Agenda
Advisory Committee on
Model Civil Jury Instructions

May 12, 2014
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Judicial Council Room, Suite N31

Welcome and approval of minutes.	Tab 1	John Young
CV 324. Alternative treatment methods. CV 302. "Standard of care" for nurses defined.	Tab 2	Committee
Punitive Damages Instructions	Tab 3	Rich Humpherys

Committee Web Page

Published Instructions

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

September 8, 2014
October 14, 2014 (Tuesday)
November 10, 2014
December 8, 2014

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
April 14, 2014
4:00 p.m.

Present: Alison Adams-Perlac, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Honorable Andrew H. Stone, Peter W. Summerill. Also present: Christopher W. Droubay, John Ray, and Terence L. Rooney

Excused: John L. Young (chair), Juli Blanch, John R. Lund, Ryan M. Springer

Ms. Adams-Perlac conducted the meeting in Mr. Young's absence.

This was Mr. Carney's last meeting. The committee thanked Mr. Carney for his eleven years of service, and Ms. Adams-Perlac presented him with a certificate. She also provided a cake to honor the occasion.

1. *CV324. Use of alternative treatment methods.* Ms. Adams-Perlac and Mr. Carney summarized the history and prior discussions on CV324. The committee had discussed amending it, dispensing with it altogether, leaving it in but with the text struck out, and posting the two sides' position statements in the committee note. Mr. Carney asked whether we should have an instruction where, as here, there is no clear Utah law on point. He noted that in MUJI 1st the committee included alternative instructions when the law was not clear, but this committee has tried to avoid alternative instructions, although the committee made an exception for the instructions on the burden of proof under the Inherent Risks of Skiing Act (CV1113A-1113C).

Dr. Di Paolo, Judge Stone, and Mr. Humpherys joined the meeting.

Mr. Carney noted that the instruction is overused, being requested in nearly every case. He also noted that there are about 26 or 27 states that have a similar instruction, including California. Mr. Rooney read the California and Washington instructions. Mr. Droubay noted that the Washington instruction was revised to meet criticisms similar to criticisms of CV324. Mr. Ray thought the instruction was duplicative and argumentative and not necessary because the law was already adequately covered in the instructions on the standard of care (CV301B and CV302). Mr. Rooney agreed that the instruction is overused but thought it was appropriate where there is a real dispute as to what the standard of care is, such as in some cancer cases, where the physician may have a choice between radiation, chemotherapy, or another treatment. Mr. Summerill thought such a dispute should be resolved by the court under evidence rule 702. He noted that the proposed revision to CV324 uses rule 702 language. Mr. Rooney noted that there is not always a single way to do something, and if there are two or more ways, a doctor should be able to use the one he thinks best. He agreed that the situation does not come up routinely in every case and that the defendant should not win just because he picked one of two accepted methods; he can still be liable if his choice was the wrong one under the

circumstances or if he was negligent in performing the method of treatment. Mr. Ray said the problem with CV324 is that it tells the jury that the defendant is not negligent as long as there is more than one accepted method of treatment. Mr. Carney suggested revising CV324 but putting in a note that it was "not approved by the committee" and letting the issue come up on appeal. Mr. Summerill thought that if the committee included any instruction, it will have the appearance of approval, regardless of what any committee note says. Ms. Adams-Perlac did not think the instruction was supported by the law and thought it should be eliminated. If people are going to use an instruction on the issue, she thought they should have a better version. Judge Stone said that at a minimum we should get rid of the current CV324, which everyone agrees is bad. He suggested a simple instruction saying that there may be more than one standard of care. Mr. Rooney re-read the Washington instruction, WPI 105.08, which says: "A physician is not liable for selecting one of two or more alternative *[courses of treatment][diagnoses],* if, in arriving at the judgment to *[follow the particular course of treatment] [make the particular diagnosis],* the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow." Mr. Summerill said that the problem with the Washington instruction is that it says that the physician is "not liable." He suggested including links to other states' instructions if attorneys need guidance in proposing their own instruction. Dr. Di Paolo pointed out that linking to other states' instructions is problematic because they do not have any basis in Utah law. Mr. Droubay thought that if the committee eliminated the instruction, the defense will be faced with motions in limine saying that they cannot argue that the defendant made a reasonable choice among acceptable alternatives. He thought that one should be able to argue that there is more than one method of treatment that may meet the standard of care. Mr. Carney thought that the model instructions should provide guidance in case the court or attorneys want to use an instruction on the issue. He favored including an instruction with a cautionary note, saying that the committee was not in agreement. Mr. Fowler agreed. He thought that the committee's job was to place the current instructions in plain English, and a form of CV324 was part of the original MUJI instructions. Dr. Di Paolo also thought that if attorneys are going to be creating jury instructions on issues not covered in the model instructions, it would be helpful to give them some guidance. Messrs. Summerill and Simmons thought that would be opening a Pandora's box because it would open the door for instructions on any number of issues for which there is no clear Utah law on point.

