

Agenda

Advisory Committee on Model Civil Jury Instructions

January 10, 2011
4:00 to 6:00 p.m.

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

Welcome and approval of minutes	Tab 1	John Young
Introduction of committee members		John Young
Premises Liability Instructions	Tab 2	Peter Summerill

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.

February 14, 2011
March 14, 2011
April 11, 2011
May 9, 2011 (Education Room)
June 13, 2011
September 12, 2011
October 11, 2011 (Tuesday)
November 14, 2011
December 12, 2011

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

December 13, 2010

4:00 p.m.

Present: John L. Young, Chair, Juli Blanch, Frank Carney, Professor Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Ryan Springer, Peter W. Summerill, Timothy M. Shea, Diane Abegglen

Excused: Judge William Barrett, Rich Humpherys, John R. Lund, Paul M. Simmons, David E. West

(1) The minutes of the meeting held on November 8, 2010 were approved.

(2) Mr. Young announced that Judge Deno Himonas, Judge Kate Toomey, and Mr. Ryan Springer were being appointed to the committee. Mr. Gary Johnson is being reappointed to the committee.

(3) CV1101. Duty to invitee. The committee added conduct of activities to discovery of conditions throughout the instruction. The committee decided the factors should be set off with brackets so that only those factors supported by the evidence would be given to the jury. The subcommittee will draft a note about the factors. The instruction was approved as amended.

(4) CV1102. Duty to licensee for an activity on the property. The committee added a reference to defendant's property. The instruction was approved as amended.

(5) CV1103. Duty to licensee for a condition on the property. The committee added a reference to defendant's property. The instruction was approved as amended.

(6) CV1104. General duty to a trespasser. The committee approved the instruction as drafted.

(7) CV1104A Duty to a trespasser for an activity on the property. The committee approved the instruction as drafted.

(8) CV1104B Duty to trespasser for an artificial condition on the property. The committee approved the instruction as drafted.

(9) CV1104C Duty to trespassing child for an attractive nuisance on the property. The committee approved the instruction as drafted.

(10) CV1106. Duty to persons on a public way. The committee changed "consent or acquiescence" to "express or implied consent." The committee changed "would deviate from" to "might leave." The instruction was approved as amended.

Tab 2

Premises Liability

(1) CV1101. Premises Liability Committee Notes	1
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(1)CV1101. Premises Liability Committee Notes

(2)CV1102. Duty to invitee.

[Name of plaintiff] claims that [name of defendant] failed to use reasonable care to [conduct [describe activity]] [discover [describe condition]] on [name of defendant]'s property and to repair, replace, or adequately warn about it. To succeed in this claim, [name of plaintiff] must prove that [name of defendant]:

[(1) held [his] property open to the public or that [name of defendant] held [his] property open for a purpose directly or indirectly connected to [his] business; and]

(2) knew or should have known of [describe activity or condition]; and

(3) knew or should have known that [describe activity or condition] presented an unreasonable risk of harm; and

(4) knew or should have known that [name of plaintiff] would not discover [describe activity or condition] or that [name of plaintiff] would fail to protect [himself].

In deciding whether [name of defendant] used reasonable care to discover or correct the [describe activity or condition], you may consider, among other factors, the following:

[(a) the location of the property; or]

[(b) the likelihood that someone would come onto the property in the same manner as [name of plaintiff] did; or]

[(c) the likelihood of harm; or]

[(d) the probable seriousness of the harm.]

References

Jex v. JRA, Inc., 2008 UT 67, 196 P.3d 576.

Hale v. Beckstead, 2005 UT 24, 116 P.3d 263

Carlile v. Wal-Mart, 2002 UT App 412, 61 P.3d 287

Canfield v. Albertsons, Inc., 841 P.2d 1224 (Ut. Ct. App. 1992).

Glenn v. Gibbons & Reed Co., 265 P.2d 1013 (1954).

