Agenda
Advisory Committee on
Model Civil Jury Instructions

March 8, 2010
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
Verdict Forms	Tab 2	Frank Carney Peter Summerill
Gross Negligence	Tab 3	Frank Carney
Proximate cause and substantial factor revisited	Tab 4	Frank Carney

Committee Web Page: http://www.utcourts.gov/committees/muji/

Published Instructions: http://www.utcourts.gov/resources/muji/

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00 p.m.

April 12, 2010
May 10, 2010
June 14, 2010
September 13, 2010
October 12, 2010 (Tuesday)
November 8, 2010
December 13, 2010

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
January 11, 2010
4:00 p.m.

Present: Hon. William Barrett, Francis J. Carney, Phillip S. Ferguson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West, and Perrin Love, chair of the eminent domain subcommittee

Excused: John L. Young (chair), Juli Blanch, Marianna Di Paolo, Tracy H. Fowler, John R. Lund

Mr. Carney conducted the meeting in the absence of Mr. Young.

1. *Schedule*. Mr. Carney suggested that the committee review vicarious liability and premises liability instructions before doing the accounting malpractice instructions. Mr. Shea noted that Mr. Lund chairs the vicarious liability subcommittee, but he did not know whether a subcommittee has been formed. Mr. Carney will check with Mr. Young.

2. *Feedback*. Mr. Carney noted that the committee is not receiving feedback on the instructions that have been approved. Judge Barrett noted that he recently used the MUJI 2d instructions in trial and noted that the Chief Justice's letter telling courts and counsel to use the instructions has been published in the *Utah Bar Journal*. Mr. Shea noted that there is a "Contact the Committee" link on the MUJI 2d website that allows a person to e-mail Mr. Shea with any comments. Mr. Summerill suggested sending a survey to the judge and attorneys after each civil jury trial and offered to prepare a form for the survey. The committee discussed how to learn when civil jury trials take place. Mr. Shea noted that trials are listed on the court calendars, but they do not always take place as scheduled. Someone suggested using *Rocky Mountain Verdicts & Settlements* as a source for information on jury trials. Mr. West offered to write an article for the *Utah Trial Journal* soliciting feedback.

Mr. Ferguson joined the meeting.

3. *Eminent Domain Instructions*. The committee continued its review of the eminent domain instructions.

a. *CV1609. Owner testifying*. The subcommittee will combine this instruction with CV1608, "Verdict based on testimony of witnesses."

b. *CV1610. Viewing of property*. Mr. Love noted that the instruction was based on MUJI 1st 16.18, which says that a view of the property is not evidence. Mr. Summerill thought the instruction was confusing. He suggested it be revised to read: "You cannot make any determination based on your personal opinion as to the property's value and should only use your viewing of the property to help you understand the testimony." Mr. Love noted that he has

never seen a court allow a view of the property and further noted that the expense makes it prohibitive in most cases. Mr. Shea suggested that the instruction say what a view is and not what it is not. He suggested revising the instruction to read: "You may consider your viewing of the property only to help you evaluate the evidence you have seen and heard in the courtroom to help you gain a better understanding of the testimony." Mr. West questioned whether it was the law that a view of the property is not evidence. Mr. West suggested saying, "Your viewing of the property is not itself evidence *of fair market value,"* adding the italicized phrase. Mr. Carney noted that, according to C.J.S., there is a split of authority on whether a view of the property is evidence or not. He further noted that the cited authority, *Weber Basin Water Conservancy District v. Moore,* 272 P.2d 176 (Utah 1954), involved a bench trial, not a jury trial, so was not controlling. Mr. Simmons suggested omitting the instruction since there is no clear Utah authority for it. Mr. Summerill suggested that, if the parties can convince the court to allow the jury to view the property, then they should draft their own instruction to cover the situation. Mr. Carney asked Mr. Love to tell the subcommittee that the consensus of opinion on the committee was that the instruction should be deleted and to see if the subcommittee will concur. A committee note could be added to the beginning of the eminent domain instructions to explain which MUJI 1st instructions were dropped and why.

c. *CV1611. Project influence.* Mr. Carney questioned the need for the instruction, since the jury should never hear evidence of project influence. Others thought that jurors would speculate on the matter if not instructed otherwise and that the instruction was therefore needed. Mr. Summerill asked what the last sentence of the committee note meant. Mr. Love explained that the jury can take a change in property value into account if the change arises from something outside the scope of the original project. The committee approved the instruction.