Mr. Carney moved to include a cleaned-up version of CV324 in the instructions, say that the committee was sharply divided on the appropriateness of the instruction, say that it should only be used when there really are alternative methods of treatment that are accepted in the medical community, and add position statements supporting and opposing the instruction. Mr. Johnson seconded the motion. The motion carried (Judge Stone, Dr. Di Paolo, and Messrs. Carney, Ferguson, Fowler, Humpherys, and Johnson voting in favor, and Messrs. Simmons and Summerill opposed). Mr. Rooney

thought that the committee note should send the message that attorneys use the instruction at their own risk.

Ms. Adams-Perlac asked if there were any concerns about the language in the proposed revision to CV324 circulated before the last committee meeting. Dr. Di Paolo said the phrase "respectable portion" was problematic. She thought that most people would interpret it to mean more than half. She suggested saying "a method generally approved" but noted that that raised the issue of what percentage of the medical community must approve a method before it is "generally approved." Mr. Ray pointed out that "respectable portion" could also mean a portion of the medical community that was respectable, regardless of its size (such as a few Dr. Welbys). Mr. Ferguson quoted *Walkenhorst v. Kesler,* 67 P.2d 654 (Utah 1937), which says "at least a respectable portion." Mr. Rooney quoted the New Jersey instruction (5.50G), which says that "alternative diagnosis/treatment choices must be in accordance with accepted standard medical practice." Mr. Summerill noted that a "respectable portion" of the medical community could be negligent and referenced Learned Hand's decision in the tug-boat case, *In re Eastern Transportation Co. (the T.J. Hooper),* 60 F.2d 737 (2d Cir. 1932) ("A whole calling may have unduly lagged in the adoption of new and available devices. . . . There are precautions so imperative that even their universal disregard will not excuse their omission.").

Judge Harris joined the meeting.

Judge Stone thought that a new term (e.g., "generally accepted" or "accepted standard medical practice") was not necessary, given the standard-of-care instruction. He also did not think that the matter was an affirmative defense. Judge Harris agreed. Judge Stone thought that the instruction should tell the jury that the standard of care may include more than one method of diagnosis or treatment. Mr. Simmons suggested doing away with CV324 and simply adding a bracketed sentence to the standard-of-care instructions (CV301B and CV302) saying that there may be more than one method of diagnosis or treatment that complies with the standard of care. Mr. Summerill thought this would be problematic because it would be adding language to an instruction that has already been approved and would eliminate CV324, which would raise more questions. Mr. Ray also preferred to keep the instructions separate; he thought that the alternative treatment language would be used in every case if it were part of the standard-of-care instruction. Judge Stone thought that the instruction should sync well with the standard-of-care instructions. Mr. Carney suggested something along the lines of CACI 506: A doctor "is not necessarily negligent just because [he/she] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice."

