a person; repeating the name or title avoids use of a pronoun and adds clarity as well.

- substituting plural pronouns for a singular pronoun. Using "witnesses . . . their" in place of "witness . . . his" usually works well.

- substituting a gender-neutral pronoun. Using "one" in place of "his" or "her" is grammatically correct but often increases the complexity of an instruction, making it more difficult to understand.

- using gender-neutral terms. The instructions typically use "police officer" instead of "policeman," "firefighter" instead of "fireman," etc.

For a summarization of these and other techniques, see Garner, A Dictionary of Modern Legal Usage, p. 499 (Oxford, 1987) and Melinkoff, Legal Writing: Sense and Nonsense, pp. 48 51 (West, 1982). Several other guides are also available. It has been the Committee's experience that rewriting can virtually always increase gender neutrality and clarity at the same time.

4. The Committee believes it is following the view of most of the commentators on current usage

in general and the law in particular. While the rules of grammar on the pronoun issue are described as unsettled, there is consensus that it is best to avoid the problem where it is possible to do so. See, for example, Garner, A Dictionary of Modern Legal Usage, p. 499 (Oxford, 1987); Melinkoff, Legal Writing: Sense and Nonsense, pp. 48 51 (West, 1982).

5. Changes in meaning can result if pronouns are changed without a careful eye on the substantive effect. For example, a criminal statute was revised several years ago to substitute "in personal possession" for "in his possession." See § 943.12, Possession of Burglarious Tools. One could argue that "personal possession" has a specific substantive meaning that changed the statute.

6. The use of singular "they."

The singular "they" is a generic third-person singular pronoun in English. In the past, formal writing and style guides, including the APA Publication Manual, the MLA Handbook, and the AP Stylebook, did not endorse the use of "they" as a singular third-person pronoun. However, most guides now wholly support the use of "they" or accept its use in limited cases as a singular and-or gender-neutral pronoun. Still, others, like the Chicago Manual of Style, take a stronger stance, deeming it too informal and ungrammatical, and recommend avoiding its use. Nevertheless, such a position is a recommendation, not a prohibition, and allows writers to make the final determination.

The Committee recognizes that such usage continues gaining scholarly acceptance and believes that it is wise to make an effort to determine what is appropriate for a particular situation. Additionally, the Committee believes that it is acceptable to use "they" or "their" instead of "he" or "she" when referring to a single person unless doing so would create undue confusion.

7. See note 3, supra.

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50 PRELIMINARY INSTRUCTION: BEFORE TRIAL

(NOTE TO THE TRIAL JUDGE: The following is a suggested instruction to be given to the jury before opening statements are made by the lawyers for the parties. While most of this instruction should apply to most cases, some parts of it do not apply to all cases, and some parts of it may not apply to the case before you now. Read the instruction before it is given and delete any parts that are not applicable. Also, the language used in this instruction is "suggested" language. You may have another way of expressing the same ideas in this instruction and may do so in a way consistent with Wisconsin law.)

MEMBERS OF THE JURY:

Before the trial begins, there are certain instructions you should have to better understand your functions as a juror and how you should conduct yourself during the trial.

Your duty is to decide the case based only on the evidence presented at trial and the law given to you by the court. Anything you may see or hear outside the courtroom is not evidence. All people deserve fair treatment in our system of justice, regardless of their personal characteristics. [These include, but are not limited to, race, national origin, religion, age, ability, sex, gender identity, sexual orientation, education, income level, occupation, or any other personal characteristic.][1] People make assumptions and form opinions from their own personal backgrounds and experiences. Generally, we are aware of these things, but you should consider the possibility that you have biases of which you may not be aware. Like conscious bias, bias of which you may not be aware can affect how you evaluate information and make decisions. This is called unconscious or implicit bias.

You must carefully evaluate the evidence and resist any urge to reach a verdict that is

influenced by bias for or against any party, witness, or attorney in order to treat all parties equally and to arrive at a just and proper verdict based on the evidence.

In fairness to the parties, keep an open mind during the trial. Do not begin your deliberations and discussion of the case until all the evidence is presented and I have instructed you on the law. Do not discuss this case among yourselves or with anyone else until your final deliberations in the jury room. This order is not limited to face-to-face conversations. It also extends to all forms of electronic communications. Do not use any electronic devices, such as a mobile phone or computer, text or instant messaging, or social networking sites, to send or receive any information about this case or your experience as a juror. Once deliberations begin in the jury room you will then be in a position to intelligently and fairly exchange your views with other jurors.

CONDUCT

We will stop, or "recess," from time to time during the trial. You may be excused from the courtroom when it is necessary for me to hear legal arguments from the lawyers. If you come in contact with the parties, lawyers [interpreters,] or witnesses, do not speak with them. For their part, the parties, lawyers, [interpreters,] and witnesses will not contact or speak with the jurors. Do not listen to any conversation about this case.

Do not research any information that you personally think might be helpful to you in understanding the issues presented. Do not investigate this case on your own or visit the scene, either in person or by any electronic means. Do not read any newspaper reports or

listen to any news reports on radio, television, over the internet, or any other electronic application or tool about this trial. Do not consult dictionaries, computers, electronic applications, social media, the internet, or other reference materials for additional information. Do not seek information regarding the public records of any party or witness in this case. Any information you obtain outside the courtroom could be misleading, inaccurate, or incomplete. Relying on this information is unfair because the parties would not have the opportunity to refute, explain, or correct it.

Do not communicate with anyone about this trial or your experience as a juror while you are serving on this jury. Do not use a computer, cell phone, or other electronic device, including personal wearable electronics, applications, or tools with communication capabilities, to share any information about this case. For example, do not communicate by telephone, blog post, e-mail, text message, instant message, social media post, or in any other way, on or off the computer.

Do not permit anyone to communicate with you about this matter, either in person, electronically, or by any other means. If anyone does so despite your telling them not to, you should report that to me. I appreciate that it is tempting when you go home in the evening to discuss this case with another member of your household, but you may not do so. This case must be decided by you, the jurors, based on the evidence presented in the courtroom. People not serving on this jury have not heard the evidence, and it is improper for them to influence your deliberations and decisions in this case. After this trial is

completed, you are free to communicate with anyone in any manner.

These rules are intended to ensure that jurors remain impartial throughout the trial. If any juror has reason to believe that another juror has violated these rules, you should report that to me. If jurors do not comply with these rules, it could result in a new trial involving additional time and significant expense to the parties and the taxpayers.

PARTIES

A party who brings a lawsuit is called a plaintiff. In this case, the plaintiff[s] [is] [are] _____ [state separately as to each if more than one]. The plaintiff[s] [is] [are] suing to [note: state purposes of the action for each plaintiff, for example, recover damages from a defendant].

[If there are multiple plaintiffs, give the following: You should decide the case of each plaintiff as if it were a separate lawsuit. Each plaintiff is entitled to separate consideration of [his] [her] [its] own claim(s). All instructions apply to each plaintiff unless I tell you otherwise.]

A party against whom a claim is made is called a defendant. In this case, the defendant[s] [is] [are] _____ [state separately to each if more than one].

[If there are multiple defendants, give the following: You should decide the case against each defendant as if it were a separate lawsuit. Each defendant is entitled to separate consideration of [his] [her] [its] own defenses. All instructions apply to each defendant

unless I tell you otherwise.]

[If there is a counterclaiming defendant, give the following: The defendant[s] in this case have also filed a claim against the plaintiff[s]. [Identify the party making the counterclaim and the party against whom the counterclaim is made]. The claim of a defendant against a plaintiff is called a counterclaim. The defendant[s] [is] [are] counterclaiming for [note: state purposes of the counterclaim for each defendant, for example, recover damages from a plaintiff.]

[If there are parties with subrogated interests or other parties named in the caption and not appearing at trial, give the following: There [is another party] [are other parties] named in this case that will not participate in this trial. Do not speculate on the reasons. Any claims involving them are not to be considered by you in deciding this case.]

[If there are settled, dismissed, or withdrawn parties, give the following: [Former party] is no longer a party in this case. [The claims of that party] [Claims against that party] have been [settled] [dismissed] [withdrawn]. Do not speculate on the reasons.]

EVIDENCE

You are to decide the case solely on the evidence offered and received at trial.

Evidence is:

1. testimony of witnesses given in court, both on direct and cross-examination, regardless of who called the witness;
2. deposition testimony presented during the trial;

3. exhibits admitted by me regardless of whether they go to the jury room; and

4. any facts to which the lawyers have agreed or stipulated or which I have directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence.

Remarks of the attorneys are not evidence. If any remarks suggest certain facts not in evidence, disregard the suggestion.

ORDER OF PROOF

Normally, a plaintiff will produce all witnesses and exhibits supporting the plaintiff's claim against the defendant before the defendant introduces any evidence, although exceptions are sometimes made to that rule to accommodate a witness. After the plaintiff's case is presented, the defendant may present witnesses and exhibits to establish any defenses. There is no requirement that the defendant call any witnesses or present any evidence [unless the defendant is making a claim against the plaintiff]. If the defendant does introduce evidence, the plaintiff is then permitted to offer additional evidence to rebut the defendant's case. Each witness is first examined by the lawyer who called the witness to testify, and then the opposing lawyer is permitted to cross-examine.

OBJECTIONS

At times during a trial, objections may be made to the introduction of evidence. I do not permit arguments on objections to evidence to be made in your presence. Any ruling upon objections will be based solely upon the law and are not matters which should concern

you at all. You must not infer from any ruling that I make or from anything that I should say during the trial that I hold any views for or against either party to this lawsuit.

During the trial, I will sustain objections to questions asked without permitting the witness to answer or, where an answer has been made, will instruct that it be stricken from the record and that you are to disregard it and dismiss it from your minds. You should not draw any inference from an unanswered question, nor may you consider testimony that has been stricken in reaching your decision. This is because the law requires that your decision be made solely upon the competent evidence before you.

[NOTETAKING NOT ALLOWED

Do not take notes during the trial. Taking notes will not be permitted in this case because _____.]

[NOTETAKING PERMITTED

You are not required to, but you may take notes during this trial, except during the opening statements and closing arguments. The court will provide you with materials.

In taking notes, you must be careful that it does not distract you from carefully listening to and observing the witnesses.

You may rely on your notes to refresh your memory during your deliberations. Otherwise, keep them confidential. After the trial, the notes will be collected and destroyed.]

TRANSCRIPTS NOT AVAILABLE FOR DELIBERATIONS; READING BACK TESTIMONY

You will not have a copy of the written transcript of the trial testimony available for use during your deliberations. [You may ask to have specific portions of the testimony read to you.] You should pay careful attention to all the testimony because you must rely primarily on your memory of the evidence and testimony introduced during the trial.