d. *CV1612. Value of undeveloped land.* Mr. Love explained the purpose of CV1612, which is to prevent the jury from treating undeveloped land as if it were already subdivided. He asked whether it was okay to cite treatises such as *Nichols on Eminent Domain* in the committee notes. The committee said it was. Mr. Carney suggested updating the references in this and other instructions to include more recent cases, such as *Thorsen v. Johnson,* 745 P.2d 1243 (Utah 1987). Mr. Love will ask the Attorney General's office to update the references. The committee approved the instruction.

e. *CV1613. Value of improved property.* Mr. Love explained the rationale for CV1613, which is that the sum of the parts cannot be greater than the whole; one may make improvements to property for which he may never recoup

the cost. Mr. Shea suggested adding "[diminish]" as an alternative to "enhance" in the last line. Others thought it was unnecessary. Mr. Ferguson thought the first and last sentences were contradictory. Mr. Love noted that the last sentence was included to make sure that the jury did not ignore improvements. Mr. Summerill noted that the *Brown* case cited deals with fixtures, not improvements. Mr. Carney thought that the easiest way to explain the concept was with examples but questioned whether it was proper to use examples in jury instructions. The rest of the committee thought it was. At the suggestion of Judge Barrett and Mr. Ferguson, the last sentence was deleted. The committee approved the instruction as modified.

f. *CV1614. Business injury or loss of profits.* Mr. Summerill questioned the use of "[separate]" in line 4 of alternative 2. Mr. Love noted that business income may affect the value of the property, but it cannot be compensated for as a separate item of damage. The theory is that the business is not being taken but can relocate to another property. The committee deleted the brackets around "[separate]" and approved the instruction as modified.

g. *CV1615. Interest and moving expenses.* Mr. Carney thought that the instructions should track the special verdict form and asked whether the special verdict form asked the jury to find "just compensation" or "fair market value." If the latter, he thought the instruction was unnecessary. Mr. Love, however, thought the instruction was necessary in either event because the jury might think that it can consider interest and moving expenses in arriving at fair market value as well as in arriving at just compensation. Judge Barrett and Mr. Carney suggested deleting the phrase, "In determining just compensation." Mr. Shea suggested revising the instruction to read: "You must not award any amount for interest, moving expenses or costs of these proceedings." Mr. Carney questioned whether the instruction merely told the jury what the law is not. Mr. Summerill thought it told the jury what the law is: the law is that you cannot award damages for these items. He thought instructing the jury on the matter was analogous to instructing the jury on the collateral source rule. Mr. Ferguson thought the instruction was similar to other instructions the committee had approved. The committee approved the instruction as drafted.

h. *CV1616. Severance damages.* Mr. Summerill thought the instruction was confusing because it uses the term "severance damages" before defining it. He suggested deleting "severance" from the first sentence or changing the order of the second and third sentences. Mr. Ferguson questioned whether "severance" was plain English. Mr. Love noted that it was a term of art that has a long history behind it and that it would be defined for the jury. Mr. Ferguson asked what the phrase "as part of the entire property" meant in the second

paragraph. Mr. Carney thought the third paragraph was unnecessary because it singled out severance damages for special treatment; all damages must be reasonably certain and not remote or speculative. Mr. Love noted that other instructions, such as the instruction on "highest and best use," contain similar language. Mr. Shea asked whether "completed" at the end of the second paragraph of the committee note should be changed to "started." Mr. Love thought not, since the idea is that the jury may consider severance damages that may take place during the course of construction, which may not be completed before trial. The committee approved the instruction as drafted.

i. *CV1617. Access*. Mr. Love noted that "reasonable access" in Utah is defined negatively (by what it is not). For that reason, the subcommittee considered using the Arizona model instruction's definition of "reasonable access" but decided against it. Mr. Summerill thought that the last sentence of the committee note was inconsistent with the last sentence of the first paragraph of the instruction. Mr. Love noted that, as a general rule, there is no right of access at a specific point, but a contract, for example, may give such a right. If there were a right to access at a specific point, CV1617 would not be used. In that situation, the court and parties would have to come up with their own instruction. The committee note was meant to explain this concept. Mr. Ferguson suggested that the subcommittee propose two instructions: (1) one for loss of reasonable access, and (2) one for loss of a legally established right of access. The committee approved CV1617 for the first situation. The subcommittee will consider a separate instruction for the second situation.

j. *CV1618. Special benefits*. Mr. Love explained the concept behind CV1618 and gave examples. He noted that the issue rarely comes up. The instruction is an extrapolation from the cited references. The committee approved the instruction.

k. *CV1619. Apportionment of just compensation among multiple interests*. Mr. Love noted that the subcommittee is going to revise CV1620, "Apportionment of just compensation between owner and tenant." The committee deferred discussion of CV1619 until the subcommittee completes that task.