Mr. Humpherys proposed including the current CV324 but with the language struck out with a note that the committee does not approve the instruction, based on

Turner v. University of Utah Hospitals & Clinics, 2013 UT 52, 310 P.3d 1212, that the committee was divided on other ways to approach the issue, and setting forth the plaintiffs' and defense positions on the issue. Mr. Humpherys thought this would show that the MUJI 1st instruction should not be used, that some version of the instruction may be valid, but that the committee could not agree on what version that might be. Judge Stone and Mr. Summerill seconded the motion. Mr. Carney said he would still want to include language that the trial court can work from. Mr. Summerill thought that doing so would make whatever language was suggested appear to have the courts' imprimatur. He thought it would be better to simply let the parties advocate their positions before the trial court. Judge Harris said he was mystified as to when he would ever give CV324. Judge Stone said that because the proposed revised CV324 refers to "*the* standard of care," it implies that there is only one way to do it. He thought the legal principle is that "the standard of care" can include more than one way of doing something. The jury will have to decide which expert to believe, the one who says that there is only one way to skin the cat, or the one who says there are two or more ways.

The committee thought that we needed new proposed language for both the instruction and the committee note before anything could be finally approved. Mr. Carney thought the language should include other things, such as that it is the defendant's burden of proof to show that there is more than one acceptable alternative. Mr. Ferguson thought that the burden of proof is on the plaintiff to show that there is only one acceptable method that meets the standard of care. Ms. Adams-Perlac offered to draft new language. The committee will vote again on the new language.

Messrs. Droubay, Ray, and Rooney were excused.

2. *Term Limits.* Ms. Adams-Perlac noted that the recent resignations of Messrs. Young and Carney (Mr. Young's to take effect after the May 2014 meeting) raised the issue of whether there should be term limits on serving on the committee. She noted that there are currently term limits for the court's advisory committees on rules. A person may serve two four-year terms, with exceptions for judges, staff attorneys, the chair, and institutional members (such as Dr. Di Paolo). The policy and planning committee will consider whether to apply term limits to the jury instruction committees at its next meeting. Ms. Adams-Perlac noted that this committee has been serving since 2003, and some members are getting burned out. Judge Harris thought that the committee needed institutional knowledge. He thought that terms should be staggered so that we do not lose a Mr. Young and a Mr. Carney at the same time. Mr. Carney noted that we have tried to keep the committee evenly balanced between attorneys who represent primarily plaintiffs and those who represent primarily defendants, but committee members do not represent a particular constituency but are supposed to do what is best for the development of the law and legal process. Ms. Adams-Perlac explained the process for adding new members to a committee: When there is a vacancy on a committee, notice goes out to the bar, and attorneys may apply to

fill the vacancy. The staff and committee chair make recommendations to the Supreme Court. The committee generally thought that term limits were a good idea.

3. *Time.* Mr. Carney expressed his view that the committee has lost its way. He noted that the first edition of MUJI took only a year to complete, and we have been working for eleven years with no end in sight. He thought at this point we should only be meeting irregularly when necessary to consider modifications to the rules based on new developments in the law. He thought that the committee needed to triage and set priorities. He noted that every jury trial has instructions, and they are done on time, in much less time than the committee has taken. Judge Harris noted that Judge Lawrence has drafted his own instructions on punitive damages (the next topic the committee is set to discuss) and has shared them with him and Judge Stone. Ms. Adams-Perlac said that she was writing an article for the Bar Journal encouraging people to submit their proposed jury instructions for the committee's consideration. Mr. Carney noted that he and Mr. Young had asked for feedback in the past and had not received much. Ms. Adams-Perlac offered to reach out to judges and ask them to send the committee the actual instructions that they use.