USE OF DEPOSITIONS

During the trial, the lawyers will often refer to and read from depositions. Depositions are transcripts of testimony taken before the trial. The testimony may be that of a party or anybody who has knowledge of facts relating to the lawsuit. Deposition testimony, just like testimony during the trial, if received into evidence at the trial, may be considered by you along with the other evidence in reaching your verdict in this case.

[JUROR QUESTIONING OF WITNESSES

You will be given the opportunity to ask written questions of the witnesses testifying in this case.

After both lawyers have finished questioning a witness, you may raise your hand if you have any questions that have not been addressed by the lawyers. Questions must be in writing and directed to the witness and not to the lawyers or me. If I determine that your question may be asked, I will ask it. If I do not ask your question, you should not speculate what the answer to the question is or why I did not ask it.]

CREDIBILITY OF WITNESSES

It is the duty of the jury to scrutinize and to weigh the testimony of witnesses and to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is, the believability, of the witnesses and of the weight to be given to their testimony.

In determining the credibility of each witness and the weight you give to the testimony of each witness, consider these factors:

- whether the witness has an interest or lack of interest in the result of this trial;
- the witness' conduct, appearance, and demeanor on the witness stand;
- the clearness or lack of clearness of the witness' recollections;
- the opportunity the witness had for observing and for knowing the matters the witness testified about;
- the reasonableness of the witness's testimony;
- the apparent intelligence of the witness;
- bias or prejudice, if any, has been shown;
- possible motives for falsifying testimony, if any has been shown; and
- all other facts and circumstances during the trial which tend either to support or to discredit the testimony.

Then, give to the testimony of each witness the weight you believe it should receive.

[In your determination of credibility, you must avoid your own personal biases.][2] There is no magic way for you to evaluate the testimony; instead, you should use your

common sense and experience. In everyday life, you determine for yourselves the reliability of things people say to you. You should do the same thing here.

BURDEN OF PROOF

In every trial there is a burden of proof. The phrase "burden of proof" means that when a party comes into a courtroom and makes a claim, as the plaintiff is making here, the law says that the claim must be proved. After the trial, I will instruct you on the proper burden of proof to be applied to the questions in the verdict that will be submitted to you.

[CLOSING ARGUMENTS

After all of the evidence is introduced and both parties have rested, the lawyers will again have an opportunity to address you in a closing argument. While the closing arguments are very important, they are not evidence, and you are not bound by the argument of either lawyer.

After the final arguments are concluded, I will instruct you on the rules of law applicable to the case, and you will then retire for your deliberations. Your function as jurors is to determine what the facts are and to apply the rules of law that I give you to the facts. The conclusion you reach will be your verdict. You will determine what the facts are from all the testimony that you hear and from exhibits that are submitted to you. You are the sole and exclusive judges of the facts. In that field, neither I nor anyone may invade your province. I will try to preside impartially during this trial and not express any opinion concerning the facts. Any views of mine as to what the facts are totally irrelevant.

I do caution you, however, that under your oath as jurors, you are duty-bound to accept the rules of law that I give you whether you agree with them or not. As the sole judges of the facts in this case, you must determine which of the witnesses you believe, what portion of their testimony you accept, and what weight you attach to it.]

OPENING STATEMENTS

We have now reached that stage of the proceedings where both lawyers have the opportunity to make an opening statement.

The purpose of an opening statement is to outline for you what each side expects to prove so that you will better understand the evidence as it is introduced during the trial. I must caution you, however, that the opening statements are not evidence.

After [counsel/the parties] have completed their opening statements, we will begin the trial by (plaintiff)'s lawyer calling the first witness.

NOTES

1. The language in brackets provides an optional, non-exhaustive list of personal characteristics. If a trial judge chooses to include this language, they may modify the list as needed for each case, either by adding new characteristics or removing existing ones.

2. The text enclosed in brackets is optional and can be included at the trial judge's discretion in the instructions given verbally or in written form to the jury.

COMMENT

This instruction was approved in 2010 and revised in 2017, 2020, and 2022. The 2017 revision included a "Note to the Trial Judge" at the beginning of the instruction. The 2020 revision expanded on the use of social media and other digital tools. This revision was approved by the Committee in January 2024; it expanded the range of personal characteristics that may affect a juror's consideration of the

evidence.

1024 PROFESSIONAL NEGLIGENCE: MEDICAL: RES IPSA LOQUITUR

If you find that (name the part of the body that was injured) of (plaintiff) was injured during the course of the operation performed by (doctor) and if you further find (from expert medical testimony in this case)[1] that the injury to the (name the part of the body that was injured) of (plaintiff) is of a kind that does not ordinarily occur if a surgeon exercises proper care and skill, you may infer, from the fact of surgery to the (name the part of the body that was injured) of (plaintiff), that (doctor) failed to exercise that degree of care and skill which reasonably prudent surgeons would exercise. This rule will not apply if (doctor) has offered an explanation for the injury to the (name the part of the body that was injured) of (plaintiff) which satisfies you that the injury to (plaintiff) did not occur through any failure on (doctor)'s part to exercise due care and skill.

NOTES

1. A plaintiff may employ "competent expert testimony which serves in the place of the jurors' common knowledge and gives them a rational basis for concluding that the event does not ordinarily occur unless someone has been negligent." Utica Mut. Ins. Co. v. Ripon Co-op., 50 Wis. 2d 431, 436-37, 184 N.W.2d 65 (1971).

If the jury may be permitted to infer negligence on the basis of layman's knowledge (as whether the plaintiff's shoulder was injured during an appendectomy), omit the phrase in lines two and three "from expert medical testimony in this case."

COMMENT

The instruction and comment were originally published in 1967. This revision was approved in 1980. The comment was updated in 1997, 2010, and 2017. This revision was approved by the Committee in January 2024; it updated the comment.

Kelley v. Hartford Casualty Ins. Co., 86 Wis.2d 129, 271 N.W.2d 676 (1978); Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1977); Trogun v. Fruchtman, 58 Wis.2d 569, 207 N.W.2d 297 (1973); Burnside v. Evangelical Deaconess Hosp., 46 Wis.2d 519, 175 N.W.2d 230 (1970); see also Lecander v. Billmeyer, 171 Wis.2d 593, 492 N.W.2d 167 (Ct. App. 1992); Petzel v. Valley Orthopedics Ltd., 2009 WI App. 106, 320 Wis.2d 621, 770 N.W.2d 787.

Whether the evidence presented warrants the giving of a res ipsa loquitur instruction always presents a question of law for the trial court. Fehrman v. Smirl, 20 Wis.2d 1, 28b, 121 N.W.2d 255 (1963).

Where "the plaintiff's evidence of negligence in a given case has been so substantial that it provides a full and complete explanation of the event," then "causation is no longer a mystery, and the res ipsa loquitur instruction would be superfluous and erroneous." Utica Mut. Ins. Co. v. Ripon Coop., 50 Wis.2d 431, 439, 184 N.W.2d 65 (1971). See also Fehrman, supra; Puls v. St. Vincent Hospital (1967), 36 Wis.2d 679, 154 N.W.2d 308, and Rembalski v. John Plewa, Inc., 2023 WI App 58, ¶16, 409 Wis.2d 647, 998 N.W.2d 523.

Res ipsa loquitur was first applied to medical malpractice actions in 1963. Fehrman v. Smirl, 20 Wis.2d 1, 121 N.W.2d 255 (1963). In this case, the Supreme Court loosened the rule that a physician's negligence could only be proven by expert testimony in situations where the errors were of such a nature that a layperson could conclude from common experience that such mistakes do not happen if the physician had exercised proper skill and care. Res ipsa loquitur is a rule of evidence that permits the jury to draw a permissible inference of the physician's negligence without any direct or expert testimony as to the physician's conduct at the time the negligence occurred. Hoven v. Kelble, 79 Wis.2d 444, 256 N.W.2d 379 (1977). The doctrine can be involved in a medical malpractice action when: (1) there is evidence that the event in question would not ordinarily occur unless there was negligence; (2) the agent or instrumentality that caused the harm was within the defendant's exclusive control; and (3) the evidence allows more than speculation but does not fully explain the event. See Lecander v. Billmeyer, 171 Wis.2d 593, 601-02, 492 N.W.2d 167 (Ct. App. 1992); Walker v. Sacred Heart Hospital, Appeal No. 2015AP805 (decided January 4, 2017). In Richards v. Mendivil, 200 Wis.2d 665, 548 N.W.2d 85 (Ct. App. 1996), the court of appeals noted that there is a danger that when a plaintiff relies upon expert testimony that the evidence of negligence will be so substantial that a full and complete explanation of causation is provided and res ipsa loquitur will not be applicable.

The third element discussed above, that the evidence allows more than speculation but does not fully explain the event, was set forth in Fiumefreddo v. Mclean, 174 Wis.2d 10, 496 N.W.2d 226 (Ct. App. 1993). See also Lecander v. Billmeyer, supra.

In Kelley, the court stated, at 132:

> Before a res ipsa loquitur instruction can be given to a jury, the evidence must conform to these requirements:
>
> (1) The event in question must be of the kind which does not ordinarily occur in the absence of negligence; and (2) the agency or instrumentality causing the harm must have been within the exclusive control of the defendant. Trogun v. Fruchtman, 58 Wis.2d 569, 590, 207 N.W.2d 297 (1973).

With respect to these two conditions, the court in Hoven v. Kelble, supra at 451-52, stated:

> When these two conditions are present, they give rise to a permissive inference of negligence on the part of the defendant which the jury is free to accept or reject. It is settled that the doctrine may be applied in medical malpractice cases and that the likelihood that negligence was the cause may be shown by expert medical testimony in cases where it may not be so inferred on the basis of common knowledge. Fehrman v. Smirl, 20 Wis.2d 1, 21, 22, 25, 26, 121 N.W.2d 255, 122 N.W.2d 439 (1963); Trogun v. Fruchtman, supra.

The principle of res ipsa loquitur, commonly discussed in the context of a jury instruction, is also applicable in court trials where the circuit court serves as the fact-finder. In a court trial, when determining whether to apply this doctrine, the circuit court essentially follows the same analysis it would use during a trial to decide whether to offer the jury instruction. See Palisades Collection LLC v. Kalal, 2010 WI App 38, ¶13, 324 Wis. 2d 180, 781 N.W.2d 503. See also Rembalski v. John Plewa, Inc., 2023 WI App 58, 409 Wis.2d 647, 998 N.W.2d 523, note 2.

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1145 RES IPSA LOQUITUR

If you find (defendant) had (exclusive control of) (exclusive right to the control of)[1] the (name the instrument or agency involved) involved in the accident, and if you further find that the accident in question is of a type or kind that ordinarily would not have occurred had (defendant) exercised ordinary care, then you may infer from the accident itself and the surrounding circumstances that there was negligence on the part of (defendant),[2] unless (defendant) has offered an explanation of the accident which is satisfactory to you.

