

Defamation – Private Person

PLF has sued DFT for making false statements about him/her/it concerning [describe defamatory statements]. As you have heard during the trial, we call this type of claim “defamation.”

To prove the defamation claim, PLF must show, more likely than not, the following four things are true:

1. DFT made [published, posted, emailed, etc.¹] a factual statement about PLF to someone else;
2. The statement [was false² and] could harm PLF’s reputation [in the minds of a substantial number of respectable people³] in the community;
3. DFT was at fault for making the statement. I will explain in a minute what it means to be “at fault;” and,
4. **<A. Applicable in most cases>** The statement caused PLF economic loss.

¹ While legal doctrine uses the word “published” in a specialized, legal sense (e.g. *Phelan v. May Dep’t Stores Co.*, 443 Mass. 52, 55 (2004)), most jurors will understand “published” “ in a much narrower sense. Modern case law often uses the phrase, “made a statement.” *Liv. Zeng*, 98 Mass. App. Ct. 743, 746 (2020); *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 629 (2003). This instruction therefore uses the phrase “made a statement” and reserves the bracketed word, “published,” for cases where the common and legal meaning of that word converge. See *Scholz v. Delp*, 473 Mass. 242, 249 (2015), cert. denied, 136 S.Ct. 2411 (2016) (lawsuit against a newspaper). In appropriate cases, the judge may prefer the word “broadcast,” “posted,” emailed or similarly precise term.

² Omit this phrase if the issue of truth or falsity arises only as a defense. Moreover, according to G.L. c. 231, 92, a private person (i.e. not a public figure) may theoretically sue for malicious publication in the writing of a defamatory statement. See *Noonan v. Staples*, 556 F.3d 20, 26 (1st Cir. 2009). That statute does not apply if the challenged statement raises a matter of public concern, even if the statement was made maliciously. *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 134 (2000). Since this issue arises so rarely, this model instruction does not address it, except to point out that the trial judge would have to remove the word “false” from this instruction.

³ This phrase may be important in some cases, but probably not in most of them.

4. [***B. If applicable***] The statement [was in writing] [accused PLF of committing a crime] [claimed that the plaintiff had [an STD] [name the loathesome disease]] [harmed PLF's profession or business].⁴

I will now explain each item in more detail.

(a) Making a Factual Statement About PLF.

First, PLF must prove that DFT made [published][posted][emailed, etc.] a factual statement about PLF to at least one other person. PLF does not have to prove that DFT made these statements to a large number of people. [However, DFT is not liable for a statement that s/he/it made only to PLF and to no one else.]

< ***Defamation by conduct*** > Here, PLF claims that DFT made a statement through conduct rather than [in addition to] by written or spoken words. To prove this, s/he/it must show that a reasonable person who saw DFT's actions would understand that DFT's actions made a statement about PLF. It is not enough just to show that PLF himself/herself believed that DFT's actions made a statement.

For example, if I work for a store, and a security guard comes and removes me from the workplace, my coworkers might not understand the security guard's actions to be saying that I broke the law. However, if my coworkers saw the guard chase, search or restrain me, they would consider the guard's actions as a statement that I committed a crime.⁵ Based on all the evidence, you must decide whether DFT's actions made a statement of fact.

⁴ *Li v. Zeng*, 98 Mass. App. Ct. 743, 746 (2020), citing *Scholz v. Delp*, 473 Mass. 242, 249 (2015), cert. denied, 136 S.Ct. 2411 (2016); *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 629-630 (2003).

⁵ See *Phelan v. May Dep't Stores Co.*, 443 Mass. 52, 58 (2004).

< *Of and Concerning Plaintiff* >⁶ The statement must be about PLF. If it did not refer to PLF by name, then s/he/it must prove one of the following two things:

- PLF may prove that DFT intended the words to refer to PLF and that someone other than PLF understood that they did refer to PLF; or,
- PLF may prove that DFT was negligent in making the statement in a way that a reasonable person could interpret as referring to PLF.