The committee discussed the work of the subcommittees. Dr. Di Paolo noted that people get discouraged when their work is not reviewed for years. She suggested setting timelines and putting a limit on the amount of time spent discussing each instruction. Judge Stone suggested having no more than two meetings on any instruction. Mr. Summerill noted that part of the problem is that committee members do not come to the meetings prepared to discuss the instructions and have to spend a large amount of the meeting time reading the instructions. He thought the best procedure was to have one person on a subcommittee be in charge of drafting the instructions for that area of the law, present them to the subcommittee for revision, and the full committee would just review the final product for minor revisions. Mr. Humpherys suggested making the committee smaller. Mr. Summerill liked the idea and thought that a smaller committee could bring in specialists ad hoc for help in certain areas. Mr. Humpherys also suggested doing the instructions like they would be done at a trial: Each side would argue its position, and the judges on the committee would decide what the instruction should be. Dr. Di Paolo also noted that the instructions should be field tested on lay people so that the committee could have research on how the instructions are actually being understood.

4. *Next Meeting.* The next meeting will be Monday, May 12, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

CV301B Elements of a medical negligence claim. Approved.

To establish that (name of defendant) was at fault, (name of plaintiff) has the burden of proving two things, a breach of the standard of care, and that the breach was a cause of (name of plaintiff)'s harm.

CV301C "Standard of care" defined. Approved.

A [health care provider/doctor] is required to use that degree of learning, care, and skill used in the same situation by reasonably prudent [providers/doctors] in good standing practicing in the same [specialty/field]. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as either "medical negligence" or "medical malpractice". (They mean the same thing.)

The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

CV309 "Cause" defined. Approved.

[If you find that the (name of defendant) breached the standard of care, then you must determine whether that failure was a cause of (name of plaintiff)'s harm.]

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word.

"Cause" means that:

(1) (name of defendant)'s act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence; and

(2) (name of defendant)'s act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

There may be more than one cause of the same harm.

References
Jensen v. IHC Hospitals, 82 P.3d 1076, 1096, 2003 UT 51.
Dalley v. Utah Valley Regional Med. Ctr., 791 P.2d 193, 195 (Utah 1990).
Dikeou v. Osborn, 881 P.2d 943, 947 (Utah 1981).
Chadwick v. Nielsen, 763 P.2d 817, 821 (Utah 1981).
Kent v. Pioneer Valley Hospital, 930 P.2d 904 (Utah App. 1997).
Robb v. Anderton, 863 P.2d 1322 (Utah App. 1993).
Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).
Lyon v Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony).

MUJI 1st Instruction
6.2

Committee Notes
~~It is unclear whether Utah cases follow a "similar locality" standard, but it should not be relevant in most cases involving board-certified physicians. The "similar locality" instruction clearly is not applicable in actions against "specialists." Jenkins v. Parrish, 627 P.2d 533 (Utah 1981); Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).~~

~~There may be cases in which the standard may differ from one locality to another, and in such cases counsel should review the cases cited above and amend the model instruction accordingly. If the court uses a "similar locality" instruction, then MUJI 1st 6.19 should also be considered: *A [health care provider] trained and practicing in a specialized field in a major city and holding himself out as a nationally trained and board-certified [expert] is required to use the same national standards of learning, skill and care followed by other qualified fellow [experts] in similar medical centers throughout the medical profession, wherever they might be.*~~

In Nielson v. Pioneer Valley Hospital, 830 P.2d 270 (Utah 1992), and Brady v. Gibb, 886 P.2d 104 (Utah App. 1994), the courts held that instructions similar to this should not be given in conjunction with a "common knowledge" or res ipsa

loquitor instruction unless plaintiff is also alleging breach of a different standard of care.

Instruction CV129, Statement of opinion, should not be given when this instruction is used, as it instructs the jurors that they may disregard expert testimony.

Instruction CV324, Use of alternative treatment methods, should also be given when defendant claims to have used an alternative treatment method.

CV 302. "Standard of care" for nurses defined.

A nurse is required to use that degree of learning, care, and skill used in the same situation by reasonably prudent nurses in good standing practicing in the same [specialty/field]. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as either "nursing negligence" or "nursing malpractice". (They mean the same thing.)