4. *Future Meetings*. Mr. Carney suggested the following agenda for future meetings:

a. Finish the eminent domain instructions.

b. Special verdict forms. (Reach agreement on a general form that can be adapted for each area of law.)

c. Gross negligence instruction (based on *Pearce v. Utah Athletic Foundation,* 2008 UT 13).

d. Revisit the causation instructions in light of *Scott v. HK Contractors,* 2008 UT App 370, with regard to the "substantial factor" issue, an issue raised by Scott DuBois.

e. Premises liability. Mr. Summerill will replace Jeff Eisenberg as chair of the premises liability subcommittee.

f. Vicarious liability.

5. *Next Meeting*. The next meeting will be Monday, February 8, 2010, at 4:00 p.m.

The meeting concluded at 5:45 p.m.

Tab 2

Notes on Special Verdict Forms

I am using “negligence” instead of “fault” because fault is already defined to include causation in CV 201 (“Fault means any wrongful act or failure to act that causes harm to the person seeking recovery. The wrongful act or failure to act alleged in this case is [negligence, etc.]”). Does that mess things up?

We need to continue to try to prevent the "net verdict" in comparative fault cases by advising the jury not to themselves make the deduction for any percentage of fault. See, *Bishop v. GenTec*, 2002 UT 36; 48 P.3d 218; *Haase v. Ashley Valley Med. Center*, 2003 UT App. 260 (unpublished op.). We’ve done this in CV 211, we’ve done it in the med-mal special verdict form, and we should continue to do so in the negligence special verdict form as well.

As in the med-mal special verdict, special damages need to be itemized in the negligence special verdict forms, for several reasons:

First, in medical malpractice actions § 78-14- 4.5 requires the court to make deductions from past medical expenses for those previously 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 usual nowadays. An unspecified award of special damages gives no guidance to lien claimants on whether the lien attaches– did the jury award special damages for medical expenses, for lost wages, or for something else, or all of them? If so, in what amounts?

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

Finally, amounts may be awarded for special 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.

FJC

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] negligent? (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 negligence 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] negligent? (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 negligence 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 negligent 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 negligence 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 negligence 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: $_____

