# AGENDA
# ADVISORY COMMITTEE
# ON MODEL CIVIL JURY INSTRUCTIONS

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

January 12, 2004
4:00 to 6:00 p.m.

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| Welcome and approval of minutes | John Young |
| Drafting guidelines | Paul Simmons |
| Negligence Subcommittee | Frank Carney |

**Meeting Schedule: Matheson Courthouse, 4:00 to 6:00, Judicial Council Room**

February 9
March 8
April 12
May 10
June 14
July 12
August 9
September 13
October 18 (3rd Wednesday)
November 8
December 13

***MINUTES***
Advisory Committee on Model Civil Jury Instructions
October 8, 2003
4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Paul M. Belnap, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Paul M. Simmons

Excused: Honorable William W. Barrett, Jr., L. Rich Humpherys, Colin P. King

_ 1. *Minutes.* The committee approved the minutes of the July 9, 2003, meeting.

_ 2. *Plain Language Writing Workshop.* The committee discussed preparations for the October 25, 2003, workshop on writing plain-language jury instructions. Mr. Shea reported that a request for CLE credit is pending. The workshop will be videotaped. Mr. Shea will send out an announcement and invitation to all members of the committee and all subcommittees tomorrow asking for a prompt RSVP. Judges have also been invited to attend. Next week an invitation will be extended to the members of the Bar's Litigation Section, with a notice that seating is limited. It was agreed that seating should be limited to no more than 100 participants. Dr. Di Paolo reported that the Department of Linguistics at the University of Utah will pick up Dr. Dumas and entertain her Friday evening. It was agreed that Mr. Young, Mr. Shea and Dr. Di Paolo would take Dr. Dumas to dinner Saturday night.

**Any other members of the committee who would like to attend the dinner Saturday evening with Dr. Dumas should let Mr. Young know.**

_ 3. *Subcommittees.*

a. *Composition and Chairs.* The committee reviewed a list of subcommittees and their members. Mr. Young has asked the following people to chair subcommittees: Robert Wallace (Civil Rights); Alan Sullivan (Contracts: Commercial); Kent Scott (Contracts: Construction); Rich Humpherys (Damages; Mr. Humpherys and Mr. Belnap were previously serving as co-chairs); Jathan Janove (Employment); George Haley (Fraud & Deceit); Paul Belnap (Insurance Company Obligations); Robert Anderson (Intentional Torts, which will include business torts); Frank Carney (Negligence); Jay Gurmankin (Officers, Directors, Partners, and Insiders Liability); Phillip Ferguson (Preliminary and General Instructions; Mr. Ferguson replaces Mr. Dewsnup as the chair of this subcommittee); Robert Morton (Premises Liability); Tracy Fowler (Product Liability); Craig Mariger (Professional Liability: Architects, Engineers); Robert Gilchrist (Professional Liability: Lawyers, Accountants); Ralph Dewsnup (Professional Liability: Medical Negligence); Charles Bennett (Will Contests). Mr. Young has also asked the members of the subcommittees to serve on them and has invited them to attend the workshop on October 25. Mr. Young reported that he has not had any response from the faculties at the law schools at the University of Utah and

Brigham Young University to his request for participation in the subcommittees. The subcommittee chairs may contact faculty members directly if they desire.

**Mr. Shea will circulate an updated list of the subcommittees and their members.**

b. *FELA Subcommittee.* Mr. Young spoke to Brent Hatch about the need for a subcommittee to cover Federal Employer's Liability Act claims. Mr. Hatch did not think there was a need for such a subcommittee. Mr. Young will ask Mr. Hatch to serve on the Contracts: Commercial subcommittee.

c. *Negligence and Motor Vehicle Subcommittees.* It was agreed that the Negligence subcommittee would cover ultrahazardous activities and electricity. Mr. Carney suggested that a separate subcommittee be formed to cover motor vehicle accidents and that Bob Gilchrist be asked to chair the subcommittee.

**Mr. Young will talk to Mr. Gilchrist about chairing the Motor Vehicle subcommittee.**

The following attorneys were suggested as members of the Motor Vehicle subcommittee: Steve Sullivan, Vicky Kidman, Lynn Davies, Barbara Maw, Pete Petersen, Stuart Schultz, David Mortensen, Terry Plant, Ted Kanell, Tad Draper, Jack Helgesen, Scott Waterfall, Chris Shaw, Erik Ward, Kevin Sutterfield, Mark Flickinger, David Lambert and Nelson Abbott.

d. *Wills Subcommittee.* Mr. Ferguson suggested that the scope of the subcommittee should perhaps be expanded to include other probate matters, guardianships and trusteeships. He also suggested that Kent Alderman serve on the committee.

