Agenda
Advisory Committee on
Model Civil Jury Instructions

May 10, 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
Proximate cause and substantial factor revisited	Tab 2	Frank Carney Scott Dubois
Verdict Forms	http://www.utcourts.gov/-~JasonR/jury.html	
CV 140. Post-verdict instruction CV 202(A). "Negligence" defined.	Tab 3	Tim Shea
Post Trial Surveys Of jurors Of judges and lawyers	Tab 4	 Marianna DiPaola Tim Shea

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.

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
April 12, 2010
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West.

1. *CV209 & CV309, Causation instructions.* Mr. Carney noted that Curt Drake and Scott DuBois of Snell & Wilmer had asked the committee to revisit CV209 and CV309, the definitions of "cause" in the negligence and medical malpractice instructions. They thought that the instructions should adopt the "substantial factor" test for proximate causation that was alternate B in MUJI 1st (MUJI 3.14). Mr. Carney noted that proximate causation encompasses two elements, actual, or "but for," causation, and legal causation, which he defined in terms of foreseeability. Mr. Carney noted that the "but for" test is problematic in cases of concurrent causation where neither cause alone would have caused the harm, such as where two fires combine to burn down the plaintiff's home. The Restatement (Second) of Torts § 431 says that negligent conduct is a "legal cause" of harm if it "is a substantial factor in bringing about the harm," and "there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." Mr. Carney noted that some Utah cases discuss proximate causation in terms of "substantial factor" or "substantial role," and others use the more traditional definition of "that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred"--"one which sets in operation the factors that accomplish the injury." Cases in the former category include *McCorvey v. Utah Department of Transportation,* 868 P.2d 41 (Utah 1993); *Holmstrom v. C.R. England,* 2000 UT App 239, 8 P.3d 281; *Hall v. Blackham,* 18 Utah 2d 164, 417 P.2d 664 (1966); and *Devine v. Cook,* 3 Utah 2d 134, 279 P.2d 1073 (1955). Cases in the latter category include *Steffensen v. Smith's Management Corp.,* 862 P.2d 1342 (Utah 1993).

Dr. DiPaolo joined the meeting.

Mr. Simmons said that the problem with the "substantial" factor test is that it does not give the jury sufficient guidance and gives the jury too much leeway to decide that a cause in fact was not a proximate cause because the jury doesn't think it was substantial enough. The jury may confuse the concept of "substantial factor" with a preponderance of the evidence and think the cause must have been the main cause of the harm (something more than 50%). He thought the problem with foreseeability as a test for proximate causation is that it is also a test for whether or not a duty exists. The court decides the question of duty as a matter of law, so by allowing the case to go to the jury, the court has already determined that harm to the plaintiff was a foreseeable result of the defendant's conduct. Allowing the jury to revisit the issue of foreseeability can lead to conflicts between the court's determination of foreseeability and the jury's.

Mr. Shea compared CV209 with the California model instructions on proximate causation. The California instructions state as an element of a negligence claim that the defendant's negligence "was a substantial factor in causing" the plaintiff's harm (CACI 400) and then define "substantial factor":

> A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.
>
> [Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

(CACI 430.) Mr. Simmons thought that "more than a remote or trivial factor" was too vague to help the jury and would eliminate cases where the defendant's fault was a cause in fact of the injury but perhaps not the main cause. He also thought that the last sentence was problematic because it would eliminate cases of concurrent causation, such as the two-fire hypothetical. Mr. Fowler noted that other instructions require the jury to look at matters from the point of view of a reasonable person.

Dr. Di Paolo suggested revising the first subparagraph of CV209 to read, "(1) the person's act or failure to act was a substantial factor in producing the harm directly or set in motion events that produced the harm in a natural and continuous sequence." Mr. Carney thought it made the instruction too complicated. Messrs. Simmons and Summerill thought CV209 was fine the way it was written.