Restatement (Second) of Torts § 343 (1965)

MUJI 1

11.2; 11.3

Committee Notes

If the status of the plaintiff as an invitee is not disputed, the court does not need to give bracketed paragraph (1) to the jury. For examples of an invitee, see the Restatement (Second) of Torts § 343 (1965).

Add note about factors

Approved.

(3)CV1103. Duty to licensee for an activity on the property.

[Name of plaintiff] claims that [name of defendant] failed to use reasonable care in [describe activity] on [name of defendant]'s property. To succeed in this claim, [name of plaintiff] must prove that:

[(1) [name of plaintiff] entered or remained on [name of defendant]'s property with [name of defendant]'s express or implied permission; and]

(2) [name of defendant] knew or had reason to know that [name of plaintiff] would not realize the danger involved in [describe activity]; and

(3) [name of plaintiff] did not know or have reason to know of [describe activity] or did not know or have reason to know of its danger.

References

Lambert v. Western Pac. R. Co., 135 Cal. App. 81, 26 P.2d 824 (1933).

Restatement (Second) of Torts § 341 Activities Dangerous to Licensees (1965).

MUJI 1

11.4; 11.5

Committee Notes

If the status of the plaintiff as a licensee is not disputed, the court does not need to give bracketed paragraph (1) to the jury.

Approved.

(4)CV1104. Duty to licensee for a condition on the property.

[Name of plaintiff] claims that [name of defendant] failed to use reasonable care to repair, replace, or adequately warn about [describe condition] on [name of defendant]'s property. To succeed in this claim, [name of plaintiff] must prove that:

(1) [name of plaintiff] went onto [name of defendant]'s property with [name of defendant]'s express or implied permission; and]

(2) [name of defendant] knew or had reason to know of [describe condition]; and

(3) [name of defendant] knew or had reason to know that [describe condition] presented an unreasonable risk of harm; and

(4) [name of defendant] knew or had reason to know that [name of plaintiff] would not discover [describe condition] or realize its danger; and

(5) [name of plaintiff] did not discover [describe condition] or did not realize its danger.

References

Lambert v. Western Pac. R. Co., 135 Cal. App. 81, 26 P.2d 824 (1933).

Stevens v. Salt Lake County, 25 Utah 2d 168, 171, 478 P.2d 496 (1970).

Restatement (Second) of Torts §342 Dangerous Conditions Known to Possessor (1965).

MUJI 1

11.4; 11.6

Committee Notes

If the status of the plaintiff as a licensee is not disputed, the court does not need to give bracketed paragraph (1) to the jury.

Approved.

(5)CV1105. General duty to a trespasser.

If you find that [name of plaintiff] entered or remained on [name of defendant's] property without [invitation / permission / privilege / consent], then, generally, [name of defendant] owes [name of plaintiff] no duty to use reasonable care:

(1) to put the property in a safe condition; or

(2) to [describe activity] so as not to endanger [name of plaintiff].

[However, ... [Follow with 1105A, 1105B or 1105C, as applicable.]

References:

Kessler v. Mortenson, 2000 UT 95, 16 P.3d 1225, 1230 (rejecting ‘allurement’ basis for attractive nuisance doctrine in Brown v. Salt Lake City, 33 Utah 222, 93 P. 570, 572 (1908)).

Connor v. Union Pac. R.R. Co., 972 P.2d 414, 417 (Utah 1998).

Whipple v. Am. Fork Irr. Co., 910 P.2d 1218, 1220 (Utah 1996)(citing and quoting Restatement (Second) of Torts §§ 333-339).

MUJI 1

11.7; 11.8

Committee Notes:

The court in Whipple adopted the Restatement §§ 333-339 as the “more accurate” statement of the law regarding the duty owed by a possessor of land. While a possessor does not generally owe a duty to trespassers, there are several exceptions enumerated in the Restatement §334-339. Only those exceptions at issue should be given as part of the jury instructions. The last exception is the ‘attractive nuisance doctrine,’ formerly MUJI 11.1. The conditions of the attractive nuisance doctrine, as described in section 339, impose a reasonable balance between the interests of the property owner and the interests of children.