**Mr. Young will talk to Charles Bennett or Mr. Alderman or both to see if they think the scope of the subcommittee should be expanded.**

_ 4. *Priorities.* The committee established the following priorities for completing instructions:

a. *First group:* Preliminary and General Instructions; Contracts: Commercial; Negligence; and Damages.

b. *Second group:* Employment; Motor Vehicles; Premises Liability.

c. *Third group:* All Professional Liability instructions; Products Liability.

d. *Fourth group:* Fraud & Deceit; Officers, Directors; Insurance; Contracts: Construction.

e. *Fifth group:* Everything else (Civil Rights; Intentional Torts; Wills).

_ 5. *Timing.* The following schedule was established for subcommittees to submit their initial drafts to the full committee:

a. *Negligence:* December 1, 2003.

b. *Preliminary and General Instructions; Damages:* February 1, 2004.

c. *Contracts: Commercial:* March 1, 2004.

d. *Employment:* April 1, 2004.

e. *Premises Liability:* May 1, 2004.

f. *Motor Vehicles:* June 1, 2004.

Dr. Di Paolo recommended that subcommittee drafts be circulated to other subcommittees as they are finished to reinforce the principles of good draftsmanship that will be taught in the October 25 seminar.

_ 6. *Alternative Instructions.* Mr. Young reported that Ms. Branch had asked the Utah Supreme Court whether the committee should propose instructions in areas where there is no clear Utah law. The court was not in favor of instructions in unsettled areas of the law. After some discussion, however, the committee agreed that it would be helpful to offer instructions, including alternative instructions in some cases, even if there is no Utah Supreme Court decision on point, since the bench and the bar will look to the instructions as a research source, and some such instructions may be necessary for the instructions to be complete. The committee agreed that subcommittees should draft such instructions. The committee will review them and decide later whether to raise the issue again with the court. The goal, however, should be to have as few alternative instructions as possible.

_ 7. *Next Meeting.* The next meeting will be Wednesday, November 12, at 4:00 p.m.

The meeting concluded at 5:35 p.m.

***MINUTES***
Advisory Committee on Model Civil Jury Instructions
December 8, 2003
4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Paul M. Simmons

Excused: Phillip S. Ferguson, Colin P. King

_ 8. *Minutes.* Because the minutes of the October 8, 2003, meeting had not been circulated yet, the committee postponed approval of those minutes until the next meeting.

_ 9. *Plain Language Writing Workshop.* The committee discussed the October 25, 2003, workshop on writing plain-language jury instructions. Committee members agreed that they would have liked to have had more practical suggestions.

_ 10. *Writing Guidelines.* Mr. Young suggested that the committee adopt a set of guidelines for drafting easily understood jury instructions. Mr. Shea had previously circulated a Summary of Guidelines for Plain-Language Jury Instructions, taken from various sources.

**Mr. Simmons will synthesize the materials we have on drafting plain-language jury instructions and prepare suggested guidelines for the subcommittees that the committee can review at its next meeting.**

_ 11. *Motor Vehicle Subcommittee.* Mr. Carney indicated that some of the negligence instructions were best left to the Motor Vehicle Subcommittee, which has not been formed yet.

**Members should come to the next meeting prepared to suggest a chair and members for the Motor Vehicle Subcommittee.**

_ 12. *Negligence Instructions.* The committee reviewed a draft of the instructions prepared by Mr. Carney's Negligence Subcommittee, which Mr. Shea had e-mailed to committee members on December 3. The following MUJI instructions have been omitted:

MUJI 3.3 (fault/negligence not implied from injury alone) and 3.4 (unavoidable accident). These instructions have been rejected by the Utah Supreme Court. *See Green v. Louder,* 2001 UT 62, ¶¶ 14-18, 29 P.3d 628; *Randle v. Allen,* 862 P.2d 1329, 1336 (Utah 1993).

MUJI 3.19 (comparative negligence--wrongful death). Mr. Carney's subcommittee will prepare a new set of instructions for wrongful death and survival actions.

MUJI 3.20 (effect of parents' negligence). The subcommittee was not comfortable with this instruction without knowing the origin of and authority for the instruction.

MUJI 3.21 (passenger's negligence in passenger's claim against driver). The instruction was left for the Motor Vehicle Subcommittee to consider.