Mr. Simmons thought that the committee had thoroughly discussed the "substantial factor" instruction (MUJI 3.14, alternate B) when it adopted CV209 and did not need to revisit the issue. Mr. Carney noted that there was no unanimity in either the committee or the court decisions defining proximate cause. Mr. Young thought that the full committee needed to be present if it was going to change CV209. He suggested that someone draft an alternative instruction using the "substantial factor" test.

Mr. Carney asked whether the "substantial factor" test incorporated the concept of foreseeability or whether it still needed to be stated separately. He suggested that the committee review comment *a* to section 431 of the Restatement (Second), which defines "substantial factor" to mean that

> the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred.

He also recommended that the committee review sections 434, 435, and 461 of the Restatement (Second).

Mr. Fowler also suggested that the committee review *Mitchell v. Gonzalez,* 819 P.2d 872 (Cal. 1991). He thought that a survey would show that the "substantial factor" test is the majority rule among U.S. jurisdictions.

Mr. Summerill noted that *Devine v. Cook* used the "substantial factor" test as a basis for excusing contributory negligence and suggested that the "substantial factor" test may have been imported from contributory negligence law, which no longer exists, leading to confusion. Mr. Summerill also noted, however, that he would rather concede the concept of "substantial factor" and accept Dr. Di Paolo's suggestion rather than fight over which alternative instruction to use in every case.

Mr. Young thought that, whatever the committee decides, there should be an extensive comment identifying and explaining the issues, to help the court and attorneys if the issue goes up on appeal.

The committee deferred further discussion of the issue. Mr. Young asked for memoranda setting out the competing considerations for each proposed definition of cause. Mr. Simmons and Mr. Summerill will draft the memorandum supporting current CV209. Mr. Carney suggested that Messrs. Drake and DuBois be invited to draft the memo supporting a "substantial factor" instruction. Mr. Young asked them to have their memos to Mr. Shea two weeks before the next meeting.

2. *CV299A & B, Special verdict forms.* Mr. Shea noted that he had incorporated changes from the last meeting and added an advisory committee note but was not sure what to put in the note. The third paragraph was meant to avoid a verdict form that lists all of the ways the plaintiff claims the defendant was at fault. Mr. Carney thought that a verdict form that asks, "Was the defendant negligent in any of the following respects?" followed by a laundry list of allegations was inappropriate. Mr. Summerill generally agreed but thought the note should not say so but should allow the court and the parties to decide how much detail to put in the special verdict. The third paragraph of the note was deleted. The first paragraph of the proposed note was also deleted.

Mr. Shea asked if there was any benefit to using "fault" in the instructions and "negligent" in the verdict form. The committee thought not, that the verdict form should track the instructions. Mr. Ferguson thought that the problem was that the law uses "negligence" and "fault" in two different ways, one incorporating the idea of causation and liability, and the other not. Attorneys understand which way the term is being used in context, but juries do not. Mr. Carney asked if we could define "fault"

without including the concept of causation. Mr. Ferguson noted that the statute does not do so, but Mr. Carney did not think the committee was bound to follow the statutory definition. Mr. Summerill noted that the use of "negligence" and "fault" only becomes an issue in cases of comparative fault. Mr. Ferguson suggested changing the order of the instructions so that the definition of "fault" (CV201) went with or was included in the comparative fault instruction (CV211). At Mr. Young's suggestion, the committee decided to make the comparative fault instructions a separate section (section 2900). Mr. Carney noted that this change may require some revisions to the medical malpractice instructions.

Mr. West asked whether, where questions on the special verdict form include subparts, must the same jurors agree on the answer to each subpart. The committee thought not.

Mr. Shea presented his proposed flowchart form of the special verdict form. Mr. Summerilll noted that in a recent trial (*Bustos,* in Second District Court), the jury foreperson tried to make a flowchart on the verdict form because it was so confusing which questions the jury was and was not supposed to answer. Mr. Ferguson thought a flowchart could be used in closing argument. Mr. Summerill suggested that it be used as a demonstrative aid but not necessarily go into the jury room. Dr. Di Paolo asked whether the committee thought the jury should be given both the flowchart and the more traditional verdict form, using the former to help it fill out the latter. Mr. Carney noted that a practical problem with the flowchart is that it would be harder to revise based on events occurring at trial. Mr. Shea said that he had prepared the flowchart in Word and thought it could be easily modified. Dr. Di Paolo noted that if the jury found the flowchart useful, it would use it, but if it did not, it would not.