NOTES

1. The alternate phrase "exclusive right to the control of" should be used in those cases where defendant disavows exclusive control because he or she has delegated (by contract or otherwise) the duty of repair or maintenance of the instrument or agency to another. Turk v. H. C. Prange Co., 18 Wis.2d 547, 119 N.W.2d 365 (1963); Koehler v. Thiensville State Bank, 245 Wis. 281, 14 N.W.2d 15 (1944). Goebel v. General Bldg. Serv. Co., 26 Wis.2d 129, 131 N.W.2d 852 (1964), is a situation where several parties might have exercised control.

2. A plaintiff may employ "competent expert testimony which serves in the place of the jurors' common knowledge and gives them a rational basis for concluding that the event does not ordinarily occur unless someone has been negligent." Utica Mut. Ins. Co. v. Ripon Co-op., 50 Wis. 2d 431, 436-37, 184 N.W.2d 65 (1971).

COMMENT

This instruction and comment were approved by the Committee in 1977. The comment was updated in 1989 and 2001. This revision was approved by the Committee in January 2024; it added to the comment.

The following conditions must be present before the doctrine of res ipsa loquitur is applicable: (1) the event in question must be of a kind which does not ordinarily occur in the absence of negligence; and (2) the agency of instrumentality causing the harm must have been within exclusive control of the defendant. When these two conditions are present, they give rise to a permissible inference of negligence, which the jury is free to accept or reject. Lambrecht v. Estate of Kaczmarczyk, 2001 WI 25, 241 Wis.2d 804, 623 N.W.2d 751.

The court decides as a preliminary matter of law that the inference is reasonable; if not, the instruction is not given.

Where "the plaintiff's evidence of negligence in a given case has been so substantial that it provides a full and complete explanation of the event," then "causation is no longer a mystery, and the res ipsa loquitur instruction would be superfluous and erroneous." Utica Mut. Ins. Co. v. Ripon Coop., 50 Wis.2d 431, 439, 184 N.W.2d 65 (1971). See also, Fehrman v. Smirl (1964), 25 Wis.2d 645, 131 N.W.2d 314; Puls v. St. Vincent Hospital (1967), 36 Wis.2d 679, 154 N.W.2d 308, and Rembalski v. John Plewa, Inc., 2023 WI App 58, ¶16, 409 Wis.2d 647, 998 N.W.2d 523.

Insert the facts of the case in the instruction if desired. This instruction was approved by implication in Brunner v. Van Hoof, 4 Wis.2d 459, 464, 90 N.W.2d 551 (1958); Colla v. Mandella, 271 Wis. 145, 149-50, 72 N.W.2d 755 (1955); and Georgia Casualty Co. v. American Milling Co., 169 Wis. 456, 460, 172 N.W. 148 (1919).

The mere happening of a collision is not probative that someone has been negligent. Millonig v. Bakken, 112 Wis.2d 445, 334 N.W.2d 80 (1983). In Millonig, the court said that res ipsa loquitur "only creates a permissive inference" and for the doctrine to apply one of the necessary elements is that the accident probably would not have occurred but for the negligent of the defendant. 112 Wis.2d, at p. 457.

The instruction does not cover negligence on the part of plaintiff, since Wisconsin has a comparative negligence law.

This instruction applies to host-guest cases. Turk v. H. C. Prange Co., supra. Henthorn v. MGC Corp., 1 Wis.2d 180, 187, 83 N.W.2d 759 (1957); Modl v. National Farmers Union Prop. & Casualty Co., 272 Wis. 650, 656, 76 N.W.2d 599 (1956).

Res ipsa loquitur can be used in strict liability cases. Jagmin v. Simonds Abrasive Co., 61 Wis.2d 60, 211 N.W.2d 810 (1973).

This instruction is proper even though plaintiffs have tried to prove specific negligence and have failed. Commerce Ins. Co. v. Merrill Gas Co., 271 Wis. 159, 168, 72 N.W.2d 771 (1955).

If res ipsa loquitur rests on data which was used as the basis for an allegation of a specific act of negligence, but the inference of negligence so raised was rebutted, then res ipsa loquitur is not in the case. Brunner v. Van Hoof, supra at 464, citing Gay v. Milwaukee Elec. Ry. & Light Co., 138 Wis. 348, 353-54, 120 N.W. 283 (1909).

Where an event which caused injury to the plaintiff might have been caused by a specific act of X or by inferred negligence of the defendant who was in control of the situation, the jury should be instructed that res ipsa loquitor would be applicable only if it first found that the specific act did not cause the event. Mixis v. Wisconsin Pub. Serv. Comm'n, 26 Wis.2d 488, 132 N.W.2d 769 (1965).

The burden of proof (persuasion) does not shift from plaintiff to defendant, and it is error to so state. Ziino v. Milwaukee Elec. Ry. & Transp. Co., 272 Wis. 21, 24, 74 N.W.2d 791 (1956).

If no instruction is requested in the trial court, the Supreme Court will not consider res ipsa loquitur for the first time on appeal. Ahola v. Sincock, 6 Wis.2d 332, 349, 94 N.W.2d 566 (1959).

The principle of res ipsa loquitur, commonly discussed in the context of a jury instruction, is also applicable in court trials where the circuit court serves as the fact-finder. In a court trial, when determining whether to apply this doctrine, the circuit court essentially follows the same analysis it would use during a trial to decide whether to offer the jury instruction. See Palisades Collection LLC v. Kalal, 2010 WI App 38, ¶13, 324 Wis. 2d 180, 781 N.W.2d 503. See also Rembalski v. John Plewa, Inc., 2023 WI App 58, 409 Wis.2d 647, 998 N.W.2d 523, note 2.

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1384 DUTY OF HOSPITAL: GRANTING AND RENEWING STAFF PRIVILEGES (CORPORATE NEGLIGENCE)

A hospital owes a duty to its patients to use reasonable care in granting and renewing staff privileges to permit only competent (physicians) (surgeons) to use its facilities. This duty requires the hospital to use reasonable care to appoint only qualified physicians and surgeons to its medical staff (and to periodically monitor and review their competency). The failure to use reasonable care is negligence.

In investigating the qualifications of doctors applying for staff privileges, the duty of reasonable care requires that a hospital: (1) require an applicant to complete an application; (2) verify the accuracy of the applicant's statements especially in regard to the applicant's medical education, training, and experience; (3) solicit information from the applicant's peers, including those not referenced in the application, who are knowledgeable about the education, training, experience, health, competence, and ethical character of the applicant; (4) determine if the applicant is currently licensed to practice in this state and if the applicant's licensure or registration has been or is currently being challenged; (5) inquire whether the applicant has been involved in adverse medical malpractice actions and whether the applicant has lost (his) (her) membership in any medical organizations or privileges at any other hospital.

A hospital must evaluate the information gained through its investigation and make a reasonable judgment to approve or deny an application for staff privileges. With respect to

its investigation and evaluation, the hospital must gather and evaluate all of the facts and knowledge that would have been acquired had it exercised reasonable care in investigating its medical staff applicants.

[Hospitals are not insurers of the competency of their medical staff. If the hospital exercised the degree of care, skill, and judgment as required of it, it cannot be found negligent simply because a member of its medical staff acted in a negligent manner.]

COMMENT

This instruction and comment were originally approved in 1988. The instruction was revised in 1998. The comment was updated in 1998 and 2017. This revision was approved by the Committee in January 2024; it added to the comment.

This instruction is based on the decision of the supreme court in Johnson v. Misericordia Community Hosp., 99 Wis.2d 708, 301 N.W.2d 156 (1981).

Standard of Care. The standard of ordinary care under the circumstances expressed in Osborn v. Montgomery, 203 Wis. 223, 234 N.W. 372 (1931) applies to hospitals. Johnson, supra at 738; Schuster v. St. Vincent Hosp., 45 Wis.2d 135, 172 N.W.2d 421 (1969). The standard of care is determined by what a reasonable hospital would do in the same or similar circumstances, not by the hospital's policies. Johnson, supra, at 739-40. The revision to this instruction in 1998 changed the standard of "average hospital" to "reasonable hospital." See Nowatske v. Osterloh, 198 Wis.2d 419, 543 N.W.2d 25 (1996).

Need for Expert Testimony. In establishing the negligence of a hospital, the necessity for expert testimony depends upon the type of negligent acts involved. Expert testimony should be adduced concerning those matters involving special knowledge, skill, or experience on subjects which are not within the realm of the ordinary experience of mankind and which requires special learning, study, or experience. Payne v. Milwaukee Sanitarium Found., Inc., 81 Wis.2d 264, 272, 260 N.W.2d 386 (1977). See also Walker v. Sacred Heart Hospital, Appeal No. 2015AP805. Because the procedures ordinarily used by hospitals to evaluate applications for staff privileges are not within the realm of the ordinary experience of mankind, expert testimony is generally required to prove negligence. Johnson, supra at 739. However, not every case will require expert testimony, e.g., where the hospital has made no effort to investigate the applicant.

Causation. A claim of corporate negligence must be supported by evidence establishing a causal nexus between the corporate conduct and the underlying act of an employee or agent that caused injury. Miller v. Wal-Mart Stores, Inc., 219 Wis. 2d 250, 261-62, 580 N.W.2d 233 (1998).

Bifurcation of Trial. If, at the pretrial, the plaintiff indicates that evidence will be presented relating to prior bad acts of medical treatment by the doctor to show the hospital's negligence, then bifurcation of the claims against the doctor and the hospital should be considered to prevent prejudice against the doctor. See Wis. Stat. § 904.03. Under this bifurcated format, the case against the doctor would be presented first. If the doctor is not negligent, then the trial is over unless there are claims against hospital employees (e.g., nurses or residents). The second phase would cover the hospital's negligence, comparison of negligence, and damages. The same jury should hear both phases of the trial.

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1391 LIABILITY OF OWNER OR KEEPER OF ANIMAL: COMMON LAW

(An owner) (A keeper) of a(n) (insert name of animal) is deemed to be aware of the natural traits and habits that are usual to a(n) (insert name of animal) and must use ordinary care to restrain and control the animal so that it will not in the exercise of its natural traits and habits cause injury or damage to the person or property of another.

In addition, if (an owner) (a keeper) is aware or in the exercise of ordinary care should be aware that the animal possesses any unusual traits or habits that would be likely to result in injury or damage, then the (owner) (keeper) must use ordinary care to restrain the animal as necessary to prevent the injury or damage.

ADD THE FOLLOWING IF THE CLAIM CONCERNS A KEEPER OF AN ANIMAL

[A person is said to be a keeper of an animal if, even though not owning the animal, the person has possession and control of it or if the person permits another person who is a member of his or her family or household to maintain the animal on his or her premises.]

