Agenda
Advisory Committee on
Model Civil Jury Instructions

September 12, 2011
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
Spoliation	Tab 2	Gary Johnson
Verdict form	Tab 3	Peter Summerill
Correlation Table to MUJI 1st	Tab 4	Frank Carney
Punitive damages	Tab 5	Frank Carney
Instructions on ski resort injuries		Tim Shea

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

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

Meeting Schedule: Matheson Courthouse, Judicial Council Room, 4:00 to 6:00 unless otherwise stated.

October 11, 2011 (Tuesday)
November 14, 2011
December 12, 2011
January 9, 2012
February 13, 2012
March 12, 2012
April 9, 2012
May 14, 2012
June 11, 2012
September 10, 2012
October 9, 2012 (Tuesday)
November 13, 2012 (Tuesday)
December 10, 2012

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
June 13, 2011
4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Honorable William W. Barrett, Jr., Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Honorable Kate A. Toomey, David E. West

Excused: Ryan M. Springer

1. *Committee Membership*. Mr. Young will review the minutes and talk to those members who have missed a number of meetings to see if they would like to be replaced or if they will recommit to their service on the committee.

2. *Vicarious Liability Instructions*. Mr. Young noted that Mr. Lund was given the assignment to come up with instructions on vicarious liability. Messrs. Carney, Johnson, and Simmons volunteered to serve as the "Gang of Three" to review the vicarious liability instructions and have them ready for review at the September 2011 meeting.

3. *Minutes*. Mr. Carney reported that he has put the committee minutes into one searchable .pdf document. He asked whether the document could be put on the Internet. Mr. Shea thought it could be added to the committee's webpage. The minutes are already on the webpage, but they cannot be searched all at once. Dr. Di Paolo suggested also looking at software that would create a word index for the minutes.

4. *General Instructions*. The committee reviewed the last of the revisions to the general instructions:

a. *CV130A, Charts and summaries as evidence; CV130B, Charts and summaries of evidence, and CV130C, Charts and summaries*. Based on the committee's discussion at the last meeting, Mr. Shea prepared three different instructions regarding charts and summaries–one for charts and summaries that are received as evidence under Utah Rule of Evidence 1006 (CV130A); one for charts and summaries of the evidence that are used only as demonstrative exhibits (CV130B), and one where both types of charts and summaries are used at trial (CV130C). Mr. Ferguson questioned the second sentence of CV130B ("You may consider them only if they correctly reflect information shown by the evidence."). He thought the instruction was ambiguous because it suggests that the jury is to determine if the chart or summary correctly reflects information shown by the evidence, when the court must determine that the chart or summary is an accurate depiction of the evidence before it receives it into evidence. Mr. Ferguson noted that, as a practical matter, the court relies on the parties to compare the chart or summary with the evidence and will receive it if there is no objection. If the court determines that it does not accurately reflect

the evidence, it will not receive it, and the jury should not consider it. Mr. Ferguson therefore thought the last sentence of CV130B should be deleted. Mr. Shea asked whether any instruction was necessary. He thought CV130A was tautological ("evidence is treated as evidence"). Dr. Di Paolo noted that, from a juror's perspective, whatever is presented to the jury in open court is considered evidence. Messrs. Summerill and West noted that the difference between CV130A and CV130B is the difference between charts and summaries that can go into the jury room (such as summaries of voluminous medical records) and those that cannot (such as summaries of an expert's testimony or an expert's drawing). Dr. Di Paolo suggested telling the jury that the charts and summaries that they take into the jury room are evidence and that others are not. The committee revised CV130A to read:

> Certain charts and summaries that are received as evidence will be with you in the jury room when you deliberate. You should consider the information contained in them as you would any other evidence.

The committee approved CV130A as revised. The committee then revised CV130B to read:

> Certain charts and summaries will be shown to you to help explain the evidence. However, the charts and summaries are not themselves evidence, and you will not have them in the jury room when you deliberate. You may consider them to the extent that they correctly reflect the evidence.