3. *CV140, Post-verdict jury instruction*. Mr. Shea introduced CV140, which he prepared based on discussions at a previous meeting. The committee thought it was good. Mr. Carney asked if he had looked at different judges' stock instructions on the matter. The committee thought that the instruction could be included as a suggestion, but that judges should be free to use it, adapt it as they see fit, or use their own stock instruction.

4. *CV202A, "Negligence" defined.* Mr. Carney noted that he had a call from the court during a trial asking where the model instruction was that laid out the specific allegations of negligence. He noted that MUJI 2d does not have an instruction similar to MUJI 3.1, setting out the parties' contentions. Mr. Fowler noted that his practice has been to submit contention instructions that were not part of MUJI. Mr. Shea noted that CV103 ("Nature of the case") was meant to fill that purpose. But he proposed adding language to CV202A (taken from CV301B of the medical malpractice instructions) to make the parties' claims explicit. The committee revised the added language to read:

To establish negligence, [name of plaintiff] has the burden of proving that:

(1) [name of defendant] was negligent, and

(2) this negligence was a cause of [name of plaintiff]'s harm.

In this action, [name of plaintiff] alleges that [name of defendant] was negligent in the following respects:

(1)

(2)

(3)

If you find that [name of defendant] was negligent in any of these respects, then you must determine whether that negligence was a cause of [name of plaintiff]'s harm.

[[Name of defendant] has the burden of proving that:

[(1) [name of plaintiff] was negligent, and

[(2) this negligence was a cause of [name of plaintiff]'s harm.

[[Name of defendant] alleges that [name of plaintiff] was negligent in the following respects:

[(1)

[(2)

[(3)

[If you find that [name of plaintiff] was negligent in any of these respects, then you must determine whether that negligence was a cause of [name of plaintiff]'s harm.]

The second part would only be given where the defendant claimed that the plaintiff was also at fault in causing his harm.

Mr. Simmons said that, in one of his firm's recent trials, the court gave the old MUJI 1st instructions rather than repeat the MUJI 2d general instructions at the close of the evidence. Mr. Shea noted that the instructions to MUJI 2d encourage the court to give substantive instructions at the beginning of the case to help the jury understand the evidence and to repeat preliminary instructions at the end of the case. Mr. Summerill noted that CV101-136 are preliminary instructions that ought to be repeated at the end of the case. Mr. Carney noted that CV103 should be read at the beginning of the case and also repeated at the end of the case. But the preliminary instructions as written do not fit well at the end of the case. They need to be revised for use at the end of the case. Mr. Carney suggested breaking the General Instructions (the 100 series of instructions) into two sets--those to be given before the evidence is heard, and those to be given after all the evidence is in. He offered to prepare the two sets.

Mr. Carney asked whether judges are giving preliminary jury instructions, as contemplated by MUJI 2d. Mr. Young suggested adding something to the survey to be given judges asking if they gave preliminary instructions. Dr. Di Paolo noted that it would be useful to also know what instructions they gave. Mr. Shea thought the committee would get fewer responses if we asked the judges to identify the instructions given. Mr. Summerill agreed that the survey needs to be kept simple so that we will get responses. Mr. Carney suggested asking judges to attach a copy of the instructions that were given. Mr. Shea noted that he can get a report of the trials that took place each month and can obtain a copy of the jury instructions given in those cases from the court file. Messrs. Young and Carney asked Mr. Shea to see if he could get them on the agenda for the monthly Third District judges' meeting to discuss the matter with the judges. Dr. Di Paolo thought that the committee should also sample a rural district to get a good demographic representation.

The meeting concluded at 6:05 p.m.

Next Meeting. The next meeting will be Monday, May 10, 2010, at 4:00 p.m.