(6)CV1105A Duty to a trespasser for an activity on the property.

... [name of plaintiff] claims that [name of defendant] owes a duty to use reasonable care in [describe activity/force]. To succeed in this claim, [name of plaintiff] must prove that:

(1) [name of defendant] knew or should have known

[(a) that trespassers constantly intruded upon a limited area of the property in dangerous proximity to [describe activity/force], or]

[(b) that [name of plaintiff] was on the property in dangerous proximity to [describe activity/force];] and

(2) [name of defendant] is in immediate control of [describe activity/force]; and

(3) [name of plaintiff] did not discover [describe activity/force] or did not realize its danger.

References:

Restatement (Second) of Torts §334 (1965).

Restatement (Second) of Torts §336 (1965).

Restatement (Second) of Torts §338 (1965).

Committee Notes

Instruct the jury on paragraphs (1)(a) and/or (1)(b), depending on the evidence.

(7)CV1105B Duty to trespasser for an artificial condition on the property.

... [name of plaintiff] claims that [name of defendant] owes a duty to use reasonable care to warn about [describe condition]. To succeed in this claim, [name of plaintiff] must prove that:

(1) [name of defendant] knew or should have known

[(a) that trespassers constantly intruded upon a limited area of the property in dangerous proximity to [describe condition], or]

[(b) that [name of plaintiff] was on the property in dangerous proximity to [describe condition];] and

(2) [describe condition] is an artificial condition that [name of defendant] created or maintained; and

(3) [name of defendant] knew that coming in contact with [describe condition] likely would cause death or seriously bodily harm; and

(4) [describe condition] is of such a nature that [name of defendant] had reason to believe that trespassers would not discover it or would not realize its danger; and

(5) [name of plaintiff] did not discover [describe condition] or did not realize its danger.

References:

Restatement (Second) of Torts §335 (1965).

Restatement (Second) of Torts §337 (1965).

Committee Notes

Instruct the jury on paragraphs (1)(a) and/or (1)(b), depending on the evidence.

(8)CV1105C Duty to trespassing child for an attractive nuisance on the property.

... [name of plaintiff] claims that [name of defendant] owes a duty to use reasonable care to eliminate the danger from [describe condition] or to protect children from the danger. To succeed in this claim, [name of plaintiff] must prove that:

(1) [describe condition] is an artificial condition; and

(2) [name of defendant] knew or had reason to know that [describe condition] involves an unreasonable risk of death or serious bodily harm; and

(3) [name of defendant] knew or had reason to know that children were likely to intrude on the property in dangerous proximity to [describe condition]; and

(4) [name of child], because of [his] youth, did not discover [describe condition] or did not realize its danger; and

(5) the benefit to [name of defendant] of maintaining [describe condition] and the burden of eliminating the danger are slight compared to the risk to children.

References:

Restatement (Second) of Torts §339 (1965).

MUJI 1

11.1

Approved

(9)CV1106. Duty to persons on a public way.

[Name of plaintiff] claims that [name of defendant] failed to use reasonable care to discover conditions creating an unreasonable risk of harm to persons on [describe public way] and to repair the condition. To succeed in this claim, [name of plaintiff] must prove that:

(1) [name of defendant] created [describe condition] or it was created with [name of defendant]'s express or implied consent; and

(2) [name of defendant] did not use reasonable care to make [describe condition] safe after [name of defendant] knew or should have known of it; and

[(3) [name of defendant] knew or should have known that [name of plaintiff] might leave the [describe public way] and encounter the [describe condition.]

References:

Schulz v. Quintana, 576 P.2d 855, 856 (Utah 1978).