The committee approved CV130B as revised. The committee decided that CV130C was unnecessary. The court can use CV130A or CV130B or both, depending on what charts and summaries are used in the case.

b. *CV131, Spoliation.* Mr. Johnson noted that CV131 does not offer any guidance as to when the instruction should be used. Under Utah Rule of Civil Procedure 37(g), the sanction for the spoliation of evidence is within the court's discretion, and an adverse inference instruction is just one possibility. Mr. Johnson also noted that the instruction requires that the spoliation be intentional, but the court in *Daynight, LLC v. Mobilight, Inc.,* 2011 UT App 28, said that rule 37(g) does not require "willfulness, bad faith, fault or persistent dilatory tactics" before a court may sanction a party for spoliation. Mr. West asked whether any jury instruction was necessary, given the lack of direction in the case law. The committee thought that a model instruction was appropriate for those cases in which the court concludes that an adverse inference instruction

is the appropriate sanction. Some committee members questioned whether "intentionally" should be omitted from the instruction. Dr. Di Paolo suggested handling the matter in a committee note. Mr. Johnson agreed to draft a proposed committee note. The committee also agreed to add citations to the recent cases on spoliation to the reference section of CV131. Those cases are *Daynight; Hills v. United Parcel Service, Inc.,* 2010 UT 39; and *Kilpatrick v. Bullough Abatement, Inc.,* 2008 UT 82.

c. *CV____, No transcript of testimony.* Mr. Simmons had suggested adding an instruction telling the jury that they would not have a transcript of the trial testimony during their deliberations, so they would need to pay close attention to the evidence presented at trial. The committee revised the second sentence of the instruction to read, "You will not have a transcript or recording of the witnesses' testimony" and approved the instruction as modified. Mr. Shea and Dr. Di Paolo questioned why jurors are not allowed to have a transcript of testimony. Mr. Carney noted that in some jurisdictions, they can have a transcript but noted that other jurisdictions, such as Utah, do not allow it because it would tend to give that evidence more weight, and the other side might then insist that the jury be given a transcript of other evidence more helpful to its case. Mr. Ferguson noted that, to be fair, the jury should receive the entire transcript or nothing.

5. *Verdict Form.* Mr. Shea revised Mr. Summerill's proposed special verdict form for a wrongful death case in light of the committee's discussion at the last meeting. The committee generally liked the format of the form (asking separate questions about fault and causation for each person alleged to have been at fault). At Mr. Simmons's suggestion, the instructions following questions (3) and (4) were changed to say "go to the next set of instructions" rather than "answer the next set of instructions." The heading "Next set of instructions" was highlighted. At Mr. Ferguson's suggestion, "Question" was inserted before the number of each question. Mr. Simmons pointed out that the heading to questions 5 and 6 says "[Name of plaintiff]," but the questions ask about the fault of the decedent. Mr. Johnson pointed out that in a given case the fault of both the plaintiff and the decedent may be relevant. The parties and court can add additional sections for each person alleged to have been at fault. The committee thought that a committee note should be added to that effect, to tell the court and counsel that the form may need to be tailored to fit the circumstances of the case. Mr. Simmons suggested that the phrase "the harm" in questions 9 through 12 be replaced with "[name of decedent]'s death." The committee approved the verdict form up to the damages section.

Mr. Simmons noted that question 13 did not reflect all of the damages recoverable in a wrongful death action. Mr. Summerill noted that the question had been