Tab 2

(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~~ was a substantial factor in bringing about the harm; 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.

Holmstrom v. C.R. England, Inc., 2000 UT App 239, 8 P3d 281.

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 injury.")

Rees v. Albertson's, Inc., 587 P.2d 130 (Utah 1978).

MUJI 1st Instruction 3.13; 3.14; 3.15.

A substantial factor is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

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 was a substantial factor in produceding the harm directly or setting 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).

MEMORANDUM

To: MUJI 2d Civil Advisory Committee
From: Paul M. Simmons and Peter W. Summerill
Date: May 4, 2010
Re: Causation Instruction (CV209)

The committee has been presented with a proposal to re-work MUJI 2d CV209, the definition of "cause" in negligence cases. Specifically, there is an attempt to re-incorporate "substantial factor" into the language of the instruction. However, the committee previously considered including "substantial factor" in the language and, after debate, concluded it would be inappropriate to do so, on the grounds that "substantial factor" goes to the jury's allocation of fault and not whether the defendant's conduct was a cause of the plaintiff's harm.[1] Importantly, no new or additional case law since that time suggests that the omission of "substantial factor" results in an improper instruction or is a misstatement of the law. Faced with a large volume of work yet ahead, the committee should not be revisiting instructions already subjected to debate and discussion. The committee already considered, and rejected, the "substantial factor" language.

The "substantial factor" language, which was incorporated in an alternative instruction in MUJI 1st,[2] comes from the Second Restatement's definition of "legal cause":

> The actor's negligent conduct is a legal cause of harm to another if
>
> (a) his conduct is a substantial factor in bringing about the harm, and
>
> (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.[3]

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[1] *See* MUJI 2d 02.108 (the predecessor to CV209), staff note (May 26, 2005 draft) ("Substantial factor removed. Goes to allocating fault, not causation."), in materials for June 1, 2005 committee meeting at 56.

[2] *See* MODEL UTAH JURY INSTRUCTIONS: CIVIL 3.14 (1993) (alternate B).

[3] RESTATEMENT (SECOND) OF TORTS § 431 (1963 & 1964).

The Restatement treatment of proximate causation came about at a time when most jurisdictions still applied the doctrine of contributory negligence[4] and had not yet adopted comparative fault schemes.[5] Because the practical effect of finding that the defendant's negligence was a proximate cause of the plaintiff's harm was to make the defendant liable for all of the plaintiff's harm, it made some sense to not hold a defendant liable where his fault was negligible or caused only negligible harm.

Under the Utah Liability Reform Act, however, if the defendant's conduct was a minor factor in bringing about the plaintiff's harm, the defendant can still be liable, but his liability is limited to his percentage of the overall fault that brought about the harm. Thus, if the defendant's negligence caused only 1% of the plaintiff's harm, the defendant is only liable for 1% of the plaintiff's damages.[6] Under a comparative fault scheme such as Utah has adopted, there is little reason to continue to rely on a "substantial factor" definition of proximate cause.

The Restatement comments also make it clear that, in many cases, if the defendant's conduct was a factor in causing the plaintiff's harm, it was a "substantial factor":

> In many cases the question before the court is whether the actor's negligence was in fact the cause of the other's harm--that is, whether it had *any* effect in producing it--or whether it was the result of some other cause, the testimony making it clear that it must be one or the other, and that the harm is not due to the combined effects of both. In such a case, the question, whether the defendant's negligence has a substantial as distinguished from a merely negligible effect in bringing about the plaintiff's harm, does not arise if the testimony clearly proves that the harm is from a cause other than the actor's negligence. Indeed, *the testimony often makes it clear that, if the defendant's conduct had any*

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[4] *See id*. §§ 463-84 (restatement of the law on contributory negligence).

[5] Although some jurisdictions had abrogated the "all or nothing" rule of contributory negligence by statute sooner, the first case to adopt a comparative fault scheme was *Hoffman v. Jones,* 280 So.2d 431 (Fla. 1973), which was decided eight years after the Restatement (Second) of Torts was promulgated.

