Medical Malpractice Instructions

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Committee Notes on Medical Malpractice Instructions

The Advisory Committee intentionally omitted several of the MUJI 1st medical malpractice instructions.

MUJI 1st 6.27 (Physician Not Guarantor of Results) was deleted in view of the decisions in Green v. Louder, 2001 UT 62, 29 P.3d 638 (trial courts directed not to instruct juries that the "mere fact" of an accident does not mean that anyone was negligent), and Randle v. Allen, 863 P.2d 1329 (trial courts directed not to instruct juries on "unavoidable accidents").

MUJI 1st 6.34 and 6.35 (causation instructions) have been replaced by a single instruction.

Approved

CV301. "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.

A [health care provider/doctor] is required to use the same degree of learning, care, and skill ordinarily used by other qualified [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 "medical malpractice."

To establish medical malpractice, [name of plaintiff] has the burden of proving three things:

(1) first, what the standard of care is;

(2) second, that the [provider/doctor] failed to follow this standard of care; and,

(3) third, that this failure to follow the standard of care was a cause of [name of plaintiff]'s harm.

In this action, [name of plaintiff] alleges that [name of defendant] failed to follow the standard of care in the following respects:

(1)

(2)

(3)

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

MUJI 1st Instruction

None

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*.

Approved

CV302. "Standard of care" for nurses defined. "Nursing negligence" defined. Elements of claim for nursing negligence.

A nurse is required to use the same degree of learning, care, and skill ordinarily used by other qualified nurses in good standing providing similar care. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as "nursing negligence." In order to establish nursing negligence, [name of plaintiff] has the burden of proving three things:

(1) what the standard of care is;

(2) that the nurse failed to follow this standard of care; and,

(3) that this failure to follow the standard was a cause of [name of plaintiff]'s harm.

In this action, [name of plaintiff] alleges that [name of defendant] failed to follow the standard of care in the following respects:

(1)

(2)

(3)

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

References

Sessions v. Dee Memorial Hosp. Ass'n, 94 Utah 460, 78 P.2d 645 (1938).

MUJI 1st Instruction

6.21

Approved

CV303. Care owed by nurse under varying circumstances.

The amount of care required of a nurse is measured by the patient's condition, the danger to the patient involved in the treatment, the service undertaken by the nurse, the information and instructions given to the nurse by the attending physician or surgeon, and other surrounding circumstances. These circumstances may require continuous attention or service, or they may justify lesser vigilance. These are matters for you to consider in deciding whether the nurse followed the standard of care.

References

Potter v. Groves Latter-Day Saints Hosp., 99 Utah 71, 103 P.2d 280 (1940).

Gitzhoffen v. Sisters of Holy Cross Hosp. Ass'n, 32 Utah 46, 88 P. 691 (1907).

MUJI 1st Instruction

6.22

Approved

CV304. Duty to disclose material medical information.

[Name of defendant] had a duty to disclose to [name of plaintiff] information concerning [name of plaintiff]'s condition that was unknown to [name of plaintiff], if the information would be important to a reasonable person in making decisions about health care, and if disclosure of the information would not be expected to make [name of plaintiff]'s health worse.

References

Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980).

MUJI 1st Instruction

6.4

Committee Notes

Nixdorf v. Hicken post-dates the informed consent statute, and appears to establish a related, but different, claim for relief. See fn 20 on p 354. When that claim for relief exists and when the informed consent statute applies, remain unclear.

Approved

CV305. Duty to refer.

If [name of defendant] knew or should have known that [he] did not possess the necessary expertise to properly treat [name of plaintiff]'s condition, and a referral to another who has the appropriate expertise could reasonably have been made under the circumstances, then [name of defendant] had a duty to offer that referral.

References

Swan v. Lamb, 584 P.2d 814 (Utah 1978).

MUJI 1st Instruction

6.3

Approved

CV306. Duty to warn of how to avoid injury.

[Name of defendant] had a duty to warn [name of plaintiff] how to avoid injury [to the area treated] following treatment.

References

Mikkelsen v. Haslam, 764 P.2d 1384 (Utah App. 1988).