revised to read, "What amount fairly compensates [name of plaintiff] for the loss of [name of decedent]?" Mr. West noted that there would need to be separate lines for each heir (and for each decedent in a case involving multiple deaths). At Mr. Johnson's suggestion, the committee decided to reverse the order of questions 13 and 14. Mr. Carney noted that the law requires an award of general damages if the jury awards special damages, so the revised order of the instructions makes sense. He further noted that a Utah appellate decision held that a party could waive its right to collect general damages by agreeing to a verdict form that asks the jury what amount "if any" would fairly compensate the plaintiff. Mr. Carney therefore moved to delete the phrase "if any" from all verdict forms. The motion passed without opposition. Mr. Summerill noted that the form could be modified to apply to personal injury cases as well as death cases. He suggested that the damage questions ask the jury to determine the amount of "economic" and "noneconomic" damages. Mr. Shea noted that "economic" and "noneconomic" damages are defined in CV2003 and CV2004. Mr. Simmons pointed out, however, that the instructions on wrongful death damages (CV2013 and CV2014) do not use the terms "economic" and "noneconomic" damages and asked whether those instructions should be revised to define the two types of damages. Mr. Carney noted that in a wrongful death case there may also be a survival claim, which belongs to the estate. He suggested adding another question before the damage questions, asking whether the decedent experienced conscious pain and suffering before he died. Mr. Ferguson suggested phrasing the question, "Did [name of decedent] incur noneconomic damages before [his] death." Some thought that the question was too sterile. Mr. Summerill suggested substituting "harm" for "noneconomic" damages.

Mr. Fowler was excused.

The committee also debated whether survival damages are recoverable where the injured party may be in a coma and may never come out of it before dying. Mr. Ferguson also noted that there is an argument for not allowing the recovery of funeral and burial expenses in a wrongful death case, since they would have been incurred when the decedent died in any event. At the suggestion of Messrs. Carney and Summerill, the committee decided to defer further discussion of the damage section of the verdict form to allow the committee more time to think about it.

6. *Discouraging Use of MUJI 1st*. Mr. Carney noted that attorneys are still requesting MUJI 1st instructions, even those that have been preempted by MUJI 2d and those the Utah Supreme Court has said should not be given. He thought it would be helpful to have a correlation table or comparison chart cross-referencing the MUJI 1st instructions with the MUJI 2d instructions and explaining why some MUJI 1st instructions are not included in MUJI 2d. Judge Toomey and Mr. Summerill noted that Chief Justice Durham has already written a letter, included on the MUJI 2d website, that says MUJI 2d should be used "to the exclusion of other instructions." They

suggested simply adding a sentence that says that if an instruction is not included in MUJI 2d, the omission was intentional. The committee thought a correlation table would still be useful. Mr. Ferguson suggested also cross-referencing JIFU. Mr. Young suggested asking each subcommittee to prepare the table for its section. Mr. Carney said he would do the table for the medical malpractice instructions first, so that the committee could review and approve the format before other subcommittees are asked to do the same for their sections.

7. *Next Meeting*. There will be no committee meeting in July or August 2011. The next meeting will be Monday, September 12, 2011, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

(1) CV131 Spoliation.

You may consider whether [name of party] intentionally concealed, destroyed, altered, or failed to preserve evidence. If so, you may assume that the evidence would have been unfavorable to [name of party].

References

Hills v. United Parcel Service, Inc., 2010 UT 39, 232 P.3d 1049.

Daynight, LLC v. Mobilight, Inc., 2011 UT App 28, 248 P.3d 1010.

Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994).

URCP 37(g).

Committee Notes

Utah appellate courts have not recognized a cause of action for first-party spoliation (a claim against a party to the underlying action – or the party's attorney – who spoliates evidence necessary or relevant to the plaintiff's claims against that party), or a cause of action for third-party spoliation (a stranger to the underlying action or a party not alleged to have committed the underlying tort as to which the loss or destroyed evidence is related). Hills v. United Parcel Serv., Inc., 2010 UT 39, 232 P.3d 1049; Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994). Rule 37(g), however, expressly provides authority to trial courts to address spoliation of evidence by a litigant, including instructing the jury regarding an adverse inference. See, URCP 37(b)(2)(F).l

In Daynight, LLC v. Mobilight, Inc., 2011 UT App. 28, 248 P.3d 1010, the Utah Court of Appeals observed that "spoliation under Rule 37(g), meaning the destruction and permanent deprivation of evidence, is on a qualitatively different level than a simple discovery abuse under Rule 37(b)(2) which typically pertains only to a delay in the production of evidence. . . . [R]ule 37(g) of the Utah Rules of Civil Procedure does not require a finding of 'willfulness, bad faith, fault or persistent dilatory tactics' or the violation of court orders before a court may sanction a party." Id. at ¶ 2.