[6] *See* UTAH CODE ANN. § 78B-5-818(3) ("No defendant is liable to any person seeking recovery for any amount in excess of the proportion of fault attributed to that defendant under Section 78B-5-819," providing for separate special verdicts on total damages and proportion of fault).

> *effect, the effect was substantial.* It is only where the evidence permits a reasonable finding that the defendant's conduct had some effect that the question whether the effect was substantial rather than negligible becomes important.[7]

The problem with the "substantial factor" test is that it gives the jury too much leeway to decide that a cause in fact was not a proximate cause because the jury doesn't think it was substantial enough. The jury may confuse the concept of "substantial factor" with a preponderance of the evidence and think the cause must have been the main cause of the harm (something more than 50%) or, if not the main cause, that it must meet some arbitrary threshold, such as 25% or 30%. As one commentator noted:

> 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.[8]

Yet, "[c]an 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?"[9] When a jury returns a verdict under a "substantial factor" instruction, "it is impossible to know whether that finding is based on a lack of size or a lack of cause."[10]

The substantial factor instructions requires the jury to consider the magnitude of a tortfeasor's wrongdoing two or possibly three times--once in determining liability (culpability), once in determining causation, and, if the jury finds both liability and causation and there are multiple tortfeasors, again in apportioning fault.

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[7] RESTATEMENT (SECOND) OF TORTS § 431, cmt. *b* (emphasis added). *See also Doe v. Garcia,* 961 P.2d 1181, 1185 (Idaho 1998) (defining "substantial factor" as "one that 'in natural or probable sequence, produced the damage complained of' or one 'concurring with some other cause acting at the same time, which in combination with it, causes the damage'") (citation omitted).

[8] John Bosco, *What a Difference a Word Makes,* TRIAL 59 (Dec. 2003).

[9] *Id.*

[10] *Id.*

As another commentator has concluded, "[o]ver the years, courts . . . used the substantial factor test to do an increasing variety of things it was never intended to do and for which it is not appropriate. As a result, the test now creates unnecessary confusion in the law and has outlived its usefulness."[11]

The problem with proximate cause is that it combines both factual and legal elements. As the Utah Supreme Court has explained, "Proximate cause is a legal construct calling for a legal conclusion based on various factors in addition to an actual cause-effect relationship."[12] Or, as Professor Dobbs has explained it:

> Proximate cause rules are among those rules that seek to determine the appropriate scope of a negligent defendant's liability. The central goal of the proximate cause requirement is to limit the defendant's liability to the kinds of harms he risked by his negligent conduct. Judicial decisions about proximate cause rules thus attempt to discern whether, in the particular case before the court, the harm that resulted from the defendant's negligence is so clearly outside the risks he created that it would be unjust or at least impractical to impose liability. *The proximate cause issue, in spite of the terminology, is not about causation at all but about the appropriate scope of responsibility*.[13]

In other words, a defendant's conduct is a proximate cause of the plaintiff's injuries if it was a cause in fact and there is no good reason to excuse the defendant from liability (that is, it would not be "unjust" or "impractical" to impose liability on the defendant).

Case law generally holds that proximate cause is a fact question for the jury to determine.[14] It follows, then, that the jury needs to be instructed on how to find proximate cause. But in the vast majority of cases, cause in fact will be sufficient to satisfy the causation element of a tort claim. Cause in fact is clearly a fact question and thus a jury question. We submit that that is what courts mean when they talk about proximate cause being a question for the jury. Whether the law should relieve a

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[11] David A. Fischer, *Insufficient Causes,* 94 KY. L.J. 277, 277 (2005) (footnote omitted).

[12] *Bennion v. LeGrand Johnson Constr. Co.,* 701 P.2d 1078, 1083 (Utah 1985).

[13] 1 DAN B. DOBBS, THE LAW OF TORTS § 180, at 443 (2001) (footnotes omitted and emphasis added).