MUJI 3.22 (willful and wanton). This instruction was left for the Intentional Tort Subcommittee to consider.

The committee considered and revised the following new instructions:

1. Introductory Instruction. This instruction was simplified. In cases where the jury is asked to return a general verdict, the instruction will need to be modified, but it was agreed that general verdicts are rarely used anymore in negligence cases.

2. Negligence Defined. The structure of the instruction was revised, and a sentence was added to make it clear that reasonable care is what an ordinarily careful person would do in a similar situation.

3. Standard of Care for the Physically Disabled (old MUJI 3.5). The committee agreed to use the term "disabilities" rather than "impairments" since "impairment" could be misconstrued as something other than a physical disability.

4. Amount of Caution Required When Children Are Involved (old MUJI 3.7). The committee agreed to add to the instruction the requirement that the person knew or should have known that young children might be present. Mr. Carney questioned the need for this instruction and for instruction 6 (dealing with electricity), since they are specific applications of the general instruction that the amount of care required depends on the circumstances, including the danger involved and the foreseeable harm. The committee decided to keep the instructions, at least for the time being.

5. Negligence Applied to Children. The committee questioned how the jury was to evaluate the "intelligence, knowledge and experience" of the child and similar children but decided to leave this phrase in the instruction since it is used in the cases and Restatements.

6. Amount of Caution Required in Handling Electricity (old MUJI 3.9). The first sentence of the draft instruction was deleted since it referred to the "standard of care," a term that had not previously been used or defined.

Copies of the revised instructions are attached to these minutes.

The committee also discussed proposed instruction 7, defining "legal cause." Dr. Di Paolo proposed an alternative instruction that used the term "legally important cause." The committee agreed that there was more authority for using "legal cause" and that it was less confusing than "proximate cause." Mr. Carney questioned whether the first two elements of the proposed instruction were both required elements of legal or proximate cause or whether they were alternatives. The committee agreed to defer further discussion of the instruction until after the subcommittee had had a chance to reconsider it.

_ 13. *Next Meeting.* The next meeting will be Monday, January 12, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

## Section 3: Negligence/Causation

**Subcommittee: Frank Carney, John Lund, Warren Driggs, David West, Pete Summerill, Vicky Kidman**

**Deleted Instructions:**

MUJI 3.3 (Fault not implied from injury alone- this instruction was expressly rejected in *Green v. Louder*, 2001 UT 82, 29 P.3d 638 (Utah 2001).

MUJI 3.4 (Unavoidable accident- the "unavoidable accident" instruction was held to be inherently misleading and always inappropriate in *Randle v. Allen*, 862 P.2d 1329 (Utah 1993)("Because of the difficulties inherent in the instruction, we now hold that an unavoidable accident instruction should not hereafter be given in any case.")

MUJI 3.6 (Amount of Care Required Varies)- incorporated into new 3.2

MUJI 3.19 (Wrongful Death)- will be in new Wrongful Death section

MUJI 3.20 (Effect of Parents' Negligence- is this needed? Is this the law? There is no authority to support this in the MUJI instruction.)

MUJI 3.21 (Passenger's Negligence- should be moved to the Auto Negligence section.)

MUJI 3.22 (Wilful and Wanton- should be in Intentional Torts)

## 1. INTRODUCTORY INSTRUCTION

In this case you must answer the following questions on a special verdict form:

[Read questions from verdict form]

I will now explain to you what these questions mean, and what you must decide in order to answer them.

## 2. NEGLIGENCE DEFINED

**(Old MUJI 3.2)**

We all must use reasonable care to avoid injuring others. "Negligence" means that a person did not use reasonable care. Reasonable care is simply what an ordinarily careful would do in a similar situation. It does not require extraordinary caution.

Negligence can mean taking an action (for example, speeding) or not taking an action (for example, not stopping at a stop sign).

The amount of care that is considered "reasonable" depends upon the situation. Some situations require more caution because an average person would understand that more danger is involved. You should decide whether the defendant was negligent by comparing his actions against those of an ordinarily careful person in a similar situation.

***Comment:*** *The examples in this instruction should not be used if the case involves speeding or not stopping at a stop sign. The judge should substitute an appropriate alternative example.*

**References:**

MUJI 3.2
Mitchell v. Pearson Enters., 697 P.2d 240 (Utah 1985)
Meese v. BYU, 639 P.2d 720 (Utah 1981)

## 3. STANDARD OF CARE FOR THE PHYSICALLY DISABLED

## (Old MUJI 3.5)

Physically disabled adults (for example, blind adults) are not held to the same standard of care as adults free from disability. The physically disabled adult must use the care that a person with similar disabilities would use in a similar situation.