SPECIAL VERDICT

1. Did (defendant) own or keep (animal)?

Answer: _____

Yes or No

2. Did (animal) cause injury or damage to the person or the property of another?

Answer: _____

Yes or No

If the answer to both question 1 and question 2 is "yes," then answer Question No. 3:

3. Was the injury or damage due to the animal's exercise of its natural traits and habits?

Answer: _____

Yes or No

If the answer to question 3 is "yes," then answer Question No. 4:

4. Was (defendant) negligent in failing to use ordinary care to restrain and control the (animal)?

Answer: _____

Yes or No

COMMENT

This instruction and comment were approved by the Committee in 1974. The comment was updated in 1990, 1994, 1995, 2001, 2004, 2013, and 2015. The special verdict was added in 2016. This revision, approved by the Committee in May 2024, modified the special verdict form to add "negligence" to question 4.

Control of Animal. This instruction sets forth the duty of the person who has control over the animal. White v. Leeder, 149 Wis.2d 948, 440 N.W.2d 557 (1989). It is not designed to set forth a duty as between the owner and keeper of an animal.

This instruction covers a claim based on common law negligence. The owner is also liable where the damage caused by the animal was caused by poor care and treatment of the animal. Denil v. Coppersmith,

117 Wis.2d 90, 343 N.W.2d 136 (Ct. App. 1983).

Stallions, Bulls, Boars, Rams, Goats. For liability of an owner or keeper for damage by a stallion over one year, a bull over six months, boar, ram, or billy goat over four months, which runs at large, see Wis. Stat. § 172.01. The statute creates strict liability; no showing of fault by the owner is required. See also Leipske v. Guenther, 7 Wis.2d 86, 88, 95 N.W.2d 774 (1959).

For injuries caused by a horse on a highway, see Templeton v. Crull, 16 Wis.2d 416, 144 N.W.2d 843 (1962). For injuries caused by a muskie, see Ollhoff v. Peck, 177 Wis.2d 719, 503 N.W.2d 323 (Ct. App. 1993).

For the negligence of a riding or stable master, see Smith v. Pabst, 233 Wis. 489, 288 N.W. 780 (1940).

Facts evidencing "unusual traits and habits likely to result in injury" are discussed in Denil v. Coppersmith, supra.

Owners and Keepers. The casual presence of a dog on someone's premises does not make that person an owner or keeper. Patterman v. Patterman, 173 Wis.2d 143, 496 N.W.2d 613 (Ct. App. 1992).

This instruction does not distinguish between domesticated and wild animals but rather instructs the jury to hold owners of animals to the appropriate standard of care given the nature of the animal involved. See Ollhoff v. Peck, 177 Wis.2d 719, 503 N.W.2d 323 (Ct. App. 1993)

The terms "owner" and "keeper" are defined in Koetting v. Conroy, 223 Wis. 550, 270 N.W. 625 (1937). See also White v. Leeder, supra at 957-58; Patterman v. Patterman, supra; Augsburger v. Homestead Mutual Ins. Co., 2014 WI 133, 359 Wis.2d 385, 856 N.W.2d 874. "Harboring" an animal lacks the proprietary aspect of keeping, Patterman, supra, at 149 n.4.

White v. Leeder, supra, contains the following discussion of the common law negligence rule with respect to animals.

> . . . . At common law, the cases have established that the owner or keeper of a domesticated animal is held to anticipate the general propensities of the class to which the animal belongs, as well as any unusual traits or habits of the individual animal. See Leipske v. Guenther, 7 Wis.2d 86, 88, 95 N.W.2d 774, 96 N.W.2d 821 (1959).
>
> The common-law rule first requires the owner or keeper to use ordinary care in controlling the characteristics normal to the animal's class. The owner or keeper of a bull is thus required to take greater precautions to keep it under effective control than would be required of the owner of a cow or steer. See Restatements, Second, Torts, sec. 518, comment g, p. 31 (1977).
>
> The common-law rule further allows the plaintiff to show that the individual animal had vicious or mischievous propensities and that the owner or keeper knew or should have known of them. A vicious propensity is a tendency of an animal to do any act which might endanger the safety of persons or property in a given situation. See 3A C.J.S. Animals, sec. 180, p. 674 (1973).

Contributory Negligence. The doctrine of contributory negligence applies to the plaintiff's actions. White v. Leeder, supra at 958.

Expert Testimony. In White v. Leeder, supra, the court agreed with the trial court that technical expert testimony was not required to establish causal negligence. The court said that the issues involving whether the matter in which the owner kept a bull negligently caused the plaintiff's injury was within the realm of comprehension.

Damages. A claim by an injured keeper against a dog's owner for common law negligence is not governed by the damage provisions in the dog bite statute § 174.02. Malik v. American Family Ins. Co., supra, ¶ 31. The court concluded that the trial court correctly ruled that since the keeper's claim under § 174.02 was dismissed, she could not recover double damages under § 174.02(1)(b) even if she prevailed on the remaining common law negligence claim. Malik, 2001 WI App 82, ¶ 10.

Liability of Landowner or Landlord. In Smaxwell v. Bayard, 2004 WI 101, the court limited liability arising from injuries caused by dogs. The court held, on public policy grounds, that landowners and landlords can be held liable only if they are the owner or keeper of the dog in question:

> "We hold, on public policy factors, that common law liability of landowners and landlords for negligence associated with injuries caused by dogs is limited to situations where the landowner or landlord is also the owner or keeper of the dog causing injury." Id. at par. 55.

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2500 DEFAMATION: LAW NOTE FOR TRIAL JUDGES

INTRODUCTION

1. **Elements**. Under Wisconsin law, the three basic elements of a defamatory communication are:

(1) the statement is false;

(2) the statement is communicated by speech, by conduct, or in writing to a person other than the person defamed; and

(3) the communication is unprivileged and tends to harm one's reputation so as to lower the person in the estimation of the community or to deter third persons from associating or dealing with the person.[1]

However, beyond these elements, additional constitutional requirements may apply based on the plaintiff's and defendant's status.

2. **Libel or Slander**. A defamation action can be founded upon either libel or slander.[2]

3. **Truth**. Substantial truth of the statement is an absolute defense to a defamation claim.[3] "By definition, a defamatory statement must be false."[4] Therefore, the truth of a communication is an absolute defense to a defamation claim. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true."[5] It is the defendant's burden in these circumstances to establish that the statement was substantially true.[6]

4. **Publication**. Actionable defamation requires publication or communication. The required parts of this element are:

(a) the words must be intentionally or negligently communicated to a person other than the person defamed, and

(b) the communication must identify the person defamed expressly or by reasonable inference.[7]

5. **Opinion**. Defamatory communication must typically consist of a statement of fact,

as expressions of opinion generally cannot serve as the basis of a defamation action. However, where the defamer departs from expressing "pure opinion" and communicates what the courts have described as "mixed opinion," then liability may result. In Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974), the Supreme Court stated that there can be no such thing as a "false idea." "Mixed opinion" is a communication which blends an expression of opinion with a statement of fact. This type of a communication is actionable if it implies the assertion of undisclosed defamatory facts as the basis of the opinion.[8] Communications are not made non-defamatory as a matter of law merely because they are phrased as opinions, suspicions, or beliefs.[9]

6. **Privilege**. Some defamatory statements are protected by privileges created by common law, state and federal constitutions, or by statute. These privileges are discussed on pages 7 and 8 of this law note.

7. **Status**. In defamation cases, the degree of fault—actual malice or negligence—varies depending on the plaintiff's status and whether they are a public figure or a private individual.[10] For public figures suing for defamation against a media defendant, the First Amendment is implicated and requires the plaintiff to prove actual malice on the defendant's part to establish liability for the defamatory statement.[11]

Conversely, a private individual suing for defamation only needs to show that the media defendant was negligent in publishing the defamatory falsehood to establish liability and receive actual damages.[12] However, if the private individual seeks to recover presumed or punitive damages, they must then prove actual malice.[13]

KEY DEFINITIONS

1. **Defamatory**. Wisconsin has adopted the definition of "defamatory" stated in Restatement, Second, Torts § 559 (1977):

> A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him. Restatement, 3 Torts, p. 156, sec. 559; Ranous v. Hughes, 30 Wis.2d 452, 460 (1966).

2. **Level of fault**. The status of the plaintiff as a public figure or public official is significant in determining the level of "fault" the plaintiff must show to recover. A public figure, either general purpose or limited purpose, suing a defendant protected by a conditional constitutional privilege must show actual malice instead of simple negligence.

3. **Implied Malice**. Wisconsin law applies a strict liability theory to the communication of a defamatory falsehood by a private defendant about a private plaintiff when there is no conditional privilege involved. The law implies "malice" in the communication and no showing of "malice" is required to recover compensatory damages.[14]

4. **Express Malice**. Express malice arises from ill will, bad intent, or malevolence towards the defamed party. Such malice exists when slanderous words are uttered or libelous words are published from motives of ill will, envy, spite, revenge, or other bad motives against the person defamed.[15] This type of malice is sometimes referred to as "common-law" malice. See page 4 for a discussion of the difference between actual and express malice.

5. **Actual Malice**. Actual malice exists when there is a statement made with knowledge that it is false or with reckless disregard of whether such statement is false or not.[16] The constitutional standard of actual malice is applicable to two broad categories of public individuals: public officials and public figures.[17] See page 4 for a discussion of the difference between actual and express malice.

6. **Public Official**. Per Wagner v Allen Media Broadcasting, 2024 WI App 9, 410 Wis.2d 666, 3 N.W.3d 758, according to Wisconsin case law, "the 'public official' designation 'applies at the very least to those ... governmental employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.'"[18] This definition includes both elected officials and some officials who are not elected.[19] For an individual to be classified as a public official, their role must be of a nature that attracts public attention and debate about the person occupying it, independently of any scrutiny and discussion arising from specific allegations in question.[20]

In Rosenblatt v. Baer, 383 U.S. 75, the U.S. Supreme Court addressed, in a footnote, whether individuals who leave public office are still treated as public officials regarding defamatory statements about their actions while in office. The Court provided that such retired individuals could still be seen as public officials, emphasizing that their past actions in office continue to be of public interest and relevance despite no longer holding their positions.

However, in Lewis v. Coursolle Broad. of Wisconsin, Inc., 127 Wis. 2d 105, 377 N.W.2d 166, the Wisconsin Supreme Court ruled that a former state legislator, who had been out of office for three years, did not retain the status of a public official after retirement. Similarly, in Biskupic v. Cicero, 2008 WI App 117, ¶¶18-19, 313 Wis. 2d 225,

756 N.W.2d 649, the court of appeals determined that a former district attorney was no longer a "public official" following his term. Both cases established that individuals who are public officials while in office lose this designation for First Amendment purposes after they retire.[21]

Although Lewis and Biskupic appear to be inconsistent with Rosenblatt, the court of appeals is bound to follow them pursuant to Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) and Zarder v. Humana Ins. Co., 2010 WI 35, ¶¶53-58, 324 Wis. 2d 325, 782 N.W.2d 682.[22] This was affirmed in Wagner v Allen Media Broadcasting, 2024 WI App 9, ¶50, 410 Wis.2d 666, 3 N.W.3d 758.