The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

References

Sessions v. Dee Memorial Hosp. Ass'n, 78 P.2d 645 (Utah 1938).

MUJI 1st Instruction

6.21

CV324 Use of alternative treatment methods.

Revised Version 2: The standard of care may include more than one acceptable method of treatment. (Name of plaintiff) has the burden to prove that there is only one acceptable method of treatment.

Current: ~~When there is more than one method of [diagnosis/treatment] that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all providers, it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection, or one not favored by some other providers. The provider has~~

~~the burden to prove that the method used is approved by a respectable portion of the medical community.~~

Revised Version 1: ~~(Name of defendant) claims that the method [he] [she] used in treating (name of plaintiff) was appropriate. In order to prevail (name of defendant) must prove the following:~~

1. ~~When there is more than one~~ the method of [diagnosis/treatment] that is ~~approved by a respectable portion of the medical community;~~,

2. ~~and no particular method is used exclusively by all providers;~~, it is not ~~medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection, or one not favored by some other providers. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.~~

3. ~~the standard of care applicable to this treatment method; and~~

4. ~~(name of defendant) met that standard of care.~~

~~The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.~~

References

~~Cf. Butler v. Naylor, 1999 UT 85, 987 P.2d 41 (even if the evidence did not support giving this instruction, it was harmless error to do so, because the jury could have found for the defendant on other grounds).~~
~~Turner v. University of Utah Hospitals and Clinics, 2011 UT App 431, rev'd 2013 UT 52.~~

MUJI 1st Instruction

6.29

Committee Notes

The committee discussed this instruction at length and agreed that the previous version of the instruction was not supported by Utah law. However, the committee was divided on whether the instruction should be removed altogether, or whether a modified instruction should be adopted. The committee also considered the positions of the plaintiffs' and defendants' attorneys on the subject and their positions follow.

Plaintiff's Position

CV324 in its current form discards any showing of reasonableness, which is the foundation of negligence law. In *Turner v. University of Utah Hosps. & Clinics* the Utah Supreme Court stated that it was "troubled by the fact that this Instruction explicitly directs the jury to return a 'no negligence' verdict if it finds that there was 'more than one method of treatment." 2013 UT 52, ¶ 16, 310 P.3d 1212. The concept of an 'alternative method of treatment' already finds a place in Utah's standard of care instruction for medical malpractice. Counsel are free to argue the existence of an 'alternative' method which meets the standard of care under CV301B. No Utah precedent exists which expressly adopts or affirmatively endorses the 'Alternative Methods of Treatment' instruction. Although some argue that the 77 year old case of *Walkenhorst v. Kesler* supports the instruction, that case addressed the issue of whether an expert in one school of medicine could testify as to the standard of care of another school of medicine, hence an 'alternative' method. However, that scenario is also covered by instructions on expert witness testimony. Providing a separate instruction on a defense oriented theory of 'alternative methods' adds complexity to the stock instructions on standard of care, may potentially confuse jurors as to what they should be deciding, and removes the concept of reasonableness from a negligence based tort.

Defendant's Position

Plaintiff's bar argues that CV324 "removes the concept of reasonableness from a negligence based tort." While the term "reasonableness" is often used in traditional negligence actions, medical malpractice actions specifically address the concept of "standard of care." Interjecting a general reasonableness standard into a malpractice action would be legally incorrect. CV324 specifically addresses the issue of standard of care. The instruction is merely designed to let the jury know that, in some instances, more than one treatment method may fall within the standard of care. Courts and jurors often believe, or are led to believe, that only one method of treatment is acceptable. In many cases, this is simply incorrect. The need for an Alternative Treatment Methods Instruction has been widely recognized. CV 324 is similar to instructions used in numerous other states. CV324 is not an anomaly. Additionally, the concept of

alternative treatment methods finds support in Utah law. *See Walkenhorst v. Kesler*, 67 P.2d 654, 668 (Utah 1937). In *Walkenhorst*, the Court stated as follows:

> That the treatment did not effect a cure is not a cause of action. Because one does not diagnose or treat a patient in the same way as another or use the other's methods, will not constitute malpractice, if the treatment employed has the approval of at least a respectable portion of the profession or is in accord with the standards of those recognized in the community to treat such ailments, and reasonable skill, learning, and diligence are manifest. Physicians or others authorized or licensed to treat human ailments are not insurers of a cure.