***References*:**

MUJI 3.5

***Comment:***

*Disability should be construed to mean physical disability and not deficiencies in mental competency. "Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances." REST 2d TORTS §§ 283B. "If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability." REST 2d TORTS §§ 283.*

## 4. AMOUNT OF CAUTION REQUIRED WHEN CHILDREN ARE PRESENT

## (Old MUJI 3.7)

A person must use greater care for the protection of young children than for adults. So a person should anticipate and guard against the ordinary impulsive behavior of children when he knows or should know that they are present.

***References*:**

MUJI 3.7

*Kilpack v. Wignall*, 604 P.2d 462 (Utah 1979)

*Belmont Springs*, 916 P2d 359 (Utah 1996): it is improper to give this instruction if the child is older than fourteen.

***Comment:*** *This instruction should be used where there is evidence that a person knew or should have known that young children would be present. It is not intended to create a new duty to anticipate the presence of children.*

## 5. NEGLIGENCE APPLIED TO CHILDREN

You must decide whether a child aged _____ was negligent. A child is not judged by the adult standard. Rather, a child is negligent if he does not use the amount of care that is ordinarily used by children of the same age, intelligence, knowledge, abilities, and experience in similar circumstances.

***References:***

"The child must exercise that degree of care which ordinarily would be observed by children of the same age, intelligence and experience under similar circumstances." *Donohue v. Rolando*, 16 Utah 2d 294, 296-297, 400 P.2d 12,14 (1965).

"It is a well-established principle of tort law that a minor participating in an adult activity, such as operating a motor vehicle, is held to the same standard of care as an adult." *Summerill v. Shipley*, 890 P.2d 1042, 1044 (Utah Ct. App. 1995). The court in Summerill went on to note that this principle is "an exception to the general rule that a "child must exercise that degree of care which ordinarily would be observed by children of the same age, intelligence and experience under similar circumstances." Id. at n. 5.

Restatement (Second) of Torts § 283A (1965)

Restatement (Third) of Torts § 8 (1999).

***Comment:***

This instruction describes the standard of care to be used when determining whether a child acted negligently, as opposed to MUJI 3.7 which addresses whether an adult acted negligently with regard to a child's behavior.

Utah case law recognizes the 'like age, intelligence and knowledge' standard. See, *Donohue v. Rolando*, 16 Utah 2d 294, 296-297, 400 P.2d 12,14 (1965); and *Summerill v. Shipley*, 890 P.2d 1042, 1044 (Utah Ct. App. 1995).

Utah case authority rejects an arbitrary tripartite approach (less than 7 years old incapable of negligence, 7-14 years old rebuttable presumption that child incapable of negligence, and, 14 and older capable of negligence in same capacity as an adult.) See, *Mann v. Fairborn*, 12 Utah 2d 342, 346, 366 P.2d 603, 606 (1961)(criticizing *Nelson v. Arrowhead Freight Lines*, 99 Utah 129, 104 P.2d 225 (1940)).

Nonetheless, this instruction should not be given where the child is less than five years old. See, *Kilpack v. Wignall*, 604 P.2d 462, 466 (Utah, 1979)("We note that a young child is generally presumed to be incapable of contributory negligence."); and,

Restatement (Third) of Torts § 8 (1999). Also, this instruction should not be given where the child is engaged in an 'adult' activity. See, *Summerill v. Shipley*, 890 P.2d 1042, 1044 (Utah Ct. App. 1995).

## 6. AMOUNT OF CAUTION FOR DANGEROUS ACTIVITIES (OLD MUJI 3.8)

Because of the great danger involved, those who are engaged in [describe activity] must use extra caution. The greater the danger, the greater the care that must be used.

**References:**

MUJI 3.8

## 6. AMOUNT OF CAUTION REQUIRED IN CONTROLLING ELECTRICITY (Old MUJI 3.9)

Power companies and others who control power lines and power stations must use extra caution to prevent people and their equipment from coming in contact with high-voltage electricity. The greater the danger, the greater the care that must be used.

*References*:

*Lish v. Utah Power & Light Co.*, 493 P.2d 611 (Utah 1972)

*Brigham v. Moon Lake Elec. Ass'n*, 470 P.2d 393 (Utah 1970)

BAJI No. 3.42 (1986).

*See also*, *Burningham v. Utah Power & Light*, 76 F.Supp. 2d 1243 (D.Utah 1999) (no duty owed to trespasser on power pole.)