MUJI 1st Instruction

6.17

Committee Notes

A jury must be specifically instructed on the duties of a physician in this context. Merely giving abstract instructions on negligence without adapting the instruction to the duties present in the case is error. Mikkelsen, 764 P.2d at 1388, citing Everts v. Worrell, 197 P. 1043, 1046 (Utah 1921).

Approved

CV307. Duties of hospital to patients.

A hospital has a duty to act with reasonable care towards its patients. In this action, plaintiff alleges that the defendant hospital failed to do so in the following respects:

(1)

(2)

(3)

If you find that the defendant hospital failed to act with reasonable care toward plaintiff in any of these respects, then you must determine whether that failure was a cause of [name of plaintiff]'s harm.

References

Gitzhoffen v. Sisters of Holy Cross Hosp. Ass'n, 32 Utah 46, 88 P. 691 (1907).

MUJI 1st Instruction

6.20

Committee Note

The trial court should tailor this instruction to set forth the particular duties at issue in the case before it; e.g., the duty to monitor a patient's well-being, the duty to follow reasonable orders of an attending physician, etc. Mikkelsen v. Haslam, 764 P.2d 1384, 1388 (Utah App. 1988)

CV308. Physicians may assume compliance with orders.

A physician may assume that appropriate orders and instructions to hospital nurses and other personnel for the care and management of a patient will be carried out. A physician is not at fault if hospital personnel fail to do so, unless that failure is brought to the physician's attention, and the physician then fails to take steps to remedy the situation.

Committee Note

Some members of the committee questioned whether this instruction would be appropriate where the physician has reason to believe, but did not know, that his orders would not be carried out.

References

Huggins v. Hicken, 6 Utah 2d 233, 310 P.2d 523 (1957).

MUJI 1st Instruction

6.28

Approved

CV309. "Cause" defined.

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

MUJI 1st Instruction

6.34; 6.35

Committee Notes

This instruction tracks the MUJI 2nd instruction on causation.

Expert testimony is usually necessary to establish causation in a medical malpractice claim. Butterfield v. Okubo, 831 P.2d 97, 102 (Utah 1992). There are exceptions when the causal link is readily apparent using only "common knowledge." Bowman v. Gibb, 2008 UT 9.

The committee considered a "loss of chance" instruction, but decided that Utah law is unclear on whether such instructions are appropriate. Counsel should review Restatement (Second) of Torts § 323(a) (1965); Medved v. Glenn, 2005 UT 77; 125 P.3d 913 (increased risk of harm is a cognizable injury where a related injury is also present) ; Anderson v. BYU, 879 F.Supp 1124 (D. Utah 1995); Seale v. Gowans, 923 P.2d 1361 (Utah 1996); George v. LDS Hospital, 797 P.2d 1117 (Utah App. 1990); Anderson v. Nixon, 139 P.2d 216 (Utah 1943); R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instructions 10-10 to 10-12 (LexisNexis, 6th ed. 2007).

CV310. Duty to obtain informed consent. "Informed consent" defined.

A physician has a duty to obtain the patient's informed consent to proposed care. Consent is informed if the patient gives consent after the physician outlines the substantial and significant risks of serious harm from the care and the reasonable alternatives to the care.

References

Utah Code Section 78B-3-406.

Burton v. Youngblood, 711 P.2d 245 (Utah 1985).

Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980).

Ficklin v. MacFarlane, 550 P.2d 1295 (Utah 1976).

Lounsbury v. Capel, 836 P.2d 188 (Utah App. 1992).

MUJI 1st Instructions

6.5; 6.9

Committee Notes

It is important to distinguish actual consent from informed consent. Informed consent is an agreement by the patient to a procedure after having been made aware of the substantial and significant risks of serious harm from the care, and the alternatives to it.

One may *actually* consent to a procedure and yet not have given an *informed* consent. See Lounsbury v. Capel, 836 P.2d 188 (Utah App. 1992).