PLF does not have to prove both of these things, but must prove at least one of them.

< *if applicable, define "negligence, adapting instruction for "Negligence, General," section on "Failure to Use Reasonable Care. >*

< *fact vs. opinion* >⁷ DFT's statement must be factual and not purely a matter of opinion. Everyone has a constitutional right to express an opinion, as long as they do not make false statements of fact. No one commits defamation by stating a pure opinion even if it is harmful or offensive.

In some cases, though, a statement that sounds like an opinion may also communicate a fact. PLF must prove that a reasonable person could have understood DFT's statement as making a statement of fact rather than a pure opinion.

⁶ *Li v. Zeng*, 98 Mass. App. Ct. 743, 747-748 (2020), citing *Scholz v. Delp*, 473 Mass. 242, 249 (2015), cert. denied, 136 S.Ct. 2411 (2016), *ELM Med. Lab., Inc. v. RKO Gen., Inc.*, 403 Mass. 779, 785 (1989). Note that there may be situations where a plaintiff may sue for defamation of a pseudonym, for damages for harm to the pseudonym's reputation in the community. *Li v. Zeng*, 98 Mass. App. Ct. 743, 749 (2020).

⁷ The judge should submit the question of fact versus opinion to the jury if a reasonable person could have understood the statement as either an opinion or a statement of fact. See *Phelan v. May Dep't Stores Co.*, 443 Mass. 52, 57 (2004); *Aldoupolis v. Globe Newspaper Co.*, 398 Mass. 731, 733-734 (1986).

In deciding whether a reasonable person would understand the statement as a fact or an opinion, you should consider all the circumstances and you may ask yourselves questions, such as:

- Was it possible for DFT to verify the statement? Generally, it is possible to verify a statement of fact but not an opinion.
- Where and how did DFT make the statement? Sometimes the location or method of making a statement is more appropriate to stating facts; other methods and places may be more likely for expression of opinions.
- Who was DFT speaking to?
- What else did DFT say?
- Did DFT give any cautions to the listeners that might lead a reasonable person to think that the statements were matters of opinion?
- Did DFT communicate in some way that s/he/it was asserting facts?

In general, you should consider the statement's context carefully, because a statement of fact in one context can be a statement of opinion in another. For example, if the setting is one in which the listeners can expect speakers [writers] to try to persuade listeners [readers] through fiery rhetoric or emotional language, people might understand a statement to be a matter of opinion, even though in a different context, the audience would consider it a statement of fact.

Based upon all the circumstances, you must decide whether the PLF has proven that a reasonable listener would consider DFT's statement(s) to be statements of fact, not just pure opinion.

< **repudiation** > A person who repeats a false factual statement is just as liable as the first person to make that statement.

(b) Statement's Falsity and/or Tendency to Harm Reputation.

The second thing PLF must prove, more likely than not, is that the statement [was false and] could harm PLF's reputation [in the minds of a substantial number of respectable people⁸] in the community.

< *Omit this paragraph in cases where truth arises only as a defense* > This requires PLF to prove two things, that the statement was false and that it could harm PLF.

PLF must first prove that the statement was false.⁹ Sometimes, even a true statement harms someone's reputation, but DFT is not responsible unless PLF also proves that the statement was false. To be false, a statement must be substantially untrue. If the gist or basics of the statement is accurate, the statement is not false. Minor inaccuracies do not make a statement false if the listener's [reader's] understanding of the basic truth remains unchanged.

If the statement was false, PLF must prove that the statement harmed his/her/its reputation [in the minds of a substantial number of respectable people] in the community.

PLF can prove this harm in a number of different ways. PLF can show that the statement:

- may hold PLF up to scorn, hatred, ridicule or contempt;
- may discredit PLF;

⁸ "A statement is defamatory if it 'may reasonably be read as discrediting [the plaintiff] in the minds of any considerable and respectable class of the community.'" *Noonan v. Staples, Inc.*, 556 F.3d 20, 25 (1st Cir. 2009), quoting *Disend v. Meadowbrook Sch.*, 33 Mass. App. Ct. 674, 675 (1992), citing *Sharratt v. Housing Innovations, Inc.*, 365 Mass. 141, 145 (1974).