7. **Public Figure**. "Public figures" are individuals who are not "public officials" but in whom the public has a justified and important interest for at least some purposes.[23] The court in Denny v. Mertz, 106 Wis.2d 636, 649-50, 318 N.W.2d 141 (1982) adopted the following test based on Gertz v. Robert Welch, Inc., supra, to determine whether an individual is a public figure:

> Analyzing the above cases, we consider the following criteria applicable to whether a defamation plaintiff may be considered a public controversy. First, there must be a public controversy. While courts are not well-equipped to make this determination as pointed out in Gertz, the nature, impact, and interest in the controversy to which the communication relates has a bearing on whether a plaintiff is a public figure. Secondly, the court must look at the nature of the plaintiff's involvement in the public controversy to see whether he has voluntarily injected himself into the controversy so as to influence the resolution of the issues involved. Factors, relevant to this test are whether the plaintiff's status gives him access to the media so as to rebut the defamation and whether a plaintiff should be deemed to have "voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." Gertz, 418 U.S. at 344-45.

An individual can be categorized as a public figure plaintiff either in a "general" sense or for "limited" specific contexts.[24]

A "general purpose public figure" refers to a widely recognized celebrity, a person whose name is familiar in many households and whose actions and opinions are closely followed by the public due to their perceived significance or influence.[25]

A "limited purpose public figure" refers to a person who, while not broadly famous or well-known, has become a public figure for a limited purpose due to their involvement in a particular public controversy.[26]

A person can become a public figure with respect to a limited public controversy either by voluntarily injecting themselves into it, or because their activities "almost inevitably" thrust them in a central role within that controversy.[27] A person can also become an involuntary public figure unintentionally, either due to bad luck or by being drawn into a public controversy.[28]

Whether an individual is a limited purpose public figure is a question of law.[29]

Determining Limited Purpose Public Figure Status: The question of whether a person is a limited purpose public figure is an issue left solely to the court to decide as a matter of law, not an issue of fact to be decided by the jury. Lewis v. Coursolle Broadcasting of Wisconsin, Inc., 127 Wis.2d 105, 110, 377 N.W.2d 166 (1985). The court of appeals has said, that while the ultimate question of whether a plaintiff is a limited purpose public figure is a question of law, material factual disputes on this issue can arise. These factual disputes are not to be left to the jury at trial but should be resolved by the trial court, after an evidentiary hearing solely on that issue. Bay View Packing Co. v. Taff, 198 Wis.2d 653, 543 N.W.2d 522 (Ct. App. 1995). See also Erdmann v. SF Broad. of Green Bay, Inc., 229 Wis. 2d at 165, 599 N.W.2d 1

In Denny v. Mertz, 106 Wis. 2d 636, 649-650, 318 N.W.2d 141, the Wisconsin Supreme Court established the following two-prong test to determine whether a plaintiff is a limited purpose public figure:

(1) there must be a public controversy; and
(2) the court must look at the nature of the plaintiff's involvement in the public controversy."

Bay View Packing, supra, at 678 (citing Denny v. Mertz, 106 Wis. 2d 636, 649-50, 318 N.W.2d 141 (1982)).

In Wiegel, supra, the court of appeals expanded on Denny and provided the following three-step analysis to be used when considering the second prong of the test:

(1) isolate the controversy at issue;
(2) examine the plaintiff's role in the controversy to determine whether it is more than trivial or tangential; and
(3) determine whether the alleged defamation was germane to the plaintiff's participation in the controversy.

Wiegel, supra, at 82-82.

The U.S. Supreme Court has recognized that "it may be possible for someone to become a public figure through no purposeful action of [their] own." Gertz v. Robert Welch, 418 U.S. at 345, 94 S.Ct. 2997. Hypothetically, a person may become an involuntary public figure "without their consent or will, purely through bad luck, or by being drawn into public controversies." Bay View Packing, supra, at 682-83.

8. **Media Defendant**. Although case law does not explicitly define "media defendant," the Court in Denny v. Mertz, supra, did suggest that the term generally refers to any entity that publishes or broadcasts an allegedly defamatory statement.[30]

It is important to note that the Wisconsin Supreme Court has not yet addressed whether the actual malice standard, applicable when the plaintiff is a public figure, also applies in situations where the defendant is not a media entity. However, the court of appeals in Sidoff v. Merry, 2023 WI App 49, 409 Wis. 2d 186, 203, 996 N.W.2d 88, considered the opinion in Underwager v. Salter, 22 F.3d 730, 732 (7th Cir. 1994) persuasive on the issue. In that particular case, the Seventh Circuit Court of Appeals determined that, according to Wisconsin law, some non-media defendants are entitled to the same actual malice protection as media defendants.[31]

TRIAL COURT'S INQUIRY ON WHETHER THE STATEMENT IS DEFAMATORY

The initial inquiry in a defamation action is usually whether the words at issue in the lawsuit are capable of a defamatory meaning. This inquiry is for the trial judge and is normally presented on a motion to dismiss. On a motion to dismiss, it is the function of the court to determine whether a communication is capable of a defamatory meaning. If the communication is capable of a defamatory as well as a nondefamatory meaning, then a jury question is presented. Only if the communication cannot reasonably be understood as defamatory should the motion be granted.[32] The question to the jury is whether the communication made was reasonably understood in a defamatory sense by the persons to whom it was published.[33]

The legal standard for determining whether a statement is capable of conveying a defamatory meaning is whether the language is reasonably capable of conveying a defamatory meaning to the ordinary mind and whether the meaning ascribed by the plaintiff is a natural and proper one.[34] In Frinzi v. Hanson, 30 Wis.2d 271, 276, 140 N.W.2d 259 (1966), the court said:

> The words must be reasonably interpreted and must be construed in the plain and popular sense in which they would naturally be understood in the context in which they were used and under the circumstances they were uttered.

Thus, Wisconsin applies the "reasonable interpretation" test. The trier of fact should not give the statement a "strained" or "unstructured construction," and the statement should be evaluated in context.[35] On a motion to dismiss, how does this "reasonable interpretation" standard relate to the requirement that complaints are to be liberally construed? Wis. Stat. § 802.03(6) governs pleadings in an action for libel or slander:

> (6) LIBEL OR SLANDER. In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their publication and their application to the plaintiff may be stated generally.

MALICE IN DEFAMATION ACTIONS

Wisconsin defamation law recognizes three types of malice: implied malice, actual malice, and express malice.

1. **Implied Malice**. The element of malice creates some confusion in analyzing the various types of defamation actions. As a general principle, Wisconsin tort law holds that malice is an element of actionable defamation.[36] However, the Supreme Court has implied the existence of such malice from the publication of a defamatory statement itself unless a conditional privilege applies.[37]

2. **Actual Malice and Express Malice**. In cases where a constitutional privilege is involved or where punitive damages are being sought, the difference between actual and express malice is important. The definitions of these two types of malice are contained in the following passage from Calero v. Del Chemical Corp., 68 Wis.2d 487, 499-500, 228 N.W.2d 737 (1975):

> "Actual malice" in defamation cases refers to a constitutional standard that is something other than malice as such. As this court said in Polzin v. Helmbrecht (1972), 54 Wis.2d 578, 587, 588, 196 N.W.2d 685:
>
> At the outset it is important to note that there are two types of malice: "Express malice" is that malice described in the jury instruction used in this case, that is "ill will, envy, spite, revenge," etc.; the Supreme Court in Rosenbloom also referred to this type of malice as "common law malice." "Actual malice" (referred to in the New York Times case) is not malice at all, rather it is knowledge that a statement

was false or published with reckless disregard of whether it was false or not. "Actual malice" is what is required for a constitutional determination of libel under New York Times.

"Express" and "actual" malice are very different concepts.

The term "actual malice" arises when there has been an abuse of a constitutional conditional privilege, i.e., where one makes a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not."[38]

The problem of actual malice arises in the cases involving first amendment protections afforded to the media, such as newspapers, television and radio, or comments made about public officers or public figures.

DEFENSES TO A DEFAMATION CLAIM

1. Truth. As stated earlier, the "substantial truth" of the alleged defamatory statement is an absolute defense to the claim.[39] In 1986, the United States Supreme Court held that a private-figure plaintiff who is suing a media defendant for publishing a defamatory statement of public concern cannot recover damages without showing that the statement at issue is false.[40] The holding in Philadelphia Newspapers, Inc. appeared to be in contrast, at least in cases involving a media defendant, to Wisconsin common, law which placed the burden of proving that the statement was true on the defendant as an affirmative defense.[41] The resulting uncertainty as to whether Denny v. Mertz applied to defamation actions involving non-media defendants was resolved in Laughland v. Beckett, 365 Wis. 2d 148, ¶¶23, 26 (Ct. App. 2015). There, the Court held that when the defendant is not a media defendant, it is the defendant's burden to establish that the allegedly defamatory statement was substantially true.[42] Philadelphia Newspapers, Inc. v. Hepps, supra, involved a constitutional conditional privilege.

2. **Privilege**. Wisconsin law recognizes certain privileges that protect the communicator of a defamatory statement from liability. These privileges have been created to allow citizens, public officials, and media personnel to engage in communications that are useful to society with some protection from liability for the consequences that result from the communications. The most litigated of these privileges involve conditional privileges.

a. Absolute privilege

This type of privilege protects participants in judicial and legislative proceedings.[43] As

a general rule, this privilege protects the communicator of the defamatory statement if the statement has some relation to the matter involved in the proceeding.

b. Conditional privileges created by common law

Wisconsin law recognizes that some communications are conditionally privileged. In Lathan v. Journal Co.,[44] the court stated:

> There are also certain occasions where a defamation is conditionally privileged. Conditional privileges or immunities from liability for defamation are based on public policy which recognizes the social utility of encouraging the free flow of information in respect to certain occasions and persons, even at the risk of causing harm by the defamation.

At common law, a person is privileged to make a statement about another person even though it is defamatory, so long as he or she is making the statement to protect certain defined interests and he or she did not abuse the privilege.

The types of communications that are protected by a conditional privilege are those statements (1) to protect the communicator's interest; (2) to protect the interest of the recipient or a third person; (3) to protect a common interest or a family relationship; and (4) statements to a person who may act in the public interest.[45]

When the defamatory communication is privileged, the law will not imply or impute malice.[46] If the privilege is abused, the communicator of the defamatory statement is not protected. In earlier case law, the court had held that this type of privilege is "conditional" because the statement must be reasonably calculated to accomplish the privileged purpose and must be made without "malice."[47] Later, in Ranous v. Hughes, supra, the court recognized that the word "malice" expressed in the Hett decision was "probably unfortunate."[48] The court, instead of retaining the "malice" concept from Hett, adopted the Restatement approach which speaks in terms of "abuse of privilege." The court then recognized the five conditions contained in Restatement, Second, Torts which may constitute an abuse of the privilege: (1) because of the publisher's knowledge or reckless disregard as to the falsity of the defamatory matter (see §§ 600-602); (2) because the defamatory matter is published for some purpose other than that for which the particular privilege is given (see § 603); (3) because the publication is made to some person not reasonably believed to be necessary for the accomplishment of the purpose of the particular privilege (see § 604); (4) because the publication includes defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged (see § 605); or (5) the publication includes unprivileged matter as well as

privileged matter (see § 605A).