The persons authorized to provide consent to treatment are designated in Utah Code Section 78B-3-406(4). Lounsbury v. Capel, 836 P.2d 188 (Utah App. 1992) held that the reference in Section 78B-3-406(4) to "spousal" consent can only be interpreted to mean that a spouse can consent for care to an incapacitated spouse. See also Reiser v. Lohner, 641 P.2d 93, 99 (Utah 1982), for the proposition that a husband's consent is not necessary for surgery on his wife.

Section 78B-3-407 has added a new limitation on actions brought against health care providers arising out of refusal of parents or guardians to consent to recommended treatment. There are other consent statutes scattered throughout the Utah Code. See for example, Sections 15-2-5 (parental consent not required for minor's blood donation), 26-6-18 (minor's power to consent to treatment for sexually transmitted diseases), 76-7-304.5 and -305 (abortions), and 62A-6-105 (sterilization).

The committee has not intended to provide an exhaustive list of every possible instruction that may be needed in any case alleging lack of consent. For this, we refer the reader to Chapter 5 of Professor Eade's comprehensive work, R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES (LexisNexis, 6th ed. 2007).

Approved

CV311. Elements of an informed consent claim.

To establish a claim for the failure to obtain informed consent, [name of plaintiff] has the burden to prove all of the following:

(1) that a physician-patient relationship existed between [name of plaintiff] and [name of defendant];

(2) that [name of defendant] provided care to [name of plaintiff];

(3) that the care posed a substantial and significant risk of causing serious harm;

(4) that [name of plaintiff] was not informed of the substantial and significant risk or of reasonable alternatives,

(5) that a reasonable person in [name of plaintiff]'s position would not have consented to [or rejected] the care after having been informed of the substantial and significant risks and alternatives; and

(6) that the care that was not consented to was a cause of [name of plaintiff]'s harm.

References:

Utah Code Section 78B-3-406(1).

Ramon v. Farr, 770 P.2d 131 (Utah 1989).

Burton v. Youngblood, 711 P.2d 245 (Utah 1985).

Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

MUJI 1st Instruction

6.7

Committee Notes

Elements (1) and (2) will normally be undisputed, and the court should tailor the instruction accordingly.

Section 78B-3-406 does not address the patient's right to be informed of the risks from *rejecting* offered treatment. The committee has inserted the bracketed portion of Paragraph (5) in case the court wishes to consider the appropriateness of an instruction on rejection of offered care, in which case Instruction CV312 should be amended accordingly.

Approved

CV312. "Substantial and significant risk" defined.

A risk is "substantial and significant" if it occurs frequently enough and is serious enough that a reasonable patient would want to be informed about it.

References

Utah Code Section 78B-3-406(2).

Ramon v. Farr, 770 P.2d 131 (Utah 1989).

Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

Ficklin v. MacFarlane, 550 P.2d 1295 (Utah 1976).

MUJI 1st Instruction

6.6

Committee Notes

Chadwick v. Nielsen, 763 P.2d 817 (Utah App. 1988), discusses the need for expert testimony in informed consent cases to establish the materiality of risks; that is, what the risks are, how serious they are, and how often they occur. But whether those risks should be disclosed is usually a matter for the jury to decide based upon their determination of substantiality and significance, not upon standard medical practice.

Approved

CV313. Standard for judging patient's consent.

To determine whether a reasonable person would not have consented to the care, you must take the viewpoint of a reasonable person in [name of plaintiff]'s position before the care was provided and before any harm occurred.

References

Utah Code Section 78B-3-406(1).

MUJI 1st Instruction

6.8

Approved

CV314. Consent to or refusal of treatment.

A [consent to/refusal of] treatment is binding even if it is not in writing.

References

MUJI 1st Instruction

6.10

Committee Notes

The "safe harbor" defense for written consent forms of Utah Code Section 78B-3-406(2)(e) does not foreclose consent obtained by other means; such as orally, by acquiescence, or by a writing that does not comply with the statute. The statute simply means that if there is a writing that complies with its requirements, it is a defense to the action for lack of informed consent unless the patient proves lack of capacity or fraud.

Approved

CV315. Consent is presumed.

There is a presumption that, if a person submits to health care, the care was authorized.