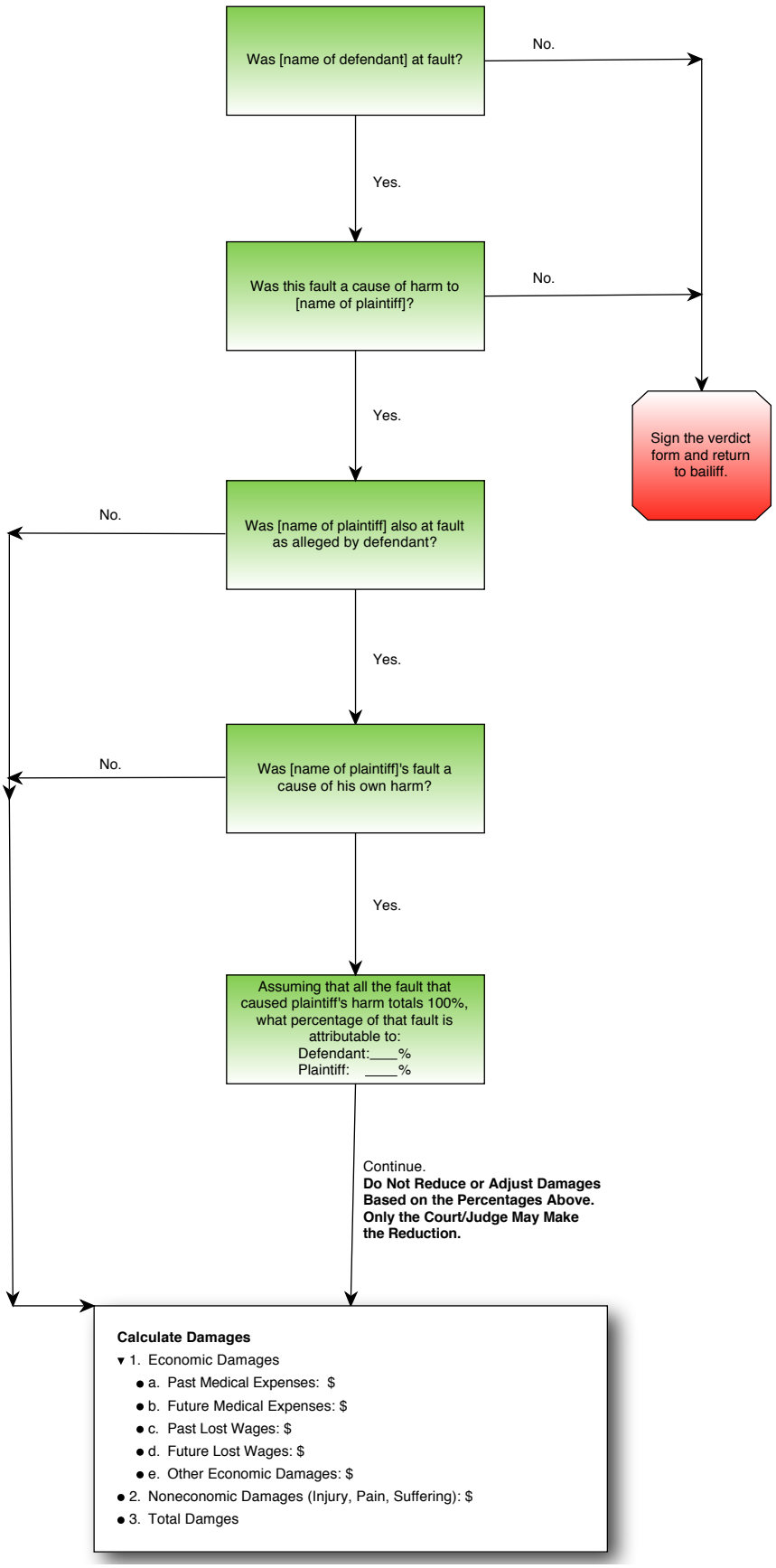
Total Damages: $_____

(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

Special Verdict Flowchart w/ Comparative Fault



Tab 3

(1) CV202B "Gross Negligence" defined.

You must decide whether [names of persons on the verdict form] were grossly negligent. Gross negligence means a failure to observe even slight care; it is carelessness or recklessness to a degree that shows utter indifference to the consequences that may result.

References

Daniels v. Gamma West, 2009 UT 66, Par. 43

Pearce v. Utah Athletic Foundation, 2008 UT 13, ¶ 24, 179 P.3d 760

Berry v. Greater Park City Co., 2007 UT 87, ¶ 26, 171 P.3d 442

Atkin Wright & Miles v. Mountain State Tel. & Tel. Co., 709 P.2d 330, 335 (Utah 1985)

Tab 4

(1) MUJI 1st Instructions on Proximate Cause

(a) MUJI 6.34

PROOF OF MEDICAL CAUSATION REQUIRED The plaintiff bears the burden of proving, by a preponderance of the evidence, which evidence must include expert testimony, that deviation from the standard of care more likely than not caused the injury or loss of which the plaintiff complains. Comments This instruction is appropriate in cases that do not deal with an alleged loss of chance or diminution in likelihood of recovery. In cases that involve such issues an instruction should take into account the decision in George v. LDS Hospital, 797 P.2d 1117 (Utah Ct. App. 1990).

This instruction describes a ``but for ...'' test of proximate cause.

THE DRAFTING COMMITTEE WAS NOT UNANIMOUS IN ITS APPROVAL OF THE CORRECTNESS OF THIS INSTRUCTION. IT SHOULD BE REVIEWED WITH CAUTION.

References:

Denney v. St. Mark's Hosp., 21 Utah 2d 189, 442 P.2d 944 (1968)

Edwards v. Clark, 96 Utah 121, 83 P.2d 1021 (1938)

(b) MUJI 6.35

PROOF REQUIRED FOR PROXIMATE CAUSE A physician's failure to conform to the applicable standard(s) of care may be a proximate cause of injury to a patient if the patient proves, by a preponderance of the evidence, which must include expert testimony, that such failure was a substantial factor in bringing about the injury.