Restatement (Second) Torts, §§ 364-370 (1965).

Committee Notes

Bracketed paragraph (3) should be given for conditions existing wholly on the land of the defendant, but which a plaintiff may only encounter through an innocent deviation from the public way e.g. a trench adjacent to a public sidewalk which the plaintiff may step into in the dark by virtue of having left the public sidewalk.

Approved.

(10)CV1107. Duty of landlord.

[Name of plaintiff] claims that [name of defendant] is liable for [name of plaintiff]'s harm. To succeed in this claim, [name of plaintiff] must prove that:

[(1) [name of defendant] is the landlord for the property; and that]

(2) [name of defendant] failed to use reasonable care to keep the rented property:

[(a) safe and suitable for its intended use; and]

[(b) free of defects or dangerous conditions of which [name of defendant] knew or should have known would expose others to an unreasonable risk of harm.]

References

Williams v. Melby, 699 P.2d 723 (Utah 1985) (quoting Stephenson v. Warner, 581 P.2d 567 (Utah 1978)).

Hall v. Warren, 632 P.2d 848 (Utah 1981)

Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89, 91 (Utah Ct. App. 1988).

English v. Kienke, 848 P.2d 153 (Utah 1993), aff'g 774 P.2d 1154 (Utah Ct. App. 1989).

Darrington v. Wade, 812 P.2d 452, 458 (Utah Ct. App. 1991)(“landlords who lease their property for public admission have a higher duty than run-of-the-mill landlords.”)

Utah Air Quality Bd. v. Truman, 2000 UT 67, ¶ 28, 8 P.3d 266, 272

MUJI 1

11.10

Committee Notes

If the defendant’s role as a landlord is not in dispute, the court does not need to instruct the jury with bracketed paragraph (1). Instruct the jury on bracketed paragraphs (2)(a) and/or (2)(b) as supported by the evidence.

Under Utah law “the landlord's common law duty has been expanded” and is not limited by the “artificial common law categories” of invitee, licensee or trespasser. Gregory v. Fourthwest Investments, Ltd., 754 P.2d 89, 91 (Utah Ct. App. 1988). Utah law recognizes that “a landlord may be subject to a duty of care imposed by a statute or ordinance.” Hall v. Warren, 632 P.2d 848, 850 (Utah 1981). In such circumstances, counsel and the court should consider adding other duties based on these laws. Counsel may also consider use of MUJI ????? (instruction regarding prima facie negligence).

Court and counsel should also consider including additional language as needed such as a duty to inspect under Darrington v. Wade, 812 P.2d 452, 458 (Utah Ct. App. 1991)(“landlords who lease their property for public admission have a higher duty than run-of-the-mill landlords.”)

Previous MUJI 11.13 and 11.14 have been eliminated as they involve a situation subject to resolution as a matter of law. In effect, if the condition is created by the tenant or in an area not subject to the control of the landlord, there is no duty and hence no question for the jury to resolve. See, e.g. English v. Kienke, 848 P.2d 153 (Utah 1993), aff'g 774 P.2d 1154 (Utah Ct. App. 1989)(summary judgment affirmed, no duty by landlord); Stephenson v. Warner, 581 P.2d 567 (Utah 1978)(directed verdict granted in favor of landlord, no evidence that landlord aware of or created the condition); and, Williams v. Melby, 699 P.2d 723 (Utah 1985)(overruling summary judgment on the grounds that the dangerous condition was located within area subject to control of the landlord).

(11)CV1108. Duty of property seller.

[Name of plaintiff] claims that [name of defendant] is liable for [name of plaintiff]'s physical injury. To succeed in this claim, [name of plaintiff] must prove that:

[(1) [name of defendant] sold the property;]

[(2) [name of plaintiff] [purchased the property / was on the property with [name of purchaser]'s permission];]

(3) [name of defendant] knew or had reason to know of [describe condition] on the property and the risk involved;

(4) [name of defendant] had reason to believe that [name of purchaser] would not discover [describe condition] or realize the risk;

(5) [name of purchaser] did not discover [describe condition]; and

(6) [name of defendant] failed to disclose [describe condition] to [name of purchaser].