References

Utah Code Section 78B-3-406(1).

Lounsbury v. Capel, 836 P.2d 188 (Utah App. 1992).

MUJI 1st Instruction

6.11

Return to Subcommittee. Refer to statute on how the plaintiff proves otherwise. Separate instructions on actual consent and informed consent.

CV316. Common knowledge defense.

If the risk of harm was commonly known to the public, then [name of plaintiff] may not recover on a claim of failure to obtain informed consent.

References

Utah Code Section 78B-3-406(2)(b).

MUJI 1st Instruction

6.13

CV317. Refusal of information defense.

If [name of plaintiff] declined to be informed of the risk of harm, then [he] may not recover on a claim of failure to obtain informed consent.

References

Utah Code Section 78B-3-406(2)(c).

MUJI 1st Instruction

6.14

CV318. Reasonable non-disclosure defense.

If [name of defendant] reasonably believed that disclosure of the risk of harm could have had a substantial and adverse effect on [name of plaintiff]'s condition, then [he] was not required to make that disclosure.

References

Utah Code Section 78B-3-406(2)(d).

MUJI 1st Instruction

6.15

CV319. Written consent defense.

A written consent is a defense to a claim for failure to obtain informed consent, unless:

[(1) [Name of plaintiff] proves by a preponderance of the evidence that the person giving consent lacked the capacity to do so.]

[(2) [Name of plaintiff] proves by clear and convincing evidence that [name of defendant] obtained the consent by fraudulent misrepresentation or fraudulent failure to state material facts.]

References

Utah Code Section 78B-3-406(2)(e).

MUJI 1st Instruction

6.16

Committee Notes

The committee felt that the court would normally decide whether a written consent complies with the requirements of Section 78B-3-406(2)(e). Thus, there is no need for a jury instruction on the statutory elements of the "safe harbor" written consent as was

contained in MUJI 1st 6.16. In this new instruction, "written consent" presumes a written consent that has been found to meet the statutory requirements. Otherwise, it should not be used.

It would be the unusual case where both lack of capacity and fraud are raised as defenses to a statutorily-compliant written consent. Therefore, the trial court will normally give only subsection (1) or (2) of this instruction, not both.

CV320. Patient's duty of care.

A patient has the duty to use reasonable care to provide for his own health and safety. This includes the responsibility to follow reasonable instructions of the health care provider, and to seek medical assistance when a reasonable person would do so.

In this action, [name of defendant] claims that [name of plaintiff] failed to use reasonable care in the following respects:

(1)

(2)

(3)

If you find that [name of plaintiff] failed to act with reasonable care in any of these respects, then you must determine whether that failure was a cause of [his] harm.

CV321. Patient's negligence in failing to follow instructions.

[Name of plaintiff] had a duty to follow [name of health care provider]'s reasonable instructions. You may consider the failure to do so in deciding whether the [name of plaintiff] was at fault and whether any of [name of plaintiff]'s fault was a cause of [his] harm.

MUJI 1st Instruction

6.23

CV322. Patient's negligence in giving medical history.

A patient must use ordinary care in giving an accurate history to [his] treating physician. In determining whether this was done, you may consider whether the physician's questions were sufficient to alert the patient of the need to disclose particular aspects of that history.

References

Mackey v. Greenview Hosp., Inc., 587 S.W.2d 249 (Ky. Ct. App. 1989).

MUJI 1st Instruction

6.25

CV323. Patient's fault: preexisting conditions.

You are not to consider any of these matters as evidence of [name of plaintiff]'s fault:

[List plaintiff's preexisting conditions or behaviors, e.g. smoking.]

References

Steiner Corporation v. Johnson & Higgins of California, 996 P.2d 531, 2000 UT 21.

MUJI 1st Instruction

Committee Notes

A patient's failure to follow medical instructions for the treatment of an ailment may constitute comparative fault in the appropriate case; for example, failure to get recommended tests for the detection of cancer, leading to a delay in diagnosis. However, a patient's conduct should not usually be relevant to the issue of comparative fault where it predates the physician's treatment. The doctor takes the patient as he finds him, even if the patient's poor condition is due to the patient's own poor choices, such as diet, smoking, or lack of exercise.