The standard announced by the Daynight court differs from that employed by the United States Court of Appeals for the Tenth Circuit. Spoliation sanctions are proper in federal court when (1) a party has a duty to preserve evidence because it knew, or should have known the litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. If the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case. Without a showing of bad faith, a district court may only impose lesser sanctions. Turner v. Public Serv. Co., 563 F.3d 1136, 1149 (10th Cir. 2009). In addition, it is appropriate for a federal trial court to consider "the degree of culpability of the party who lost or destroyed the evidence." North v. Ford Motor Co., 505 F. Supp. 2d 1113, 1116 (D.Utah 2007).

The discussion by the Utah Court of Appeals in Daynight appears to indicate that even the negligent destruction of evidence will be sufficient to trigger a spoliation instruction without a finding of willfulness or bad faith.

Tab 3

Members of the jury: Please answer the following questions in the order they are presented. If you find that the issue has been proved by a preponderance of the evidence, answer "Yes," if not, answer "No." At least six jurors must agree on the answer to all of the required questions, but they need not be the same six on each question. When 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 advise the bailiff that you have reached a verdict.

[Name of defendant A]

Question (1) Was [name of defendant A] at fault? (If you answer "Yes," answer Question (2). If you answer "No," answer Question (3).) ☐ Yes ☐ No

Question (2) Was [name of defendant A]'s fault a cause of [name of decedent]'s death? (Regardless of your answer, answer Question (3).) ☐ Yes ☐ No

[Name of defendant B]

Question (3) Was [name of defendant B] at fault? (If you answer "Yes," answer Question (4). If you answer "No," go to the next set of instructions.) ☐ Yes ☐ No

Question (4) Was [name of defendant B]'s fault a cause of [name of decedent]'s death? (Regardless of your answer, go to the next set of instructions.) ☐ Yes ☐ No

Next set of instructions: If both Questions (2) and (4) are unanswered or answered "No," stop here, have the foreperson sign the verdict form, and advise the bailiff. If either Question (2) or (4) is answered "Yes," answer Question (5).

[Name of decedent]

Question (5) Was [name of decedent] at fault? (If you answer "Yes," answer Question (6). If you answer "No," answer Question (7).) ☐ Yes ☐ No

Question (6) Was [name of decedent]'s fault a cause of [his] own death? (Regardless of your answer, answer Question (7).) ☐ Yes ☐ No

[Name of third party]

Question (7) Was [name of third party] at fault? (If you answer "Yes," answer Question (8). If you answer "No," answer Questions (9)-(12).) ☐ Yes ☐ No

Question (8) Was [name of third party]'s fault a cause of [name of decedent]'s death? (Regardless of your answer, answer Questions (9)-(12).) ☐ Yes ☐ No

Comparative fault

Question (9) What percent of the fault that caused [name of decedent]'s death is attributable to [name of defendant A]. (If your answer to either (1) or (2) is "No," then enter zero.) _____ %

Question (10) What percent of the fault that caused [name of decedent]'s death is attributable to [name of defendant B]. (If your answer to either (3) or (4) is "No," then enter zero.) _____ %

Question (11) What percent of the fault that caused [name of decedent]'s death is attributable to [name of plaintiff]. (If your answer to either (5) or (6) is "No," then enter zero.) _____ %

Question (12) What percent of the fault that caused [name of decedent]'s death is attributable to [name of third party]. (If your answer to either (7) or (8) is "No," then enter zero.) _____ %

The total must equal 100% 100 %

If [name of plaintiff]'s fault is 50% or more, stop here, have the foreperson sign the verdict form, and advise the bailiff. If [name of plaintiff]'s fault is less than 50%, answer Questions (13) and (14). Do not deduct from the damages any percentage of fault that you have assessed to [name of plaintiff]. The judge will make any necessary deductions later.