Id. at 668.

Moreover, the Utah Appellate Courts have never rejected CV324. In *Turner v. University of Utah Hosps. & Clinics,* the Supreme Court did not hold that the instruction should not be used; it merely held that the instruction was misapplied in that particular case. 2013 UT 52, ¶ 16, 310 P.3d 1212. Abandoning CV324 simply because it was found inapplicable in a particular case would be an overreaction. Many jury instructions are only applicable in certain cases. The most important question in determining whether any jury instruction is appropriate is whether the instruction accurately instructs the jury on the law. CV324 accurately instructs the jury on the law. If the committee believes that the current wording of CV324 is confusing then the solution is to amend the instruction, not abandon it altogether.

A majority of the committee voted to adopt the modified instruction. If an alternative treatment method is at issue, this version, not the previous version, should be used.

~~This instruction is currently under review by the committee. This instruction is slightly modified from MUJI 1st 6.29. The committee agreed on deleting the "best judgment" language from the instruction, as that inappropriately suggested a subjective standard of care might be followed; that is, what defendant "thinks best," whether it is within the standard of care or not.~~

~~This instruction should only be used when a proper foundation is laid for it, namely, that the "alternative method" is shown by defendant to be used by something more than a small minority of doctors, but not necessarily the majority. In other words, the defendant must show that the challenged treatment enjoys such substantial support within the medical community that it truly is "generally" recognized. See Peters v. Vander Kooi, 494 N.W.2d 708 (Iowa 1993); Bickham v. Grant, 861 So.2d 299 (Miss. 2003); Velazquez v. Portadin, 751 A.2d 102 (N.J. 2000); Yates v. University of W. Va. Bd. of Trustees, 549 S.E.2d 681(W. Va. 2001); R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instruction 3-38, cmt. 3 (LexisNexis, 6th ed. 2007).~~

~~The drafting subcommittee was not unanimous in its approval of this instruction, so counsel and the trial court should review it with caution. Some thought that it is inappropriate to instruct a jury that a doctor is "not negligent" if he uses an approved method, but that this is simply one factor to consider in determining whether the provider met the standard of care.~~

~~Some members of the committee expressed concerns regarding this instruction, and these concerns are summarized as:~~

~~First, no Utah authority recognizes the appropriateness of this instruction, and Butler v. Naylor did not question the propriety of giving the "alternative methods" instruction. Rather, appellant only challenged the instruction on the basis that the "evidence failed to establish that the surgical procedure used [was] recognized by a respectable portion of the medical community." Butler v. Naylor, 1999 UT 85 at & 19, 987 P.2d 41. Butler avoided any detailed examination of the instruction "because [the instruction] presents only one of several theories upon which the jury could have relied in finding for [Defendant]." Id. at & 20. Accordingly, the court offered no direct endorsement or rejection of the instruction as an accurate statement of the law. At best, Butler is ambiguous about whether the instruction reflects the state of the law in Utah.~~

~~Second, the instruction is inconsistent with Utah law defining medical malpractice and standard of care. We tell jurors that a health care provider is required to use the same degree of learning, care, and skill ordinarily used by other qualified providers in good standing practicing in the same. This instruction, however, then tells the jurors that "it is not negligence" if more than one method exists, effectively eliminating any requirement that a physician exercise that degree of learning, care and skill ordinarily used~~

~~The bare existence of more than one method automatically excuses the physician because "it is not medical malpractice" to choose one method over another, thereby alleviating the physician of their duty to exercise any degree of learning, care or skill ordinarily used in the field. Under this instruction, the~~

~~physician becomes "not negligent" simply by the existence of alternative methods without needing to exercise any judgment or care whatsoever in choosing the method.~~

~~This ignores whether one method may be safer, more effective, or carry less risk of complication. Instead, it simply says that if there is more than one method and the method is "accepted by a respectable portion of medical community," it is not malpractice to choose one over the other. Clearly, this cannot be the law of medical negligence where every practitioner must exercise their skill, learning and professional care in treating patients.~~

CV326 Expert testimony required.

