

Defamation – Public Figure

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.”

PLF must prove four things in order to prove the defamation claim.

PLF must show that the first three things are more likely than not true:¹

1. DFT made [published, posted, emailed, etc.²] a factual statement about PLF to someone else;
2. The statement [was false and³] could harm PLF’s reputation [in the minds of a substantial number of respectable people⁴] in the community; and,
3. <**A. Applicable in most cases**> The statement caused PLF economic loss.
3. <**B. If applicable**> The statement [was in writing] [accused PLF of committing a crime] [claimed that PLF had [a sexually

¹ In *Tripoli v. Boston Herald--Traveler Corp.*, 359 Mass. 150, 153 (1971), the SJC said:

“We agree that it is a generally accepted legal principle that words published, when read as a whole and which create the impression that a person has committed a crime, are libelous per se. *Lyman v. New England Newspaper Publishing Co.*, 286 Mass. 258, 262 (1934). *King v. Northeastern Publishing Co.*, 294 Mass. 369 (1936). However, this does not entitle a person to recover where a matter of ‘public interest’ is involved, *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967), or where the person has attained the status of a ‘public figure,’ *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967), unless actual malice is shown.”

² 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 “Defamation – Private Person,” Instruction x.1.1 n. 1, citing *Scholz v. Delp*, 473 Mass. 242, 249 (2015), cert. denied, 136 S.Ct. 2411 (2016) (lawsuit against a newspaper); *Li v. Zeng*, 98 Mass. App. Ct. 743, 747 (November 3, 2020); *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 629 (2003). In appropriate cases, the judge may prefer the word “broadcast,” “posted,” “emailed” or similarly precise term.

³ Omit this phrase if the issue of truth or falsity arises only as a defense.

⁴ This phrase may be important in some cases, but probably not in most of them. See Instruction “Defamation – Liability – Private Figure.”

transmitted disease] [name the loathsome disease]] [harmed PLF's profession or business].⁵

In addition, if PLF proves these three things, then s/he/it must prove a fourth thing – DFT's state of mind – by clear and convincing evidence, which is a higher burden of proof that I will explain in a minute.⁶ At that time, I will also define what I mean by "state of mind."

I will now explain each of these four items in more detail.

(a) Statement of Fact.

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

⁵ *Li v. Zeng*, 98 Mass. App. Ct. 743, xxx (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).

⁶ See *Howell v. Enter. Publ'g Co.*, 455 Mass. 641, 664 (2010) (*public official*); *Astra USA, Inc. v. Bildman*, 455 Mass. 116, 144-146 (2009) (*limited purpose public figure*); *Lane v. MPG Newspapers*, 438 Mass. 476, 484 (2003) (*public official*); *Stone v. Essex County Newspapers, Inc.*, 367 Mass. 849, 866 (1975) (*all-purpose public figure*). While the judge usually determines whether the plaintiff is a public or private figure, it is possible that disputes of fact will lead the court to submit the question to the jury, with proper instructions. Because a jury issue on this question is so rare, the judge will need to fashion a case-specific instruction, using the above-cited cases as a guide.

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.⁷ Based on all the evidence, you must decide whether DFT's actions made a statement of fact.

< ***Of and Concerning Plaintiff*** >⁸ 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*** >⁹ 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.

⁷ See *Phelan v. May Dep't Stores Co.*, 443 Mass. 52, 58 (2004).

⁸ *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).

⁹ 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 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.

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 did 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.

< *republication* > 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 Potential to Harm.

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 people¹⁰] 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.¹¹ 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:

¹⁰ "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).

¹¹ 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. See instruction "Civ – Defamation – Defenses."

- May hold PLF up to scorn, hatred, ridicule or contempt.;
- may discredit PLF;
- 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*¹²> 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) Economic Injury.

Third, PLF must prove that, more likely than not, the false statement caused PLF economic loss.

¹² *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).

(d) State of Mind

Fourth, PLF must prove, by clear and convincing evidence, that DFT either knew that the statement was false or recklessly disregarded whether the statement was true or not.¹³

Proof by "clear and convincing evidence" differs from "proving something is more likely than not," which is the standard that I have discussed so far. So, I will tell you what it means to prove DFT's state of mind by clear and convincing evidence.

< *Insert Instruction, "Civ - Clear and Convincing Evidence"*¹⁴ >

PLF must prove by clear and convincing evidence at least one of two things about DFT's state of mind:

- DFT knew that the statement was false when s/he/it made it; or,
- DFT recklessly disregarded whether the statement was true or not at the time.

If PLF has proven the DFT's state of mind in at least one of these two ways by clear and convincing evidence, then s/he/it has proven that the DFT had the state of mind needed for this claim.

< *Insert definition of "knowledge", from "General Civil Definitions," if applicable* >

With respect to the second state of mind, reckless disregard for the truth, PLF must show that DFT had serious doubts about the truth of the

¹³ This instruction avoids the phrase "actual malice." On this particular issue the United States Supreme Court has expressly advised trial judges to use "plain English." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 666 n. 7 (1989).

¹⁴ See also *Callahan v. Westinghouse Board. Co., Inc.* 372 Mass. 582, 588 n. 3 (1977) (setting forth a possible charge on "clear and convincing evidence").

statement but made the statement anyway.¹⁵ This state of mind depends on DFT's attitude toward the statement, not DFT's attitude towards PLF.¹⁶

Reckless disregard for the truth is more than just a departure from journalistic standards. PLF must prove more than mere negligence or ill will; in other words, it is not enough to show that a reasonably careful person would have done more investigation or even that DFT disliked or wanted to harm PLF. Also, it is not enough to show that DFT wanted to make a profit from the statement.¹⁷

In deciding whether DFT knew that the statement was false or acted with reckless disregard of its truth, you may ask yourself questions such as :

- Did DFT investigate the statement's accuracy by contacting known witnesses and examining available sources?
- Did DFT know about probable inaccuracies in the statements?
- Did DFT deliberately intend to avoid the truth?
- Was there any obvious reason for DFT to doubt the source's truthfulness or the accuracy of the source's information?
- By what methods, if any, did DFT edit or check the statement for accuracy?

DEFENSES [See "Defamation- Defenses" Instruction]

DAMAGES [See "Defamation-Damages" Instruction]

¹⁵ *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 530 (2013). *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 48-59 (2007).

¹⁶ *Rotkiewicz v. Sadowsky*, 431 Mass. 749, 755 (2000).

¹⁷ *Murphy v. Boston Herald, Inc.*, 449 Mass. 42, 48-59 (2007).