Damages

Question (13) What amount fairly compensates [name of plaintiff] for ~~medical and funeral expenses~~ economic damages? $ _____

Question (14) What amount fairly compensates [name of plaintiff] for ~~the loss of affection, counsel and advice; the loss of care and solicitude for the welfare of the family; and loss of the comfort and companionship of~~ [name of decedent]'s death? $ _____

When 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 advise the bailiff that you have reached a verdict.

_____ Sign here ► _____

Date Jury Foreperson

Committee Notes

The verdict form must be tailored to fit the circumstances of the case. Add or remove sections about parties as needed to account for different tortfeasors. Similarly, in the

section on comparative fault, add or remove lines as needed to account for different tortfeasors. In the section on damages, add or remove lines as needed to describe the damages of each heir and of each decedent.

Where we left off (From the minutes):

Mr. Summerill noted that the form could be modified to apply to personal injury cases as well as death cases. He suggested that the damage questions ask the jury to determine the amount of “economic” and “noneconomic” damages. Mr. Shea noted that “economic” and “noneconomic” damages are defined in CV2003 and CV2004. Mr. Simmons pointed out, however, that the instructions on wrongful death damages (CV2013 and CV2014) do not use the terms “economic” and “noneconomic” damages and asked whether those instructions should be revised to define the two types of damages. Mr. Carney noted that in a wrongful death case there may also be a survival claim, which belongs to the estate. He suggested adding another question before the damage questions, asking whether the decedent experienced conscious pain and suffering before he died. Mr. Ferguson suggested phrasing the question, “Did [name of decedent] incur noneconomic damages before [his] death.” Some thought that the question was too sterile. Mr. Summerill suggested substituting “harm” for “noneconomic” damages.

The committee also debated whether survival damages are recoverable where the injured party may be in a coma and may never come out of it before dying. Mr. Ferguson also noted that there is an argument for not allowing the recovery of funeral and burial expenses in a wrongful death case, since they would have been incurred when the decedent died in any event. At the suggestion of Messrs. Carney and Summerill, the committee decided to defer further discussion of the damage section of the verdict form to allow the committee more time to think about it.

Tab 4

MUJI 1st to MUJI 2d Medical Malpractice Correlation Table

The MUJI 2d medical malpractice instructions are intended to entirely replace MUJI 1st; therefore, MUJI 1st should not be used. JIFU (1957) should also not be used. Any instruction that appeared in MUJI 1st but is not in MUJI 2d was intentionally omitted by the MUJI Committee.

MUJI 1st	Title	MUJI 2d
6.1	Duty to Comply With Standard of Care	CV301B.
6.2	Expert Testimony Required	CV326.
6.3	Duty to Refer	CV305.
6.4	Duty to Disclose Material Medical Information	CV304.
6.5	Duty to Obtain Informed Consent	CV310.
6.6	Substantial and Significant Risk Defined	CV312.
6.7	Elements of Informed Consent	CV311.
6.8	Standard for Judging Patient's Consent	CV313.
6.9	Persons Authorized to Give Consent	Deleted. Identifies the persons statutorily empowered to give actual consent to treatment, and the committee determined that this would rarely be a jury issue.
6.10	Oral Consent	CV314.
6.11	Implied Consent	CV315.
6.12	"Minor Risk" Defense	Deleted as simply restating the need to prove that the risk was "substantial and significant." Use CV 312 and 311.
6.13	"Common Knowledge" Defense	CV316.
6.14	"Oral Consent" Defense	CV317.
6.15	"Reasonable Disclosure" Defense	CV318.
6.16	"Written Consent" Defense	CV319.
6.17	Duty to Warn of Injury Avoidance	CV306.
6.18	Duty of Specialist	Deleted. Use CV301B. The Committee determined that an historical instruction solely devoted to "specialists" is unnecessary in this age of board certification and the decline of the "general practitioner."
6.19	Standard of Nationally-Trained Specialist	Deleted. Use CV301B, and see preceding note.
6.20	Duty of Hospital Toward Patient	CV307.
6.21	Duty Owed By Nurse to Patient	CV302.
6.22	Care Owed By Nurse Under Varying Circumstances	CV303.

