

Judicial Council Standing Committee on
Model Utah Civil Jury Instructions

Agenda

October 16, 2023

4:00 to 6:00 p.m.

[Via Webex](#)

Welcome and Approval of September Minutes	Tab 1	Alyson/Lauren
Public Comments to CV632 and CV632A-D	Tab 2	Alyson
CV132A Out-of-State Witnesses draft instruction	Tab 3	John Macfarlane
CV2021 Advisory Committee Notes; <i>Brinkerhoff v. Fleming</i> , 2023 UT App 92, ¶19 n.4.	Tab 4	Alyson
Progress on Instruction Topics	Tab 5	(Informational)

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Monthly on the 2nd Monday at 4 pm

Next meeting: November 13, 2023

TAB 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 11, 2023
4:00 p.m.

Present: Judge Keith A. Kelly, Lauren A. Shurman, Alyson McAllister, William Eggington, Mark Morris, John Macfarlane, Michael D. Lichfield, Stewart Harman, Jace Willard.

Also present: Clark Cunningham, Jesse Egbert, Scott Jarvis, Robert J. Fuller, Robert B. Cummings

Excused: Judge Kent Holmberg, Douglas G. Mortensen, Ricky Shelton, Adam Wentz

1. Welcome

Alyson McAllister welcomed the Committee.

2. Approval of Minutes

July meeting minutes approved.

3. Welcome new Committee member (Stewart Harman)

Ms. McAllister welcomed Stewart Harman as a new Committee member (effective 8/18/23). Mr. Harman introduced himself to the Committee and Committee members introduced themselves.

4. CV107A, CV632, CV632A-CV632D

Mr. Willard noted that no public comments had been received as to several recently published instructions (CV 107A, CV632, CV632A, CV632B, CV632C, and CV632D). The instructions were thus approved as final.

5. Language and Law Research Proposal

William Eggington introduced his professional linguist colleagues (Clark Cunningham, Jesse Egbert, and Scott Jarvis) to the Committee, with their written proposal to collaborate with the Committee. Mr. Cunningham discussed the linguists' experience and background, and suggested that the Committee could propose certain instructions to be reviewed by the linguists for understandability by lay members of the public. Judge Kelly suggested that the linguists might begin by reviewing the stock instructions in the CV100 series as those are the most frequently used instructions. Ms. McAllister invited volunteers to form a subcommittee. A subcommittee was formed, comprised of Judge Kelly, John Macfarlane, Michael Lichfield, Robert B. Cummings, Bill Eggington, Clark Cunningham, Jesse Egbert, and Scott Jarvis. Mr. Willard will email the CV100 series instructions and a scheduling poll to the Subcommittee.

6. *CV920 “Easement” Defined.*

- Beginning with CV920, Mr. Cummings led a discussion of the draft prescriptive easement instructions, which were partially addressed during a prior meeting. He and Robert J. Fuller suggested that this draft instruction is correct. No Committee member raised any concerns with this instruction.

7. *CV921 Prescriptive Easement. Introduction.*

- This instruction was discussed and revised during a prior meeting. No concerns were raised as to this instruction.

8. *CV922 Easement by Implication. Introduction.*

- The Committee reviewed certain feedback and proposed revisions to this instruction sent via email to Lauren Shurman by Christopher Hogle. Mr. Hogle’s email expressed concern that this instruction does not correctly reflect the law because it omits the “claim of right” requirement mentioned in *Judd v. Bowen*, 2017 UT App 56, ¶ 10, 397 P.3d 686, and *Valcarce v. Fitzgerald*, 961 P.2d 305, 311 (Utah 1998). Mr. Fuller pointed to language in a recent case setting forth prescriptive easement elements in *M.N.V. Holdings LC v. 200 South LLC*, 2021 UT App 76, ¶ 9, 494 P.3d 402, without mention of the “claim of right” requirement. Mr. Lichfield and Mr. Cummings were of the view that the “claim of right” requirement was essentially already included in the requirement that any use be adverse, as indicated in the third element of the instruction.
- Pursuant to a suggestion by Mr. Eggington, the 20-year requirement stated in the fourth element was placed in the phrase immediately preceding the elements in this instruction.

9. *CV923 Prescriptive Easement. “Open and Notorious” Defined.*

- Mr. Eggington suggested that the meaning of the term “notorious” in this instruction is not sufficiently clear, given the negative historical meaning. Pursuant to this suggestion, Mr. Cummings added a quote from the Utah Property Ombudsman website (<https://propertyrights.utah.gov/find-the-law/legal-topics/>). Mr. Eggington said this resolved his concerns.

10. *CV924 Prescriptive Easement. “Adverse” Defined; CV925 Presumptions and Rebuttals.*

- Mr. Cummings suggested that the first paragraph of this instruction was sufficient to define “adverse.” Addressing Mr. Hogle’s concerns regarding the second paragraph, Mr. Cummings suggested it should be made part of a separate instruction dealing with presumptions and rebuttals. Regarding the latter point, Mr. Fuller pointed to language in *Harrison v. SPAH Family Ltd.*, 2020 UT 22, ¶¶ 31 & 32, n.16, 466 P.3d 107, which addresses the issue.
- Mr. Cummings will put together a draft for this separate instruction (CV925) for the Committee to consider next month. Mr. Willard will review the appropriate references for CV924.

11. *CV926 Prescriptive Easement. “Continuous” Defined.*

- Mr. Cummings suggested that the second paragraph of this instruction should use the term “not continuous” rather than “interrupted” for the sake of consistency in terms.
- Ms. McAllister suggested reformatting the itemized list in this instruction for improved readability.