**At the Advisory Committee meeting of December 8, 2003, the preceding instructions were approved. The following instructions (#s 7, 8, 9, and 10) are still under consideration.**

**We agreed that the "Legal Cause" instruction needs substantial reworking by the subcommittee before the next meeting of the Advisory Committee.**

## 7. DEFINITION OF "LEGAL CAUSE"
## (Old MUJI 3.13 and 3.14)

If you decide that the defendant was negligent, you must then decide if that act or failure act was a legal cause of injury.

For the act or failure to act to be a "legal cause" of harm, you must decide that all of the following statements to be true:

1. There was a cause and effect relationship between the negligence and the injury;

2. The negligence played a substantial role in causing the harm; and

3. A reasonable person could foresee that harm could result from the act or omission.

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

**References:**

MUJI 3.13, 3.14, and 3.15

**Comments:**

The term "proximate" cause should be avoided. While its meaning is readily understandable to lawyers, the lay juror may be unavoidably confused by the similarity of "proximate" to "approximate."

## 8. (Old MUJI 3.17)
## COMPARATIVE FAULT

In this case you, as jurors, are being asked to determine and compare fault. "Fault" means any breach of a duty that is a legal cause of damages, and may include any of the following:

(a) Negligence;
(b) Comparative Negligence;
(c) Intentional misconduct;
(d) Strict liability as may be imposed by statute (or law);
(e) Breach of express or implied warranty;
(f) Product liability;
(g) Misuse of a product; or,
(h) Other

(It is suggested that the Court include only the conduct claimed to be applicable to the case. Further instructions would then be appropriate to define what is being claimed.)

***References*:**

§78-27-37(2), *Utah Code Annotated*
Utah Code Ann. §§ 78-27-38, -40 (1986)
Biswell v. Duncan,
Haase v. Ashley Valley Medical Center- 2003 UT 360
Bishop v. GenTec, 2002 UT 36

## 9. COMPARATIVE FAULT APPLIED

The questions on the verdict form require you to compare the negligence or fault attributable to each listed party, and to assign a percentage to the conduct of each party based on the gravity or seriousness of the conduct. The total negligence or fault must equal 100%.

For your information, the allocation of percentages will affect the final recovery. Plaintiff's total recovery in this case will be reduced by the percentage of negligence attributed to him or her. If it is determined that plaintiff's negligence is 50% or greater, plaintiff will recover nothing.

When answering the questions on damages you should not reduce the award by plaintiff's percentage of negligence. The reduction will be made by the court after total damages are determined.

***References*:**

Utah Code Ann. §§ 78-27-38, -40 (1986)
Biswell v. Duncan,
Haase v. Ashley Valley Medical Center- 2003 UT 360
Bishop v. GenTec, 2002 UT 36

***Comment:***

*The Court should ensure that the Special Verdict form makes it clear that fault should only be assessed as to those parties for whom the jury finds both fault and causation.*

## 10. VIOLATION OF STATUTE, ORDINANCE, OR SAFETY ORDER

**(Old MUJI 3.11)**

There is a law of Utah that provides:

[Insert statute or ordinance]

Plaintiff claims that defendant violated this law. A violation of a safety law is evidence of negligence if it is shown that:

1. Plaintiff belonged to a class of people that the law intended to protect; and,

2. The law was intended to protect against the type of harm that occurred as a result of the violation.

If you decide that defendant violated this law, then you may consider it to be evidence of negligence. However, there are five exceptions to this rule:

[*The Court should include only the relevant exceptions.*]

1. When obeying the law would have created an even greater risk of harm.

2. When the person who violated the law was faced with an emergency that person did not create, and, by reason of the emergency, that person could not obey the law.

3. When the person who violated the law made a reasonable effort to obey the law, but was unable to do so.

4. When the person who violated the law could not obey the law because the person was incapable of doing so.

5. When the person violating the law was incapable of understanding the requirements of the law.

The person violating the law has the burden of proving one of the exceptions. If an exception is proven, you must disregard the violation of the safety law, and simply decide whether the person acted with reasonable care under the circumstances.