~~You must use only the standard of care established through evidence presented in this trial by expert witnesses and through other evidence admitted for the purpose of defining the standard of care. You may not use a standard based on your own experience or any other standard of your own.~~

~~References~~

~~Dalley v. Utah Valley Reg. Med. Ctr., 791 P.2d 193 (Utah 1990).~~
~~Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).~~
~~Lyon v Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony).~~

~~MUJI 1st Instruction~~

~~6.2~~

~~Committee Notes~~

~~In Nielson v. Pioneer Valley Hospital, 830 P.2d 270 (Utah 1992), and Brady v. Gibb, 886 P.2d 104 (Utah App. 1994), the courts held that instructions similar to this should not be given in conjunction with a "common knowledge" or res ipsa loquitor instruction unless plaintiff is also alleging breach of a different standard of care.~~

~~Instruction CV129, Statement of opinion should not be given when this instruction is used, as it instructs the jurors that they may disregard expert testimony.~~

Tab 3

Punitive Damages

(1) 2026. Purpose of punitive damages.

Punitive damages are intended to punish a wrongdoer for some extraordinary misconduct and to serve as a deterrent to others. They are not intended to compensate the plaintiff.

Authority: *State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408, 416 (2003) (punitive damages are intended to punish and deter, in contrast to compensatory damages, which "are intended to redress the concrete loss that Plaintiffs have suffered by reason of the defendant's wrongful conduct" (citation omitted)); *BMW of N. Am. Inc. v. Gore,* 517 U.S. 559, 568 (1996) (punitive damages are imposed to punish unlawful conduct and deter its repetition); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 19-20 (1991).

References

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 568 (1996).

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19-20 (1991).

Committee Notes

(2) 2027. Requirements for punitive damages.

You may award punitive damages if the [name of plaintiff] has proved by clear and convincing evidence that the acts or omissions of [name of defendant] were the result of

[[willful and malicious] [intentionally fraudulent] conduct] [conduct that manifested a knowing and reckless indifference toward and a disregard of the rights of others]. Whether or not to award punitive damages is left entirely up to you.

Comment: *See* MUJI 2nd _____ regarding definition of clear and convincing.

References

Utah Code § 78B-8-201(1)(a).

Committee Notes

(3) 2028. Amount of punitive damages.

If you decide to award punitive damages, the amount must be reasonable and proportionate to the harm to [name of plaintiff] as a result of conduct by [name of defendant] that you find caused [name of plaintiff]'s injuries. The amount of punitive damages may not be arbitrarily selected but should be in an amount necessary to fulfill the two purposes of punitive damages—to punish past misconduct and to deter future misconduct.

Authority: *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) ("[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to Plaintiffs and to the general damages recovered."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-83 (1996) ("The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on Plaintiffs."); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* 532 U.S. 424, 440-42 (2001) (punitive damage award must bear reasonable relation to the amount of "actual injury" from specific misconduct at issue).

References

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-83 (1996).

Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 440-42 (2001).

Committee Notes

(4) 2029. Punitive damages.

In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may not award any punitive damages for the purpose of punishing [name of defendant] for its conduct in states other than [forum state] or for the purpose of changing [name of defendant]'s conduct outside of [forum state].

Authority: *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred;" "[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-75 & 585 (1996) ("While each State has ample power to protects its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

References

State Farm Mut. Auto. Ins. Co. v. Campbell, No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003).

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 570-75 & 585 (1996).

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