Comments

This instruction describes a ``substantial factor'' test of proximate cause.

There is no present case law to establish the measure of damages to be awarded in instances where loss of chance or diminution in likelihood of recovery is alleged.

THE DRAFTING COMMITTEE WAS NOT UNANIMOUS IN ITS APPROVAL OF THE CORRECTNESS OF THIS INSTRUCTION. IT SHOULD BE REVIEWED WITH CAUTION.

References:

George v. LDS Hosp., 797 P.2d 1117 (Utah Ct. App. 1990)

(c) MUJI 3.13 PROXIMATE CAUSE (Alternate A)

A proximate cause of an injury is that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred. A proximate cause is one which sets in operation the factors that accomplish the injury.

References:

Bennion v. LeGrand Johnson Constr. Co., 701 P.2d 1078 (Utah 1985)

Mitchell v. Pearson Enters., 697 P.2d 240 (Utah 1985)

Skollingsberg v. Brookover, 26 Utah 2d 45, 484 P.2d 1177 (1971)

Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664 (1966)

JIFU No. 15.6 (1957)

BAJI No. 3.75 (1986)

(d) MUJI 3.14 PROXIMATE CAUSE (Alternate B)

In addition to deciding whether the defendant was negligent, you must decide if that negligence was a ``proximate cause'' of the plaintiff's injuries.

To find ``proximate cause,'' you must first find a cause and effect relationship between the negligence and plaintiff's injury. But cause and effect alone is not enough. For injuries to be proximately caused by negligence, two other factors must be present:

1. The negligence must have played a substantial role in causing the injuries; and

2. A reasonable person could foresee that injury could result from the negligent behavior.

References:

Bennion v. LeGrand Johnson Constr. Co., 701 P.2d 1078 (Utah 1985)

Mitchell v. Pearson Enters., 697 P.2d 240 (Utah 1985)

Skollingsberg v. Brookover, 26 Utah 2d 45, 484 P.2d 1177 (1971)

Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664 (1966)

JIFU No. 15.6 (1957)

BAJI No. 3.75 (1986). Reprinted with permission; copyright © 1986 West Publishing Company

(2) MUJI 2 Instructions on Causation

(a) CV209 "Cause" defined.

I've instructed you before that the concept of fault includes a wrongful act or failure to act that causes 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) the person'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) the person'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

Raab v. Utah Railway Company, 2009 UT 61.

Steffensen v. Smith's Management Corp., 862 P.2d 1342 (Utah 1993).

McCorvey v UDOT, 868 P.2d 41, 45 (Utah 1993) ("there can be more than one proximate cause or, more specifically, substantial causative factor, of an an injury.")

Rees v. Albertson's, Inc., 587 P.2d 130 (Utah 1978). MUJI 1st Instruction 3.13; 3.14; 3.15.

Committee Notes

The term "proximate" cause should be avoided. While its meaning may be understood by lawyers, the lay juror may be unavoidably confused by the similarity of "proximate" to "approximate." The committee also rejected "legal cause" because jurors, looking for fault, may look only for "illegal" causes. Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions (1979) 79 Colum. L. Rev. 1306.

The Utah Code includes "proximate" cause in its definition of "fault" in Section 78B-5-817, but did not define the term. We intend to simplify the description of the traditional definition, but not change the meaning.

In Mitchell v. Gonzales, 819 P.2d 872 (Cal. 1991), the supreme court of California held that use of the so-called "proximate cause" instruction, which contained the "but for" test of cause in fact, constituted reversible error and should not be given in California negligence actions. The court determined, using a variety of scientific studies, that this instruction may improperly lead jurors to focus on a cause that is spatially or temporally closest to the harm and should be rejected in favor of the so-called "legal cause" instruction, which employs the "substantial factor" test of cause in fact. CACI 430 reflects this adjustment in the law; embracing the "substantial factor" test and abandoning the term "proximate cause."

Recognizing additional studies of the confusion surrounding "legal cause," the court also recommended that "the term 'legal cause' not be used in jury instructions; instead, the simple term 'cause' should be used, with the explanation that the law defines 'cause' in its own particular way." Id., at 879 (citation omitted). These recommendations have since been integrated into the California jury instructions.

(b) 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) the person'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) the person'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.

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. Kalm, 2008 UT 9, 179 P.3d 754.

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).