Comparative fault instructions should therefore be limited to those cases where the patient's negligence occurs at or after the time of the defendant's conduct, as in Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989) (plaintiff participated in sexual misconduct by therapist) or Harding v. Bell, 57 P.3d 1093, 2002 UT 108.

A patient's conduct is relevant to fault in a medical malpractice case when the conduct specifically and directly impedes the efficacy of the defendant physician's care, such as failure to comply with instructions for follow up care, failure to accurately report symptoms, or failure to follow instructions regarding return to work.

See, e.g., DeMoss v. Hamilton, 644 N.W.2d 302 (Iowa 2002); Jensen v. Archbishop Bergan Mercy Hospital, 459 N.W.2d 178, 186-87 (Neb. 1990); Fritts v. McKinne, 934 P.2d 371, 374 (Okla. Civ. App. 1996); Ostrowski v. Azzara, 545 A.2d 148 (N.J. 1988); Harding v. Deiss, 2000 MT 169, 3 P.3d 1286; Lambert v. Shearer, 616 N.E.2d 965 (Ohio Ct. App. 1992); Krklus v. Stanley, 833 N.E.2d 952 (Ill. App. Ct.), *appeal denied*, 844 N.E.2d 38 (Ill. 2005); Spence v. Aspen Skiing Co., 820 F. Supp. 542 (D. Colo. 1993); Matthews v. Williford, 318 So.2d 480 (Fla. Dist. Ct. App. 1975); Eiss v. Lillis, 357 S.E.2d 539 (Va. 1987); R.W. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instruction 13-2 (Lexis-Nexis 6th ed. 2004).

CV324. Use of alternative treatment methods.

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 [he] used is approved by a respectable portion of the medical community.

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).

MUJI 1st Instruction

6.29

Committee Notes

The committee was not unanimous in its approval of this instruction. Use it with caution.

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: what defendant "thinks best," whether within the standard of care or not.

The committee did not agree whether this instruction should ever be used. Some committee members 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.

In any event, 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).

Some members of the committee expressed concerns regarding this instruction. In particular, no Utah case authority formally recognizes the appropriateness of this instruction. The Butler v. Naylor decision only found there to be harmless error in giving the instruction. Further, whether or not the physician exercised reasonable care does not depend on whether or not there are different modes of treatment, even if generally accepted. The physician must exercise reasonable care, even when choosing among alternative methods of treatment. The simple existence of an alternative does not mandate that jurors be told the provider may not be or is not negligent. A driver of a vehicle may also be presented with "alternatives" that would avoid the collision, but we do not nor should we instruct a jury that simply because the driver chose one alternative over another he may not be negligent.

In the absence of a very well-recognized alternative, the instruction should not be given. Accordingly, this instruction should especially be avoided where using it would condone an alternative treatment method simply because it is a "cheaper" alternative. Outmoded, but still widely employed procedures/methods, should not become cemented as the standard of care through this instruction as tort law is designed to encourage adoption of the safest and best procedures, not enshrine role and custom as the standard of care.

FJC Note: I am voting with "is not" medical malpractice instead of "may not be" as suggested by Pete Summerill. There are four of us on the subcommittee, so Pete is outvoted 3-1. His thoughtful comment should be included in the Committee Note.

First, while I understand the concern that this may **never** be an appropriate instruction, we've come a long way from the original version.

Second, Elliott graciously "gave" on other areas in order to get some things he wanted, and this is one of them. I don't think it's fair to go back in the entire committee and re-write the substance of the instruction, because that does not take into account the extensive give-and-take of the subcommittee's work.

Third, although this appeared in JIFU (in a different form), the JIFU med-mal instructions contain things that are antiquated, argumentative, and later rejected by appellate decisions. Nevertheless, this had been around in one form or another for a long time and I am willing to leave it to be fought out at the trial court and then hope at some point an appellate court will advise us whether this is a good instruction or not.

Fourth, I don't know exactly what "respectable portion" means but I don't know how we can make it clearer without getting into a numbers game.

