

2520 DEFAMATION: PUNITIVE DAMAGES

Punitive damages are not awarded to compensate (plaintiff) but are to punish (defendant) and to discourage and deter others from engaging in such conduct in the future. Punitive damages can only be assessed when a defendant, in making (publishing) a defamatory statement, was prompted by (express malice) (actual malice) toward a plaintiff.

(For express malice, give Wis JI-Civil 2513)

(For actual malice, give Wis JI-Civil 2511 (exclude paragraph 1))

Even if you find that (defendant) was prompted by (express malice) (actual malice) in making (publishing) the statement, you are not required to assess punitive damages. Whether you do or not is left to your sound judgment and discretion under these instructions and the evidence in this case.

(Plaintiff) must satisfy you by evidence that is clear, satisfactory, and convincing, to a reasonable certainty, that punitive damages should be awarded.

If you believe that you should assess punitive damages against (defendant) by way of punishment and as a warning to others, then you should award such damages as you deem just and proper. Otherwise, you will insert the word "nothing" in answer to question ____.

During the course of this trial, evidence was offered and received as to the wealth and financial standing of (defendant). Such evidence has a bearing in this case only on question __, relating to punitive damages, and is not to be considered by you in answer to question __, relating to compensatory damages. If, in your sound judgment and discretion, you determine that this is a proper case in which to award punitive damages, you may consider evidence of the wealth of (defendant). Such evidence was admitted solely to aid you in determining what amount you should assess as punishment for the defamation.

You are further instructed that if you do not find any damages in your answer to question ___, then you must answer question ___ by inserting the word "nothing." Punitive damages cannot be awarded unless the jury awards compensatory damages.

COMMENT

This instruction and comment were approved by the Committee in 1985. 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.

Whether the plaintiff must prove express or actual malice to support an award of punitive damages depends on the identity of the parties. In the following cases, proof of express malice is required:

- a. Private individual versus private individual with or without a conditional privilege. Dalton v. Meister, 52 Wis.2d 173, 179, 188 N.W.2d 494 (1971); Calero v. Del Chemical Corp., 68 Wis.2d 487, 506, 228 N.W.2d 737 (1975).
- b. Public figure versus media defendant or private individual with constitutional privilege. Polzin v. Helmbrecht, 54 Wis.2d 578, 588, 196 N.W.2d 685 (1972).

In cases involving a private individual versus a media defendant, the plaintiff must prove actual malice to warrant an award of punitive damages. Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3012; Denny v. Mertz, 106 Wis.2d 636, 659, 318 N.W.2d 141 (1982).

Wangen v. Ford Motor Co., 97 Wis.2d 260, 300, 294 N.W.2d 437 (1980), has set the standard of proof in all cases involving punitive damages as the middle burden of proof.

Evidence of a defendant's wealth and ability to pay is admissible and relevant in assessing punitive damages. Fahrenberg v. Tengal, 96 Wis.2d 211, 225, 291 N.W.2d 516 (1980); Wangen, *supra* at 304. But, where there are multiple defendants, see Comment, Wis JI-Civil 1707, Punitive Damages.

Compensatory damages must be awarded before punitive damages can be given. Widemshek v. Fale, 17 Wis.2d 337, 340, 117 N.W.2d 275 (1962); Bachand v. Connecticut Gen. Life Ins. Co., 101 Wis.2d 617, 633, 305 N.W.2d 149 (Ct. App. 1981). However, if the compensatory damages are nominal, that is - six cents, punitive damages cannot be awarded. Barnard v. Cohen, 165 Wis. 417, 162 N.W. 480 (1917); Wussow v. Commercial Mechanisms, Inc., 90 Wis.2d 136, 140, 279 N.W.2d 503 (Ct. App. 1979).