A finding of express malice, i.e., ill will, spite, etc., will also constitute an abuse of the conditional privilege.[49]

Subsequent to the decision of the United States Supreme Court in Gertz v. Robert Welch, Inc., supra, the Restatement substituted a new test of abuse of privilege, namely: "actual knowledge of falsity or reckless disregard as to truth or falsity."

C. Conditional privileges created by the United States Constitution

A constitutional conditional privilege refers to the protection afforded media sources (and also to nonmedia persons, where the statement involves a matter of a public interest or concern) under the first amendment. The principal case establishing this constitutional privilege is New York Times Co. v. Sullivan, supra. The effect of the constitutional conditional privilege is that the court will require some finding of "fault" on the part of the defendant instead of allowing the strict liability which exists at common law where malice is implied. The degree of "fault" required by this privilege depends on the nature of the plaintiff. Where the plaintiff is a private individual, only negligence by the defendant media source or individual is required to be shown. Denny v. Mertz, supra. However, where the plaintiff is a public official or public figure, a higher level of fault must be shown. In this type of case, the plaintiff must show that the defamatory statement was published with "actual malice," i.e., actual knowledge or with reckless disregard of whether the statement was true or false. In discussing the Gertz decision, the court, in Denny v. Mertz, explained the rationale in Gertz for permitting a less rigorous showing of "fault" when a private plaintiff was seeking recovery. The court, in Denny, supra, stated:

The [Gertz] court justified divergent standards for public figures and private individuals on the ground that public figures had greater access to the media and so could more effectively counteract defamations. It also reasoned that public figures had, by seeking prominent roles for themselves, assumed a risk of being libeled, which was not true of private individuals. 418 U.S. at 344.[50]

In Gertz v. Robert Welch, Inc., supra, the United States Supreme Court permitted the states to adopt the degree of protection to be afforded statements involving private persons so long as the states did not impose liability without fault. The Wisconsin Supreme Court, in response to Gertz, stated that in a defamation action involving a private plaintiff in a matter of private concern, the required showing of fault is simple negligence. Denny v. Mertz, supra.

D. Statutory privilege

Wisconsin statutes create an absolute privilege which protects persons reporting legislative, judicial, or other public official proceedings. Wis. Stat. § 895.05(1) states:

Damages in Actions For Libel. (1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication of such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning him in the course of such proceeding by some other person.

TYPES OF DEFAMATION ACTIONS

Generally, an action for defamation will fall into one of four categories according to the nature of the parties. At the end of this law note, there is a chart that compares the various types of defamation actions. These categories are:

a. Private individual versus a private individual with no conditional privilege applicable.

b. Private individual versus a private individual with a conditional nonconstitutional privilege applicable.

c. Private individual versus a media defendant which will always involve a conditional constitutional privilege.

d. Public official or public figure versus a media or nonmedia defendant which will always involve a conditional constitutional privilege.

In each of these categories, the requisite showing of "fault" is different.

1. When the action is brought by a private individual against another private individual, with no privilege involved, existence of malice is implied from the libelous matter itself.[51]

2. When the action is brought by a private individual against another private individual, with a conditional nonconstitutional privilege involved, liability can be established by proof of the defamatory statement[52], and abuse of the conditional privilege.[53]

3. When the action is brought by a private individual against a media defendant, thereby involving a conditional constitutional privilege, liability is established by proof that the media defendant was negligent in broadcasting or publishing the defamatory statement.[54]

4. In a case involving a public official or public figure, as defined in Denny, against a media defendant or a nonmedia individual, thereby involving a conditional constitutional privilege, the plaintiff must prove actual malice.[55]

BURDEN OF PROOF TO ESTABLISH CAUSE OF ACTION

1. In a case involving a private individual against another private individual, with no privilege involved, existence of malice is implied. The burden of proof of showing the defamatory statement was made is the ordinary burden.[56]

2. In the case involving a private individual versus a private individual, with a conditional nonconstitutional privilege involved, the plaintiff has the ordinary burden of proof to show the defamatory statement was made; i.e., greater weight of the credible evidence to a reasonable certainty.[57] The defendant has the ordinary burden to prove privilege as a defense to the action.[58]

3. In the case involving a private individual versus a media defendant, the plaintiff has the ordinary burden of proof; i.e., the greater weight of the credible evidence to a reasonable certainty. There is no Wisconsin case directly stating that the plaintiff has the ordinary burden of proof. However, the Gertz decision permits individual states to define for themselves the appropriate standard of liability in such cases. The court in Denny, supra[59], established for Wisconsin that a private individual need only prove that a media defendant was negligent in broadcasting or publishing a defamatory statement. With negligence as the standard, the Committee concluded that ordinary burden of proof applies.

4. In cases involving a public official or a public figure versus a media defendant or private individual, the plaintiff has the middle burden of proof, i.e.; by evidence that is clear, satisfactory, and convincing to a reasonable certainty.[60]

RECOVERY OF COMPENSATORY DAMAGES

It is not necessary in libel actions to plead or prove actual damages of a pecuniary nature, called special damages.[61] If the writing alleged to be libelous is determined by the court to be capable of a defamatory meaning, an allegation of general damages is sufficient. Slanderous statements may, in certain instances, be classified as defamatory and slanderous per se, and, in such instances, the plaintiff may plead and recover general damages.[62] Oral statements imputing certain crimes, a loathsome disease, or affecting the plaintiff in his business, trade, profession, or office, or of unchastity to a woman are actionable without proof of special damages. All other slander not falling into these seemingly artificial categories is not actionable without alleging and proving special damages.[63]

In Denny v. Mertz, supra, the court stated that items of damage recoverable in libel and slander actions in Wisconsin are set forth in Wis JI-Civil 2516.

The burden of proof is the ordinary civil burden.

RECOVERY OF PUNITIVE DAMAGES

In cases involving a private individual against a private individual, whether or not a conditional unconstitutional privilege is involved, the plaintiff must establish express malice to recover punitive damages.[64] In cases involving a private individual against a media defendant, the plaintiff must prove actual malice to recover punitive damages.[65]

In cases involving a public official or public figure against a media defendant or nonmedia individual, the plaintiff can only recover punitive damages upon a showing of express malice.

It should finally be noted that in a case such as this where the New York Times standards apply and where punitive damages are sought, there must be a finding of both express and actual malice to support an award of punitive damages: "Express malice" to meet the criteria for awarding punitive damages and "actual malice" to meet the constitutional requirements for liability at all.[66]

The decision in Wangen v. Ford Motor Co., 97 Wis.2d 260, 300, 294 N.W.2d 437 (1980), establishes the standard for the required degree of proof to be applied to punitive damage claims. In Wangen, the court held that the middle burden of proof shall apply to punitive damage claims. Therefore, the plaintiff must establish its punitive damage claims to a reasonable certainty by evidence that is clear, satisfactory, and convincing. This burden of proof applies to all types of defamatory actions, whether involving conditional privileges

or not.

TYPES OF DEFAMATION ACTIONS - CHART

The following page compares the different types of defamation actions as to elements and burdens of proof.

DEFAMATION SERIES

The following list shows the instructions on substantive law and damages included in this defamation series.

2501 Defamation: Private Individual Versus Private Individual, No Privilege
2505 Defamation: Truth as a Defense (Nonmedia Defendant)
2505A Defamation: Truth of Statement (First Amendment Cases)
2507 Defamation: Private Individual Versus Private Individual with Conditional Privilege
2509 Defamation: Private Individual Versus Media Defendant (Negligent Standard)
2511 Defamation: Public Figure Versus Media Defendant or Private Figure with Constitutional Privilege (Actual Malice)
2513 Defamation: Express Malice
2516 Defamation: Compensatory Damages
2517.5 Defamation: Public Official: Abuse of Privilege
2520 Defamation: Punitive Damages

TYPES OF DEFAMATION ACTIONS IN WISCONSIN

Type of Plaintiff	Type of Defendant	Degree of "Fault" Necessary for Compensatory Damages	Burden of Proof for Compensatory Damages	Conduct Necessary for Punitive Damages	Burden of Proof for Punitive Damages
Private individual	Private with no confidential privilege	Defamatory statement only (malice is implied or imputed)	Ordinary Calero v. Del Chemical 68 Wis.2d 487, 500	Express malice Dalton v. Meister 52 Wis.2d 173, 179, Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Private with nonconstitutional conditional privilege	Defamatory statement and abuse of privilege Ranous v. Hughes, 30 Wis.2d 452, 468	Ordinary, Calero, supra at 500	Express malice Calero, supra at 506	Middle - Wangen v. Ford Motor Co., 97 Wis.2d 260, 300
Private individual	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, p. 183	Negligence Gertz v. Robert Welsh, Inc., 418 U.S. 323, 347, held that states establish the standard of liability; Denny v. Mertz, 106 Wis.2d 636, 654 established the negligence standard	Ordinary	Actual malice Denny, supra at 659 Gertz, supra at 350	Middle - Wangen, supra at 300
Public figure	Media defendant or private indiv. in matter of public concern with constitutional privilege - Dalton, supra at 183	Actual malice New York Times v. Sullivan, 376 U.S. 254, 279-280 Calero, supra at 500 Polzin v. Helmbrecht, 54 Wis.2d 578, 587-588	Middle Calero, supra at 500	Express malice Polzin, supra at 588	Middle - Wangen, supra at 300

NOTES

1. See Donohoo v. Action Wisconsin Inc., 2008 WI 56, ¶37, 309 Wis. 2d 704, 750 N.W.2d 739. In Sidoff v. Merry, 2023 WI App 49, 409 Wis. 2d 186, 996 N.W.2d 88, the court observed in a footnote that the Wisconsin Supreme Court acknowledged a shift in the Court of Appeals' approach to the elements of defamation. While earlier opinions referenced four elements following the Restatement (Second) of Torts § 558 (1981), since 2008, the Court of Appeals has consistently adhered to the three elements outlined in Donohoo.

2. See Martin v. Outboard Marine Corp., 15 Wis.2d 452, 113 N.W.2d 135 (1962).

3. See Schaefer v. State Bar of Wis., 77 Wis.2d 120, 252 N.W.2d 343 (1977). See also DeMiceli v. Klieger, 58 Wis.2d 359, 363, 206 N.W.2d 184 (1973).

4. Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275.