Pete Summerill:

Why *Butler* Does Not Support Giving This Instruction.

The issue raised on appeal in *Butler v. Naylor* did not question the propriety of giving the 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. Accordingly, because appellant did not challenge the instruction as an accurate statement of the law, the *Butler* could not have been addressing the propriety of the instruction because that issue was not before the court.

Second, *Butler* refused to provide an analysis of the instruction's accuracy. *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. "[E]ven if the trial court had erred by giving instruction thirty-eight, the error would be harmless as the jury could have reached the no-cause verdict on several alternative theories." *Id.* This committee is not formed to say what the law is, let alone create precedent. Because *Butler* does not affirmatively recognize this instruction as law, there is no basis on which this committee can endorse or adopt such an instruction.

Why the Instruction Should Not Be Adopted - CV324 Offends Utah Law & Contradicts CV301.

The instruction is inconsistent with Utah law defining medical malpractice and standard of care. Specifically, CV301 tells jurors that:

> "A [health care provider/doctor] is required to use the same degree of learning, care, and skill ordinarily used by other qualified [providers/doctors] in good standing practicing in the same [specialty/field]."

The Utah Supreme Court also recognizes a health care provider's duty to use the ordinary care and skill. "The duty of care generally owed by a physician to his patient is to exercise that degree of skill and learning ordinarily possessed and exercised, under similar circumstances, by other practitioners in his field of practice." *Farrow v. Health Services Corp.*, 604 P.2d 474, 477 (Utah 1979). "[T]he law imposes upon [a physician] the duty to employ that care and skill required of men of similar calling." *Dickinson v. Mason*, 18 Utah 2d 383, 386, 423 P.2d 663, 665 (Utah 1967).

CV324, however, tells juries 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. Because CV324 undermines Utah law and contradicts CV301 by telling jurors that it is not negligence if more than one method exists, it cannot be adopted by this committee.

CV324 goes even further than the 'error in judgment' instructions previously rejected by the committee. 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.

CV324 ignores whether one method may be safer, more effective, or carry less risk of complication. Instead, CV320 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 chose 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.

Because *Butler v. Naylor* is admittedly ambiguous regarding the propriety of this instruction, because this committee must state what the law is, not what it might be, and because CV324 runs contrary to the basic premise of medical malpractice, effectively excusing a lack of ordinary care by the p

CV325. Timely filing claim. "Discovery of injury" defined.

You must decide the date by which [name of plaintiff] should have discovered the injury. A plaintiff must file a medical malpractice claim within two years from the date [he] discovered the injury or the claim is barred.

"Discovery" of an injury from medical malpractice occurs when a patient knows or through reasonable diligence should know each of the following:

(1) that he sustained a physical injury;

(2) the cause of the injury; and

(3) the possibility of a health care provider's fault in causing the injury.

References

Seale v. Gowans, 923 P.2d 1361 (Utah 1996).

Chapman v. Primary Children's Hosp., 784 P.2d 1181 (Utah 1989).

Brower v. Brown, 744 P.2d 1337 (Utah 1987).

Hove v. McMaster, 621 P.2d 694 (Utah 1980).

Foil v. Ballinger, 601 P.2d 144 (Utah 1979).

McDougal v. Weed, 945 P.2d 175 (Utah App. 1997).

Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989).

Hargett v. Limberg, 598 F. Supp. 152 (D. Utah 1984).

MUJI 1st Instruction

6.37

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 derived from 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).

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.

MUJI 2nd CV129 (Statement of Opinion) should not be given when this instruction is used, as it instructs the jurors that they may disregard expert testimony.

CV327. Inference of negligence (res ipsa loquitur).

You may draw an inference that [name of defendant] was negligent if three things are proved by a preponderance of the evidence:

(1) that [name of plaintiff]'s injury was of a kind which, in the ordinary course of events, would not have happened if due care had been observed;

(2) that [name of plaintiff]'s actions were not responsible for the injury; and,

(3) that the cause of the injury was under the exclusive control of [name of defendant].