⁹ This instruction places the burden of proving falsity on the plaintiff, because, "[i]n cases . . . involving matters of public concern published by a media defendant, the burden is on the plaintiff to prove falsity." *Murphy v. Boston Herald*, 442 Mass. 42, 51 (2003). See *Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129 (1998). In other cases, the court should use the instruction for truth as a defense, below

- may harm PLF's reputation by lowering the community's opinion of him/her; or,
- may keep other people from associating or dealing with PLF.

PLF must prove at least one of these kinds of harm. In making this decision, you should give the DFT's statement its common sense meaning under all the circumstances. You may also consider how people who heard [read] the statement interpreted it. You should not consider strained or unreasonable interpretations of the statement, and you should not take words, phrases or sentences out of context.

< *if appropriate*¹⁰> You must also decide whether the harm to PLF's reputation occurred among a respectable part of the community. For instance, suppose I said that a person is an honest, law-abiding citizen. That might hurt the person's reputation among armed robbers who thought that they could rely upon him to help them commit crimes. But the law does not allow recovery in that situation because the community of armed robbers is not respectable. Keep in mind that PLF does not have to prove that the statement harmed his/her reputation in the entire community or among all reasonable people.

(c) Defendant's Fault and Harm / or Defamation Per Se

Third, PLF must prove that DFT was at fault. To do this, PLF must prove at least one of two things.

- DFT was at fault if s/he/it knew that the statement was false; or
- Even without knowledge, DFT was at fault if s/he/it was reckless or negligent about whether the statement was true or false.

< *Insert definition on "knowledge", if applicable*>

< *Insert definition on "reckless" from Civil Definitions, if applicable*>

¹⁰ *Smith v. Suburban Restaurants, Inc.*, 374 Mass. 528, 529-530 (1978); *Disend v. Meadowbrook Sch.*, 33 Mass. App. Ct. 674, 675 (1992), citing *Sharratt v. Housing Innovations, Inc.*, 365 Mass. 141, 145 (1974).

< ***Negligent publication***> Let me describe what it means to be negligent in this case. Before making a statement, DFT must act reasonably in checking whether or not the statement is true. To prove that DFT made the statement negligently, PLF must show that DFT failed to use the amount of care that a reasonably careful person would use in determining whether the statement was true or false, in the same or similar circumstances. In deciding what a reasonably careful person would do, you should consider all the evidence and ask yourself questions, such as:

- < ***if applicable***> Did DFT follow the customs and practices within the profession?
- Did the DFT have enough time and opportunity to verify the facts?
- Did the DFT take notes and do research into the facts? If so, were the notes reliable?
- < ***if applicable***> What research and note-taking skills did DFT have?
- How reliable was the DFT's source of information?

Considering all the circumstances, you must decide whether DFT made the false statement because s/he/it failed to use the care that a reasonable person would have used to investigate the statement's accuracy.

< ***Alternative #1: Unless defamation per se applies***> Fourth, PLF must prove that, more likely than not, the false statement caused PLF economic loss.

< ***Alternative #2: If a category of defamation triggers defamation per se***> Finally, the fourth thing PLF must prove is that, more likely than not, the false statement [was written] [accused PLF of committing a crime] [claimed that PLF had an STD] [harmed PLF's profession or business]. If PLF proves this, then s/he/it is entitled to at least a nominal amount of money in damages. That is, the damages cannot be zero. ¹¹

¹¹ *Li v. Zeng*, 98 Mass. App. Ct. 743, 746 (2020), citing *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 629–630 (2003).

DEFENSES [See "Defamation – Defenses" Instruction]

DAMAGES [See "Defamation - Damages" Instruction]