References

Loveland v. Orem City Corp., 746 P.2d 763 (Utah 1987).

Restatement (Second) of Torts § 353 (1964).

MUJI 1

11.15

Committee Notes

(12)CV1109. Recovery for injury to ski resort patrons.

[Name of defendant] claims that [he] is not liable for that part of [name of plaintiff]'s harm that was caused by [describe applicable conditions in Utah Code Section 78B-4-402(1)(a)-(h)].

References

Utah Code Section 78B-4-402.

Utah Code Section 78B-4-403.

Clover v. Snowbird Ski Resort, 808 P.2d 1037 (Utah 1991).

Ghionis v. Deer Valley Resort Co., 839 F. Supp. 789 (D. Utah 1993).

White v. DeSeelhorst, 879 P.2d 1371 (Utah 1994).

Rothstein v. Snowbird Corp., 2007 UT 96, 175 P.3d 560.

MUJI 1

11.16

Committee Notes

This instruction is designed for use when a question of fact exists about whether the mechanics of the injuries or the instrumentality involved falls within those risks inherent in skiing. This instruction should be given with instructions defining the elements of negligence and reasonable care and with an instruction that all of the jury instructions be read together and considered as a whole.

Give this instruction in conjunction with CV202A.

(13)CV1110. Duty of recreational property owner

[Name of defendant] claims that [he] is not liable for [name of plaintiff]'s harm. To succeed in this claim, [name of defendant] must prove that:

(1) [name of defendant] did not charge [name of plaintiff] a fee to come upon [name of defendant]'s property for a recreational purpose; and,

(2) [name of defendant] held the property open to the public for [insert relevant useage enumerated under Utah Code Section 57-14-2].

If you find both (1) and (2) above, [name of defendant] owed no duty to exercise reasonable care to make the land safe or to warn of conditions on the land.

Nevertheless, [name of plaintiff] claims that [name of defendant] is liable for harm because:

(A) [name of defendant] willfully or maliciously caused [name of plaintiff]'s harm; or

(B) [name of defendant] willfully or maliciously failed to guard or warn against [describe the condition, use, structure or activity].

If you find either (A) or (B), then [name of defendant] is liable for harm caused as a result of (A) or (B).

References

Utah Code Section 57-14-3.

Utah Code Section 57-14-4.

Crawford v. Tilley, 780 P.2d 1248 (Utah 1989)

De Baritault v. Salt Lake City Corp., 913 P.2d 743, 748 (Utah 1996)

Perrine v. Kennecott Mining Corp, 911 P.2d 1290 (Utah 1996)

MUJI 1

11.22

Committee Notes

This instruction should be used only if a question of fact exists as to the application of the act limiting liability or as to the character of the alleged omissions as willful or malicious. The existence of a duty is generally a question of law. If no question exists about the application of the act or the nature of the conduct, the presence or absence of a duty will presumably be determined as a matter of law by application of the act and this instruction will be unnecessary.

This instruction should be accompanied by the related instructions defining "recreational lands" and "recreational purposes," and should also be accompanied by definitions of "willful" and "malicious." If appropriate, a definition of a "charge" for use of the land may be given. The last paragraph may be omitted if no question exists of an intentional or willful injury.

This instruction is inappropriate if applied to property that exists in an urban, improved land environment. The instruction is based on Utah's Recreational Use

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statute and should only be given where the land is: “(1) rural, (2) undeveloped, (3) appropriate for the type of activities listed in the statute, (4) open to the general public without charge, and (5) a type of land that would have been opened in response to the statute.” *De Baritault v. Salt Lake City Corp.*, 913 P.2d 743, 748 (Utah 1996).