MUJI 1st	Title	MUJI 2d
6.23	Negligence of Patient- Failure to Follow Practitioner's Instructions	CV321.
6.24	Patient May Rely on Physician Advice	CV329.
6.25	Patient Negligence- Medical History	CV322.
6.26	Duty to Volunteer Medical Information	Deleted. Use CV322.
6.27	Physician Not Guarantor of Results	Deleted. See, Green v. Louder, 2001 UT 62, 29 P.3d 638 ("The mere fact that an accident or injury occurred does not support a conclusion that the defendant or any other party was at fault or negligent" was an inappropriate instruction) and Randle v. Allen, 863 P.2d 1329 ("Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable for injuries resulting from it" also inappropriate.) Randle noted that these types of instructions divert the jury from the primary issue of negligence and create the impression of "extra hurdles" to be overcome in order to prevail. It also noted that such instructions reemphasize a defendant's theory of the case and may constitute improper judicial comment on the evidence. 862 P.2d 1335-6.
6.28	Physician May Assume Hospital Compliance with Orders	CV308.
6.29	Use of Alternative Treatment Methods	CV324.
6.30	Out of State/Town Experts	Deleted. Use CV135.
6.31	Conflict Between Medical Experts	Deleted. Use CV136.
6.32	Res Ipsa Loquitor	CV327.
6.33	Common Knowledge Eliminates Need for Expert Testimony	CV328.
6.34	Proof of Medical Causation Required	Deleted. Use CV309.
6.35	Proof Required for Proximate Cause	Deleted. Use CV309.
6.36	No Recovery for Oral Promises	CV330.
6.37	Discovery of an Injury	CV325.

Tab 5

MEMORANDUM

To: MUJI Civil Committee
From: Francis J. Carney
Date: September 1, 2011
Subject: Punitive Damages Instructions

I confess that trying to draft a set of punitive damage instructions proved much more difficult than I anticipated. There have been several cases that have gone to trial with punitive damage instructions given, and I have used these as the basis for my drafts. That, of course, is the easiest route, but it may well not be the best approach. We have members on our Committee who are very familiar with the law of punitive damages, and I trust that they can assist in pointing out errors I have made and suggest needed changes.

MUJI 1st (1993) contained a single instruction on punitive damages, 27.10:

> PUNITIVE DAMAGES
>
> *In addition to the actual damages the plaintiff alleges to have sustained, the plaintiff also seeks to recover punitive damages against the defendant. Punitive damages may be awarded only if compensatory or general damages are awarded and it is established by clear and convincing evidence that the acts or omissions of the defendant were a result of willful and malicious conduct, or conduct that manifested a knowing and reckless indifference toward, and a disregard of, the rights of others.*
>
> *If you find that punitive damages are proper in this case, you may award such sum as, in your judgment, would be reasonable and proper as a punishment to the defendant for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and are not the measure of actual damage.*

Our statutory scheme anticipates two sets of punitive damage instructions. The first set is given in the main trial, and only addresses the issue of whether punitive damages should be awarded at all. The second set concerns the amount of punitive damages and is used in the phase-two trial just on punitive damages.

For unknown reasons, 1 MUJI 27.10 did not include the "seven factors" for a jury to consider in awarding punitive damages set forth in Crookston v. Fire Insurance Exchange, 817 P.2d 789 (Utah 1991)(this case is attached). Those factors are:

> "The stated list of factors we have said must be considered in assessing the amount of punitives to be awarded include the following seven: (i) the relative wealth of the defendant; (ii) the nature of the alleged misconduct; (iii) the facts and circumstances surrounding such conduct; (iv) the effect thereof on the lives of the plaintiff and others; (v) the probability of future recurrence of the misconduct; (vi) the relationship of the parties; and (vii) the amount of actual damages awarded. " Crookston I at p. 27.