*References*:

*Child v. Gonda*, 1998 UT _____, 972 P.2d 425

*Gaw v. State ex rel. Dep't of Transp.*, 798 P.2d 1130 (Utah Ct. App. 1990)
*Jorgensen v. Issa*, 739 P.2d 80 (Utah Ct. App. 1987)
*Hall v. Warren*, 692 P.2d 737 (Utah 1984)
*Intermountain Farmers Ass'n v. Fitzgerald,* P. 2d 1162 (Utah 1978)
*Thompson v. Ford Motor Co.*, 16 Utah 2d 30; 395 P.2d 62 (1964)

# What a difference a word makes

JOHN BOSCO

Mark Twain once wrote that "the difference between the almost right word and the right word is really a large matter—it's the difference between the lightning bug and the lightning." This is certainly true in the law, particularly in the language used in jury instructions. A prime example is the instruction on causation.

In recent years, the keepers of the doctrine of causation in many states developed a distaste for the word "proximate," so they discarded it.[1] Unwilling to let "cause" stand on its own, they selected the word "substantial" as a better companion for it, introducing the language of size into the analysis of causation.

This change is contrary to the laws of my state—New York—and many others. Under this scheme, when causation is small, liability is eliminated. In many states, however, when a defendant's conduct was only a small contributing cause of an injury, liability is supposed to be lessened, not eliminated. Instead of making lightning, the keepers of the causation doctrine have made a lightning bug—an inferior type of illumination—to enlighten jurors.

In opening statement, summation, and proposed jury instructions, a plaintiff lawyer should discuss causation as the chain of events that included the defendant's conduct and ended in the injury. In deciding causation, the jury's role is to determine whether the defendant's conduct is a link in the chain, not to evaluate the size of the link. If a defendant's conduct is a link, it is a cause of an injury, regardless of its size. Only if that conduct lies outside the chain of causation is a finding of "no causation" justified. The doctrine of causation is not intended to filter out small-cause cases, only no-cause cases.

A typical liability trial has two parts: culpability and causation. By law, the "size," or significance, of a defendant's conduct is considered in the culpability phase. A jury allocates percentages of culpability according to the relative sizes of defendants' conduct.[2] A minor misdeed merits a small percentage; a significant one merits a large percentage. A small amount of culpability does not knock a defendant off the liability hook.

It is unrealistic to believe that jurors leave behind their opinions about the size of a defendant's culpability when they move on to deliberate about causation. A juror who believes that a defendant's share of culpability is small will undoubtedly argue that its conduct was not a "substantial" factor and that the jury should return a verdict of "no causation."[3]

*In deciding causation, the jury's role is to determine whether the defendant's conduct is a link in the chain, not to evaluate the size of the link.*

But at what point does this argument cease to be persuasive? Does a 10 percent, 20 percent, or 30 percent portion of causation constitute a substantial factor, or does it have to be 70 percent, 80 percent, or 90 percent? Without direction, juries are left to speculate about when a share of culpability stops being "trivial" and becomes "substantial." Induced by the word "substantial," jurors tend to choose higher, not lower, percentages.

## The problem of size

Consider an analogy: A baseball game has a 2-1 score in the bottom of the ninth inning. The first batter makes a single base hit; the next slams a home run. The single is certainly a cause of the team's victory, even though the home run is necessary to clear the bases. Yet if size were pertinent to causation, the single might not measure up. Causes that are small are still causes.

The size problem often stays hidden in one-on-one cases but shows itself in one-on-many cases. In fact, as the number of defendants grows, so does the likelihood that a jury will dismiss defendants because of the small size of their conduct, even though the jury firmly believes that their conduct contributed to the injury. Can anyone blame a jury, having been instructed that a defendant's conduct must be "substantial," for finding "no causation" in a case involving four defendants, each of which the jury believes is merely 25 percent responsible for an injury?

Considering size in causation also invites duplicity into the halls of justice. A jury may have no doubt that a defendant's conduct was a cause of an accident, but it may also believe that the significance of a defendant's conduct is less than "substantial." Believing that there is causation, the jury is constrained to render a verdict of "no causation," and it is impossible to know whether that finding is based on a lack of size or a lack of cause.

Because size pertains to culpability, and not to causation, the causation interrogatory on the verdict form should simply ask, "Was the defendant's conduct a cause of the accident?" Isn't this what a jury is supposed to decide? Size should matter only once. To consider size twice—in both culpability and causation—cheats plaintiffs by double-charging them. ■

Notes

1. *See, e.g.*, DiMaggio v. O'Connor Contracting Co., 668 N.Y.S.2d 449 (1998).
2. *See, e.g.*, N.Y. C.P.L.R. 1411, 1601.
3. *See* Kovit v. Estate of Hallums, 690 N.Y.S.2d 82 (App. Div. 1999) (concurring and dissenting opinions).

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