If you find that all three of these things has been proved, this is sufficient to support a finding of fault on the part of [name of defendant]. [Name of defendant] may introduce evidence to rebut the inference of fault.

References

Dalley v. Utah Valley Regional Medical Ctr., 791 P.2d 193 (Utah 1990).

Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980).

Talbot v. Dr. W.H. Groves Latter-Day Saints Hosp., 21 Utah 2d 73, 440 P.2d 872 (1968).

Robb v. Anderton, 863 P.2d 1322 (Utah App. 1993).

Virginia S. v. Salt Lake Care Ctr., 741 P.2d 969 (Utah App. 1987).

Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Utah App. 1987).

Roylance v. Rowe, 737 P.2d 232 (Utah App. 1987).

Weeks v. Latter-Day Saints Hosp., 418 F.2d 1035 (10th Cir. 1969).

MUJI 1st Instruction

6.32

CV328. Common knowledge and need for expert testimony.

Expert testimony is not needed to establish the standard of care if the medical procedure is of a kind, or the outcome so offends commonly held notions of proper medical treatment, that the standard of care can be established by the common knowledge, experience and understanding of jurors.

References

Bowman v. Gibb, 2008 UT 9.

Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980).

Kim v. Anderson, 610 P.2d 1270 (Utah 1980).

Malmstrom v. Olsen, 16 Utah 2d 316, 400 P.2d 209 (1965).

Fredrickson v. Maw, 119 Utah 385, 227 P.2d 772 (1951).

MUJI 1st Instruction

6.33

Committee Notes

Nielson v. Pioneer Valley Hospital, 830 P.2d 270 (Utah 1992), and Brady v. Gibb, 886 P.2d 104 (Utah App. 1994), held that instructions similar to this one are inconsistent with "need for expert testimony" instructions and should not be given together.

This instruction should be given only if there is another instruction stating the need for expert testimony on the standard of care as, for example, when a patient claims a needle was improperly left in the surgical site and that the suturing was done incorrectly. The first claim would probably not require expert testimony under Nixdorf v. Hicken; the second would. The instruction should also clarify which claim requires expert testimony and which does not.

CV329. Patient may rely on advice.

A patient may rely on the physician's professional skill and advice. A patient is not required to determine whether the physician's advice is correct.

References

Mikkelsen v. Haslam, 764 P.2d 1384 (Utah App. 1988).

MUJI 1st Instruction

6.24

CV330. No recovery for oral promises.

To find [name of defendant] at fault for violating a guarantee, warranty, contract or assurance regarding a result to be obtained from the health care, you must find that the guarantee, warranty, contract or assurance is in writing and signed by [name of defendant] or [his] authorized agent.

References

Utah Code Section 78B-3-408.

MUJI 1st Instruction

6.36

CV2##. Out-of-state or out-of-town experts

You may not discount the opinions of [name of expert] merely because of where [he] resides or practices.

References

Swan v. Lamb, 584 P.2d 814, 819 (Utah 1978).

MUJI 1st Instruction

6.30

Committee Notes

The committee was not unanimous in its approval of this instruction. Use it with caution.

CV2##. Conflicting testimony of experts.

In resolving any conflict that may exist in the testimony of [names of experts], you may compare and weigh the opinion of one against that of another. In doing this, you may consider the qualifications and credibility of each, as well as the reasons for each opinion and the facts on which the opinions are based.

MUJI 1st Instruction

6.31

Special Verdict Forms

Committee Notes on Special Verdict Forms

The Advisory Committee recommends that the so-called "net verdict" (two deductions for fault) be avoided in comparative fault cases by advising the jury not to make a deduction from damages for any percentage of fault assessed, but to leave it to the judge to do so. See *Bishop v. GenTec*, 2002 UT 36; 48 P.3d 218; *Haase v. Ashley Valley Med. Center*, 2003 UT App. 260 (unpublished opinion).

In addition, economic damages need to be itemized on the verdict form in medical malpractice actions, for various reasons:

First, Utah Code Section 78B-3-405 requires the court to make deductions from past medical expenses for those paid by collateral sources. This cannot be done unless the amount of past medical expenses is specifically determined by the jury.