[14] *E.g., Rees v. Albertson's, Inc.,* 587 P.2d 130, 133 (Utah 1978).

defendant from liability for the consequences of his negligence, it seems to us, is a legal issue that should be up to the court to decide.

The authors of JIFU long ago recognized that "[m]ost of the difficulty with proximate cause seems to arise from trying to state a definition which will be of universal application in various hypothetical situations."[15] The authors suggested "that a great deal of such difficulty can be avoided, and a much more simple and understandable instruction be given, by dealing only with the case at hand."[16]

In the vast majority of cases, the jury probably does not need to be instructed on proximate cause. As the Restatement recognizes, the popular sense of the term "cause" in a legal setting includes the idea of responsibility. If a further definition of "cause" is necessary, the "natural and continuous sequence" instruction should be used, because it best states the cause-in-fact requirement for proximate causation. If the unique facts of a particular case, however, make the instruction inappropriate (such as in Rich Humphery's case, where the fault is the failure to prevent harm), the court and the parties should be encouraged to draft an instruction that meets the facts of the case. Whether that is a "substantial factor" instruction, a "foreseeability" instruction, or something else will depend on the facts of the case and the issues the jury must resolve.

The current MUJI 2d causation instruction tried to define proximate cause in plain English (for example, by deleting the modifier *proximate)* and combined the two alternatives of MUJI 1st by using the traditional definition of MUJI 3.13 and the foreseeability test of MUJI 3.14:

> **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;

---

[15] JURY INSTRUCTION FORMS: UTAH 15.6 note, at 50 (1957).

[16] *Id.*

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.

As currently drafted, including the prior discussion and debate which eliminated "substantial factor," CV209 adequately educates the jury regarding the law of causation and need not be revisited.

Tab 3

(1) CV140. Post-verdict instruction. (new)

Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.

You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them - or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.

If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.

Again, thank you for your service.

Approved

(2) CV202A "Negligence" defined.

You must decide whether [names of persons on the verdict form] were negligent.

Negligence means that a person did not use reasonable care. We all have a duty to use reasonable care to avoid injuring others. Reasonable care is simply what a reasonably careful person would do in a similar situation. A person may be negligent in acting or in failing to act.

The amount of care that is reasonable depends upon the situation. Ordinary circumstances do not require extraordinary caution. But some situations require more care because a reasonably careful person would understand that more danger is involved.

To establish negligence, [name of plaintiff] has the burden of proving that:

(1) [name of defendant] was negligent; and

(2) this negligence was a cause of [name of plaintiff]'s harm.

In this action, [name of plaintiff] alleges that [name of defendant] was negligent in the following respects:

(1)

(2)

(3)

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

[[Name of defendant] claims that [name of plaintiff] was negligent in causing [his] own harm. To establish [name of plaintiff]'s negligence, [name of defendant] has the burden of proving that:

(1) [name of plaintiff] was negligent; and

(2) this negligence was a cause of [name of plaintiff]'s harm.

In this action, [name of defendant] alleges that [name of plaintiff] was negligent in the following respects:

(1)

(2)

(3)

If you find that the [name of plaintiff] was negligent in any of these respects, then you must determine whether that negligence was a cause of [his] harm.]

References

Dwiggins v. Morgan Jewelers, 811 P.2d 182 (Utah 1991).

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

Meese v. BYU, 639 P.2d 720 (Utah 1981).

MUJI 1st Instruction

3.2; 3.5; 3.6.

Tab 4

January 12, 2010

Attorney/Judge
Firm Name
Mailing Address

Dear [Attorney/Judge]:

You were recently involved in [CASE NAME/CASE NUMBER], a case tried to jury verdict. Please complete and return the following to Tim Shea/Utah Jury Instruction Committee at:

	Circle One
Did you use the Model Utah Jury Instructions, 2nd?	Yes No
Did you modify or alter any of the Model Instructions? (If yes, please submit your alterations with this form).	Yes No
Did you need to draft an instruction because one was unavailable in MUJI 2nd? (If yes, please submit your instruction with this form).	Yes No
Please provide any comments:	