5. Anderson, supra.

6. Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

7. See Ranous v. Hughes, 30 Wis.2d 452, 461 62, 141 N.W.2d 251 (1966). See also Schoenfeld v. Journal Co., 204 Wis. 132, 235 N.W. 442 (1931); Wis. Stat. § 802.03(6); and Restatement, Second, Torts § 577 (1977).

In Wagner v. Allen Media Broadcasting, 2024 WI App 9, 410 Wis.2d 666, ¶33, 3 N.W.3d 758(2024), the court noted the following:

> Our case law provides that, for a statement to be defamatory, it must "refer to some ascertained or ascertainable person, and that person must be the plaintiff." Arnold v. Ingram, 151 Wis. 438, 452, 138 N.W. 111 (1912) (citation omitted); see also Luthey v. Kronschnabl, 239 Wis. 375, 379, 1 N.W.2d 799 (1942). "If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory." Arnold, 151 Wis. at 452, 138 N.W. 111. This concept is sometimes referred to as "ascertainment." See Giwosky v. Journal Co., 71 Wis. 2d 1, 10 & n.9, 237 N.W.2d 36 (1976).

8. Restatement, Second, Torts § 566 (1977).

9. See, Converters Equip. Corp. v. Condes Corp., 80 Wis.2d 257, 263-64, 258 N.W.2d 712 (1977). See also Laughland v. Beckett, 2015 WI App 70, supra.

10. Sidoff v. Merry, 2023 WI App 49, ¶14, 409 Wis. 2d 186, 996 N.W.2d 88. See also Torgerson v. Journal/Sentinel, Inc., 210 Wis. 2d 524, 535, 563 N.W.2d 472 (1997).

11. Sidoff, supra, at ¶14. See also New York Times Co., supra, at 279-80.

12. Denny v. Mertz, 106 Wis.2d 637, 654, 318 N.W.2d 141 (1982).

13. Denny, supra, at 639.

14. Denny, supra, at 657.

15. See Polzin v. Helmbrecht, 54 Wis.2d 578, 587, 196 N.W.2d 685 (1972).

16. See New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964); Polzin, supra, at 587-88.

17. See Lewis v. Coursolle Broad. of Wisconsin, Inc., 127 Wis. 2d 105, 114, 377 N.W.2d 166 (1985).

18. Wagner v Allen Media Broadcasting, 2024 WI App 9, ¶51, 410 Wis.2d 666, 3 N.W.3d 758, citing Pronger v. O'Dell, 127 Wis. 2d 292, 295, 379 N.W.2d 330 (Ct. App. 1985).

19. Miller v. Minority Broth. of Fire Prot., 158 Wis. 2d 589, 599, 463 N.W.2d 690 (Ct. App. 1990).

20. Rosenblatt v. Baer, 383 U.S. 75, 87, 86 S.Ct. 669.

21. Following its decision that Lewis, due to his retirement, was no longer a public official, the Wisconsin Supreme Court further concluded that he was a general purpose public figure. This determination was based on the recognition that his actions while in office had brought him widespread fame and notoriety, thus requiring him to allege actual malice in his case. Lewis v. Coursolle Broad. of Wisconsin, Inc., 127 Wis. 2d 105, 115-16, 377 N.W.2d 166 (1985). Adopting a similar stance, the court in Biskupic determined that the plaintiff had achieved the status of a general purpose public figure. This was due to his controversial actions while in office, which continued to be a topic of active public discussion, thus obliging him to allege actual malice in his claim. Biskupic v. Cicero, 2008 WI App 117, ¶¶24-26, 313 Wis. 2d 225, 756 N.W.2d 649.

22. Pursuant to Cook v. Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) and Zarder v. Humana Ins. Co., 2010 WI 35, ¶¶53-58, 324 Wis. 2d 325, 782 N.W.2d 682.22, the court of appeals cannot dismiss a statement in a prior Wisconsin Supreme Court opinion as dictum. See also Wagner v Allen Media Broadcasting, 2024 WI App 9, ¶50, 410 Wis.2d 666, 3 N.W.3d 758.

23. See Biskupic, supra, at ¶15, and Lewis, supra, at 113.

24. Sidoff, supra, at ¶15.

25. Wiegel v. Capital Times Co., 145 Wis. 2d 71, 82, 426 N.W.2d 43 (Ct. App. 1988).

26. Sidoff, supra, at ¶16. See also Wiegel, supra, at 82; Bay View Packing Co. v. Taff, 198 Wis. 2d 653, 676, 543 N.W.2d 522 (Ct. App. 1995), and Erdmann v. SF Broad. of Green Bay, Inc., 229 Wis. 2d 156, 165, 599 N.W.2d 1 (Ct. App. 1999).

27. Sidoff, supra, at ¶16 (citing Weigel, supra, at 85-86, and Erdmann, supra, at 164).

28. Bay View Packing, supra, at 682-83.

29. Sidoff, supra, at ¶19.

30. Denny, supra, at 660. The Court explained that the constitutional actual malice standard properly applies when "[a] defamation ... is published or broadcast" because it "gets infinitely greater circulation and can do the defamed person much greater harm."

31. Underwager v. Salter, 22 F.3d 730, 732 (7th Cir. 1994).

32. Starobin v. Northridge Lakes, 91 Wis.2d 1, 287 N.W.2d 747 (1980). See also Denny, supra; Westby v. Madison Newspapers, Inc., 81 Wis.2d 1, 5, 259 N.W.2d 691 (1977); Schaefer, supra; DiMiceli,

supra; Polzin, supra; and Lathan v. Journal Co., 30 Wis.2d 146, 140 N.W.2d 417 (1966).

33. Schaefer, supra, at 124-25.

34. Meier v. Meurer, 8 Wis.2d 24, 29, 98 N.W.2d 411 (1959).

35. Schaefer, supra.

36. Denny, supra, at 657.

37. Polzin v. Helmbrecht, supra. See also Denny, supra, at 657.

38. New York Times Co., supra, at 279.

39. Schaefer v. State Bar of Wis., supra.

40. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

41. Denny, supra, at 661.

42. Laughland v. Beckett, 365 Wis. 2d 148, ¶¶23, 26 (Ct. App. 2015).

43. Spoehr v. Mittlestadt, 34 Wis.2d 653, 150 N.W.2d 502 (1967); Hartman v. Buerger, 71 Wis.2d 393, 398 400, 238 N.W.2d 505 (1976); Restatement, Second, Torts §§ 583 92 (1977).

44. Lathan v. Journal Co., supra, at 152.

45. Restatement, Second, Torts §§ 594 98 (1977).

46. Hett v. Ploetz, 20 Wis.2d 55, 121 N.W.2d 270 (1963).

47. Hett v. Ploetz, supra.

48. Ranous v. Hughes, supra, at 468.

49. Calero, supra; Polzin, supra, at 584; Ranous, supra, at 469; Restatement, Second, Torts § 603 Comment a (1977).

50. Denny, supra, at 645.

51. Denny, supra, at 657.

52. Calero v. Del Chemical Corp., supra, at 500.

53. Ranous, supra, at 468.

54. Denny, supra, at 654.

55. New York Times Co., supra, at 726; Calero, supra, at 500; Polzin, supra, at 586; see also Dalton v. Meister, 52 Wis.2d 173, 188 N.W.2d 494 (1971).

56. Denny, supra, at 657.

57. Calero, supra, at 500.

58. Calero, supra, at 499.

59. Denny, supra, at 654.

60. Polzin, supra, at 586; Calero, supra, at 500.

61. Dalton, supra; Lawrence v. Jewell Companies, Inc., 53 Wis.2d 656, 193 N.W.2d 695 (1972).

62. Starobin v. Northridge Lakes Co., supra.

63. Martin v. Outboard Marine Corp., supra.

64. Calero, supra, at 506; Dalton, supra, at 179.

65. Gertz, supra; Denny, supra, at 659.

66. Polzin, supra, at 588.

COMMENT

This law note was approved in 1987 and revised in 2016 and 2022. The format was revised in 2002. This revision, approved by the Committee in May 2024, expanded on the designations of "public official," "public figure," and "media defendant."

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2511 DEFAMATION: PUBLIC FIGURE VERSUS MEDIA DEFENDANT OR PRIVATE FIGURE WITH CONSTITUTIONAL PRIVILEGE (ACTUAL MALICE)

(As to question 1, give the definition of "Defamation" from Wis JI-Civil 2501.)

Because of protections afforded a defendant such as (defendant) under the First Amendment of the Constitution, (plaintiff) must prove that any defamatory statements made (published) by (defendant) were made (published) with actual malice.

Your answers to questions 2 and 3 of the verdict will determine whether (defendant) acted with actual malice in making (publishing) the alleged defamatory statements.

A person acts with actual malice when such person (makes) (publishes) a defamatory statement knowing that the statement is false[1] or with reckless disregard of whether it is false or not.[2] If you find that the statement was substantially true, then the statement is not false. Slight inaccuracies of expression do not mean that the statement is false if it is true in substance.

To find that (defendant) acted with reckless disregard of the truth or falsity of the statement, you must determine that (defendant) had serious doubts as to the truth of the statement or had a high degree of awareness that the statement was probably false.[3]

Reckless conduct is not measured by whether a reasonably prudent person would have made (published) the statement or would have investigated the facts more thoroughly before making (publishing) it.[4] It is not enough to show that (defendant) made (published) the statement from feelings of ill will or a desire to injure (plaintiff).[5] There must be

sufficient evidence to permit the conclusion that (defendant) in fact entertained serious doubts as to the truth of the statement made (published). Making (publishing) a statement with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.[6]

In the course of your deliberations, you need not accept as conclusive (defendant)'s testimony that (he) (she) believed the statement to be true or had no serious doubt as to the truth of the statement. You may consider such factors as whether there were obvious reasons for (defendant) to doubt the veracity of (his) (her) information or whether the statement is so inherently improbable that only a reckless person would have made (published) it.[7]

(Plaintiff) has the burden of proof to convince you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that (defendant) made (published) the statement knowing it was false or with reckless disregard of whether it was false or not.[8]

(As to question 4, the damage question, give Wis JI-Civil 2516.)

(As to question 5, express malice, give Wis JI-Civil 2513.)

(As to question 6, punitive damages, give Wis JI-Civil 2520.)

(As to questions 4, 5, and 6, give Wis JI-Civil 205.)

SPECIAL VERDICT

Question 1: Was the statement made (published) by (defendant) (insert statement, e.g., that John Jones took a bribe) defamatory?

Answer: _____

Yes or No

Question 2: If you answered "yes" to question 1, answer this question:

Did (defendant) make (publish) such a statement knowing that it was false?

Answer: _____

Yes or No

Question 3: If you answered "no" to question 2, answer this question:

Did (defendant) make (publish) such a statement with reckless disregard of its truth or falsity?

Answer: _____

Yes or No

Question 4: If you answered "yes" to either of questions 2 or 3, answer this question:

What sum of money will fairly and reasonably compensate (plaintiff) because of such a defamatory statement?