Second, liens and reimbursement claims are routine in medical malpractice actions. An unspecified award of special damages gives no guidance to lien claimants on whether the lien attaches--did the jury award economic damages for medical expenses, for lost wages, for something else, or all of them? If so, in what amounts?

Third, a judge cannot feasibly assess prejudgment interest on past economic damages if there is no distinction made in the special verdict between past and future economic damages.

Finally, amounts may incorrectly be awarded for economic damages that are not supported by the evidence, and specificity in the special verdict allows the court the opportunity to correct such miscalculations or improper awards without the need for a new trial.

Special Verdict - One Defendant (No Comparative Fault)

MEMBERS OF THE JURY:

Please answer the following questions *in the order they are presented*. If you find that the evidence favors the issue by a preponderance, answer "Yes." If you find that the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the greater weight of evidence is against the issue, answer "No."

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and then advise the bailiff.

(1) Was [name of defendant] at fault? (Check one.)

Yes_____ No_____

(*If you answer "Yes," please answer Question 2. If you answer "No," stop here, and sign and return this verdict*.)

(2) Was this fault a cause of [name of plaintiff]'s harm? (Check one.)

Yes_____ No_____

(*If you answer Yes," please answer question 3. If you answer "No," stop here, and sign and return this verdict*.)

(3) What amount do you find would fairly compensate [name of plaintiff] for [his] harm? (*Only answer this if you checked "yes" on both Questions 1 and 2*.)

(a) Economic Damages:

(1) Past Medical Expenses $_____

(2) Future Medical Expenses: $_____

(3) Past Lost Wages: $_____

(4) Future Lost Wages: $_____

(5) Other Economic Damages: $_____

(b) Noneconomic Damages: $_____

Total Damages: $_____

(*When you have completed this verdict, please have your foreperson date and sign it, and advise the bailiff that you have reached a verdict*.)

_____ _____

Date Jury Foreperson

Special Verdict - One Defendant (Comparative Fault)

MEMBERS OF THE JURY:

Please answer the following questions *in the order they are presented*. If you find that the evidence favors the issue by a preponderance, answer "Yes." If you find that the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the greater weight of the evidence is against the issue, answer "No."

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and then advise the bailiff.

(1) Was [name of defendant] at fault? (Check one.)

Yes_____ No_____

(If you answer "Yes," please answer Question 2. If you answer "No," stop here, and sign and return this verdict.)

(2) Was this fault a cause of harm to [name of plaintiff]? (Check one.)

Yes_____ No_____

(*If you answer "Yes," please answer question 3. If you answer "No," stop here, and sign and return this verdict*.)

(3) Was [name of plaintiff] also at fault as alleged by defendant? (Check one.)

Yes_____ No_____

(*If you answer "Yes," please answer Question 4. If you answer "No," please skip Questions 4 and 5 and go on to Question 6.*)

(4) Was [name of plaintiff]'s fault a cause of his own harm?

Yes_____ No_____

(*If you answered Question 4 "Yes," please answer Question 5. If you answered Question 4 "No," please skip Question 5 and go on to Question 6*.)

(5) Assuming all the fault that caused plaintiff's harm totals 100%, what percentage of that fault is attributable to:

[Name of Defendant]: _____ %

[Name of Plaintiff]: _____ %

Total: 100 %

(*Please answer Question 6 if you checked "yes" on both Questions 1 and 2. Do not make a deduction from damages for any percentage of fault that you have assessed to plaintiff. The judge will make any necessary deductions later*.)

(6) What amount do you find would fairly compensate [name of plaintiff] for [his] harm?

(a) Economic Damages:

(1) Past Medical Expenses $_____

(2) Future Medical Expenses: $_____

(3) Past Lost Wages: $_____

(4) Future Lost Wages: $_____

(5) Other Economic Damages: $_____

(b) Noneconomic Damages: $_____

Total Damages: $_____

(*When you have completed this verdict, please have your foreperson date and sign it, and advise the bailiff that you have reached a verdict.*)

_____ _____

Date Jury Foreperson