I have tried to find cases that went to trial and where punitive damages instructions were actually given. I have located three.

All of these cases contain the "general" punitive damages language from the statue and then a separate instruction on the "Crookston seven factors." These cases are CPG v Westgate Resorts (a 2008 case tried by Rich Humpherys), Hart v Alpine Country Club, (a case that went to verdict in August 2011 in Provo), and Haug v. La Caille.

As the lawyers on the Committee know, there have been significant limitations imposed on punitive damages in the case of Campbell v State Farm and others. A significant issue is the punishment of a defendant for conduct that occurred in other states, something the US Supreme Court held was inappropriate. As the note to CACI 2940 says:

> *Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See Philip Morris USA v. Williams (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See State Farm Mutual Automobile Insurance Co. v. Campbell (2003) 538 U.S. 408, 419- "A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."An instruction on this point should be included within this instruction if appropriate to the facts.*

The new California instructions on punitives, CACI 3940- 3949 are extensive and complex. I attach them in full.

As you can see in CACI 3940, they define "malice," "oppression" right in the instruction. Do we want to try to define the statutory predicate terms or leave it as is?

As I said before, I have gone with the simpler route, as a starting point for our discussion. I am not wedded to this.

(1) CV 2026. Punitive damages. (Trial Phase One).

In addition to ~~the~~ actual damages, [name of plaintiff] ~~alleges to have sustained, [he] also~~ seeks to recover punitive damages ~~against [name of defendant]~~. Punitive damages may be awarded only if:

(1) compensatory damages are awarded; and if

(2) it is ~~established~~ proved by clear and convincing evidence that the acts of [name of defendant] were a result of willful and malicious or intentionally fraudulent conduct, or conduct that manifested a knowing and reckless indifference toward, and a disregard of, the rights of others.

In the Special Verdict form ~~that you will receive~~, you will be asked to answer a question on punitive damages. You will answer that question only if you find that [name of defendant] [committed a fraud, or other basis for awarding punitive damages]. If you answer that question "no", your deliberations on ~~that particular claim~~ punitive damages are ~~concluded~~ finished. If you answer the question "yes", the amount of punitive damages awarded will be reserved for further consideration at a later time.

References

Utah Code Section 78B-8-201.

Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991).

MUJI 1st Instruction

27.20

Committee Notes

(2) CV 2027 Vicarious punitive damages liability. (Trial Phase One).

You may find [name of defendant] liable for punitive damages resulting from the acts or conduct of [his] agent only if you find at least one of the following to be true:

(1) [name of defendant] or a managerial agent authorized the agent's specific conduct that caused the injury and the manner in which that conduct was carried out; or

(2) the agent was unfit and [name of defendant] or its managerial agent was reckless in retaining the agent; or

(3) the agent was employed in a managerial capacity and was acting within the scope of employment; or

(4) [name of defendant] or a managerial agent ratified or approved the agent's specific conduct that caused the injury.

References

Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

Restatement (Second) of Torts § 909 (1977).

Restatement (Second) of Agency § 217C (1957).

MUJI 1st Instruction

25.20

Committee Notes

(3) CV 2028 Punitive damages as punishment. (Trial Phase Two).

You have previously found that punitive damages are proper in this case, and thus you may award such sum as, in your judgment, would be reasonable and proper as a punishment of [name of defendant] for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and not as the measure of actual damages.

References

MUJI 1st Instruction

27.20

Committee Notes

(4) CV 2029 Amount of punitive damages. (Trial Phase Two).

In determining the amount of punitive damages, you should take into account these factors:

(1) the relative wealth of [name of defendant];

(2) the nature of the alleged misconduct;

(3) the facts and circumstances surrounding such conduct;

(4) the effect of the conduct on the lives of the consumers and others;

(5) the probability of future recurrence of the misconduct;

(6) the relationship of the parties; and

(7) the amount of actual damages awarded.

References

Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991).

MUJI 1st Instruction

Committee Notes