Answer: $_____

Question 5: If you answered "yes" to either of questions 2 or 3, answer this question:

Did (defendant) act with express malice in making (publishing) such a statement?

Answer: _____

Yes or No

Question 6: If you answered "yes" to question 5, answer this question:

What sum of money, if any, do you assess against (defendant) for punitive damages?

Answer: $_____

NOTES

1. "By definition, a defamatory statement must be false." Anderson v. Hebert, 2011 WI App 56, ¶14, 332 Wis. 2d 432, 798 N.W.2d 275. Therefore, the truth of a communication is an absolute defense to a defamation claim. Id. Further, the communication need not "be true in every particular. All that is required is that the statement be substantially true." Id. It is the defendant's burden in these circumstances to establish that the statement was substantially true. See, e.g., Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, ¶¶23, 26, 870 N.W.2d 466.

2. The term "actual malice" was defined in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and cited by Wisconsin in Polzin v. Helmbrecht, 54 Wis.2d 578 (1972), and Calero v. Del Chemical Corp., 68 Wis.2d 487 (1975). See also Wis JI-Civil 2500, Law Note.

3. Restatement, Second, Torts § 580A, Comment d (1977); Garrison v. State of Louisiana, 379 U.S. 64 (1964).

4. Restatement, Second, Torts § 580A, Comment d (1977); St. Amant v. Thompson, 390 U.S. 727 (1968).

5. Restatement, Second, Torts § 580A, Comment d (1977).

6. St. Amant, 88 S. Ct. 1325.

7. St. Amant, 88 S. Ct. 1326.

8. Calero, supra note 1, at 500.

COMMENT

This instruction and comment were approved in 1986. Nonsubstantive editorial changes were made to the instruction in 1993. The comment was updated in 1997. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The instruction was also

revised in 2022. This revision, approved by the Committee in May 2024, amended the comment to direct users to Wis JI-Civil 2500, Defamation - Law Note for Trial Judges, for guidance on "public figures."

For detailed guidelines on determining who is a "public figure" plaintiff, either for "general" or "limited" purposes in defamation cases, refer to Wis JI-Civil 2500 Defamation - Law Note for Trial Judges.

There is an obvious problem of proof when the case is based upon reckless disregard of whether the defamatory statement is false or not. This problem was recognized by the U.S. Supreme Court in St. Amant v. Thompson, 390 U.S. 727, 88 St. Ct. 1323 (1968):

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes or case law. 88 S. Ct. 1325.

2750 EMPLOYMENT RELATIONS: WRONGFUL DISCHARGE — PUBLIC POLICY

In Wisconsin, an employer may discharge an employee for good reason, for no reason, or even for a reason that is morally wrong without committing a legal wrong. An exception to this rule is [where the termination of the employee's job violates] [where the employee is discharged for refusing an employer's command to do something that would itself violate] a well-established and important public policy. Public policy in Wisconsin prohibits the firing of an employee for (insert policy).

(Plaintiff) claims that (he) (she) was fired from (his) (her) job by (defendant) because (give public policy being violated, e.g., (he) (she) refused to commit perjury). If you find that (defendant) fired (plaintiff) for that reason, then (plaintiff) was wrongfully discharged.

A discharge is not wrongful merely because it is retaliatory, unreasonable, or motivated by bad faith or malice. Further, a discharge is not wrongful merely because the discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it.

SPECIAL VERDICT

Was (plaintiff) wrongfully discharged from (his) (her) employment by (defendant)?

ANSWER: _____

Yes or No

COMMENT

This instruction was approved in 1985 and revised in 1991 and 1995. The comment was updated in 1986, 1987, 1995, 1998, 2018, and 2020. This revision was approved by the Committee in January 2024; it added to and amended the comment.

Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, 335 N.W.2d 834 (1983); Ferraro v. Koelsch, 124 Wis.2d 154, 368 N.W.2d 666 (1985); Scarpace v. Sears, Roebuck & Co., 113 Wis.2d 608, 335 N.W.2d 844 (1983); Yanta v. Montgomery Ward & Co., Inc., 66 Wis.2d 53, 244 N.W.2d 389 (1974). See also Schultz v. Industrial Coils, Inc., 125 Wis.2d 520, 373 N.W.2d 74 (Ct. App. 1985). A claim for wrongful discharge based on public policy may be grounded upon an administrative rule. Winkelman v. Beloit Memorial Hosp., 168 Wis.2d 12, 483 N.W.2d 211 (1992).

Employment-at-Will Doctrine. In Brockmeyer, the court expressly refused to require good faith in the termination of employment contracts. However, the court did recognize the "public policy exception" to the employment-at-will doctrine. The court stated that the public policy claimed by the plaintiff must be evidenced by a constitutional or statutory provision. The other two exceptions to employment-at-will are (1) where an employment contract specifies a period of employment and (2) where a statutory provision governs the employment agreement. The court in Brockmeyer v. Dun & Bradstreet, 113 Wis.2d 561, provided the following non-exclusive list of various Wisconsin statutory provisions prohibiting the discharge of an employee for certain reasons:

> Statutory modification of the at will doctrine can be found in a variety of federal and state laws prohibiting certain forms of discrimination. Both Title VII of the Civil Rights Act of 1964 6 and Wisconsin's Fair Employment Act, secs. 111.31-111.395, Stats., make it unlawful for an employer to discharge an employee because of race, color, religion, sex or national origin. 7 Similarly, the National Labor Relations Act 8 and the Wisconsin Employment Peace Act, sec. 111.06(1) (c)1, prevent discharges for union activities. Other forms of discriminatory discharges have also been prohibited by the legislature.

Id., at 567-568. See also, n.9.

In Wandry v. Bull's Eye Credit Union, 129 Wis.2d 37, 384 N.W.2d 325 (1986), the court concluded that Wis. Stat. § 103.455 articulates a "fundamental and well-defined public policy" within the public policy exception to the employment-at-will doctrine. This statute proscribes economic coercion by an employer upon an employee to bear the burden of a work-related loss when the employee has no opportunity to show that the loss was not caused by the employee's carelessness, negligence, or willful misconduct. Wandry, supra at 47.

In Hausman v. St. Croix Care Center, 214 Wis.2d 654, 571 N.W.2d 393 (1997), the Supreme Court examined the employment-at-will doctrine, surveyed the breadth of the narrow public policy exception to the doctrine, and determined whether the case fell within its requirements. In its decision, the court rejected the plaintiffs' claims that the facts as alleged fit within the existing public policy exception and declined to adopt a broad whistle-blower exception. However, the court recognized that the plaintiff's compliance with an affirmative legal duty requiring them to take action to prevent abuse or neglect of nursing home residents comports with a well-defined public policy and the rationale of the court's public policy exception to the

employment-at-will doctrine.

The plaintiff-employee bears the burden of proving that the dismissal violates a clear mandate of public policy. Kempfer v. Automated Finishing, Inc., 211 Wis.2d 100, 564 N.W.2d 692 (1997). In Kempfer, the court said that if a public policy is not contained in a statutory, constitutional, or administrative provision, it cannot fall under the public policy exception to the employment-at-will doctrine. However, just because a public policy is evidenced by a statutory, constitutional, or administrative provision does not mean that it falls under the exception. 211 Wis.2d at 112. The public policy must still be found to be fundamental and well defined. In Kempfer, the court noted that an administrative rule is less likely to satisfy the fundamental and well defined requirements than a statutory provision and that a statutory provision is less likely to rise to the level of fundamental and well defined than a constitutional provision. In Kempfer, the Supreme Court made clear that the Wisconsin public policy exception to the employment-at-will doctrine is very narrow. It only provides that an employee may not be discharged for refusing a command to violate a fundamental and well-defined public policy that is evidenced by a constitutional, statutory, or administrative provision. With the exception of such a public policy, an employer may discharge an employee at will for any reason or for no reason.

Procedure. In Brockmeyer, the court explained the format for wrongful discharge litigation. The threshold determination of whether the public policy asserted by the plaintiff is a well-defined and fundamental one is an issue of law and is to be made by the trial court. Brockmeyer v. Dun & Bradstreet, supra at 574. At trial, the plaintiff must then "demonstrate" to the jury that "the conduct that caused the discharge was consistent with a clear and compelling public policy." The decision in Brockmeyer, supra at 574, suggests by way of dicta that an employer must then produce evidence to prove that the dismissal was for "just cause." See also Winkelman, supra at 24. The Committee is of the opinion that "just cause" need not be proved but only that the discharge was for a reason other than a violation of a clear and compelling public policy.

Remedies. In Brockmeyer v. Dun & Bradstreet, supra, the court determined that a wrongful discharge claim is a contract action. It specifically rejected tort remedies, including punitive damages. Instead, it stated, at 113 Wis.2d at 575:

> We believe that reinstatement and back pay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee "whole."

The court, in Brockmeyer, also held that where the legislature has created a statutory remedy for a wrongful discharge, that remedy is exclusive. 113 Wis.2d at 576 n.17.

Effect of Employee Handbooks. Representations in an employee's handbook may limit the power of an employer to terminate an employment relationship that would otherwise be terminable at will. Ferraro v. Koelsch, supra. A handbook may convert the employment relationship into one that can only be terminated by adherence to contractual terms.

Attorney's Fee. Attorney's fees are not available in a common law wrongful discharge cause of action. Winkelman v. Beloit Memorial Hosp., supra.

Intentional disability discrimination. An employer engages in employment discrimination if it terminates a person from employment "because of any basis enumerated in s. 111.321." Wis. Stat.

§ 111.322(1). Two methods of determining whether an employer intentionally terminated employment "because of" disability are available. The first method asks whether the employer held "actual discriminatory animus against an employee because that employee was an individual with a disability[.]" Maeder v. Univ. of Wisconsin-Madison, ERD Case No. CR200501824 (LIRC June 28, 2013). The alternative method, known as the "inference method," finds intent to discriminate when an employer bases its adverse action on "a problem with that employee's behavior or performance which is caused by the employee's disability." See Id. A violation of Wis. Stat. § 111.322(1) cannot be found to have occurred under the inference method of proving intentional discrimination unless the employee proves the employer knew that a disability caused the conduct on which the adverse employment decision was made and that the employer had this knowledge at the time it made the decision. Wisconsin Bell, Inc. v. Labor & Indus. Review Comm'n, 2018 WI 76, 382 Wis.2d 624, 657, 914 N.W.2d 1 (2018).

Probationary Employees: For decisions discussing the applicability of procedural guarantees outlined in sec. 62.13(5) as they pertain to probationary employees, see Kaiser v. Board of Police & Fire Commissioners of Wauwatosa, 104 Wis.2d 498, 311 N.W.2d 646 (1981); and State v. City of Prescott, 390 Wis.2d 378, 938 N.W.2d 602, 2020 WI App 3.

OFFICE OF JUDICIAL EDUCATION

7/2024

WISCONSIN JURY INSTRUCTIONS

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