12. *CV132A Prescriptive Easement. “Continuous” Defined.*

- Mr. Macfarlane presented proposed instruction CV132A, addressing the assessment of witness credibility based on where the witness lives and whether the witness appears remotely rather than in person. The Committee discussed the possibility that there may be instances when a witness’s place of origin could affect the witness’s ability to give reliable testimony as to an event occurring in another state. The Committee agreed it would be better to limit this instruction to remote vs. in-person appearances. Mr. Eggington suggested that the phrase “discount the opinions” in this instruction might be confusing since the word “discount” is usually used today to refer to something being offered at a reduced price.

13. *October Meeting Date*

- The Committee agreed that, due to the Columbus Day holiday, the October Committee meeting will be held on the 16th rather than the 9th.

The meeting concluded at approximately 6:10 PM.

TAB 2

CV632 Minimum Injury Requirements.

[Name of defendant] claims that [name of plaintiff] has not met the minimum injury requirements and therefore cannot recover non-economic damages.

In order to recover non-economic damages resulting from an automobile accident [name of Plaintiff] must prove [he/she] has suffered one of the following:

[(1) death.] or

[(2) dismemberment.] or

[(3) permanent disability or permanent impairment based on objective findings.] or

[(4) permanent disfigurement.] or

[(5) a bone fracture.] or

[(6) reasonable and necessary medical expenses in excess of \$3,000.]

References

Utah Code Section 31A-22-309(1)(a).

Pinney v. Carrera, 2020 UT 43, 469 P.3d 970.

CV632A “Permanent Disability” Defined.

A “permanent disability” is an inability to work that is reasonably certain to continue throughout the life of the person suffering from it.

References

Pinney v. Carrera, 2019 UT App 12, ¶¶ 23-25, 438 P.3d 902, aff'd, *Pinney v Carrera*, 2020 UT 43, 469 P.3d 970.

CV632B “Permanent Impairment” Defined.

A “permanent impairment” is the loss of a bodily function that is reasonably certain to continue throughout the life of the person suffering from it.

References

Pinney v. Carrera, 2019 UT App 12, ¶¶ 23-25, 438 P.3d 902, aff'd, *Pinney v Carrera*, 2020 UT 43, 469 P.3d 970.

CV632C “Permanent Disfigurement” Defined.

A “permanent disfigurement” is a disfigurement that is reasonably certain to continue throughout the life of the person suffering from it.

References

Pinney v. Carrera, 2019 UT App 12, ¶¶ 23-25, 438 P.3d 902, aff'd, *Pinney v Carrera*, 2020 UT 43, 469 P.3d 970.

Committee Notes

Unlike disability and impairment, what is meant by "disfigurement" under this statute does not appear to have been defined so this definition just focuses on the "permanent" aspect. (In fact, the Supreme court specifically declined to reach the issue of disfigurement in *Sheppard v. Geneva Rock*, 2021 UT 31, ¶ 45 n.8, 493 P.3d 632, because it resolved the case on other grounds.) Only provide the jury with these definitions if applicable to the threshold or thresholds the plaintiff claims to meet.

CV632D “Objective Findings” Defined.

To be considered objective, a finding that [plaintiff] is permanently disabled or permanently impaired must be based on externally verifiable evidence; that is, the finding must be based on something other than [plaintiff's] own subjective testimony.

References

Pinney v. Carrera, 2019 UT App 12, ¶¶ 26-27, 438 P.3d 902, aff'd, *Pinney v. Carrera*, 2020 UT 43, ¶¶ 21-29, 469 P.3d 970.

Committee Notes

Testimony from an expert or treating physician could satisfy the “objective findings” requirement.

Mark Anderson (8/8/23 via email)

Background: Active full time practice of Emergency Medicine and, Occupational and Environmental Medicine.

Minimal Injury Requirements: I would wish this to require rational diagnoses based defined objective medical findings. Too often I see a diagnosis of just "Pain." Even more common is "Somatic and segmental dysfunction" It is an ICD 10 code but absolutely meaningless as it is vague, vacuous, non-specific and worthless in directing any type of care. It is even decried by the Canadian Chiropractic Assoc.

Permanent Disability: A "permanent disability" is an inability to work that is reasonably certain to continue throughout the life of the person suffering from it."

When I was a medical director for the U.S. Postal Service there was an instruction on every certificate signed by the doctor which explained that even though a person was blind they could work. Even though they were deaf they could work. Even though they were both, they could work.

It needs to state, as in some disability insurance plans, "Any and all occupations" and specify not just "own occupation" or the later with be automatically assumed by the doctor.

Too often the doctor just states, "Can't work" That should require a detailed rational, defensible medically based explanation as to why.

Perhaps work should be defined as an activity for compensation or any equivalent recreational or home bound equivalent. Specific restrictions must be outlined

Objective Findings, defined.

"Testimony from an expert or treating physician could satisfy the "objective findings" requirement.

Such testimony must be limited to and based solely on objective findings. Too often experts testify as to headache, neck pain, and other symptoms . These are subjective and not objective and must be excluded (objected to) for the jury to understand. Otherwise they are accepted as medical objective fact, which they are not.

Sincerely,
Mark Anderson, M.D.

TAB 3

CV132A Remote testimony.

You may not discount the opinions of a witness merely because ~~of how~~ their testimony was ~~delivered~~ given remotely to the jury, be it in person or by ~~through~~ audio or visual means.

TAB 4

The Court of Appeals recently mentioned [CV2021](#) in a footnote as follows:

Brinkerhoff also challenges the district court's ruling that she needed to submit expert testimony to reduce her future medical expenses to present value. As we affirm on causation, we do not need to reach the medical expenses issue. But we do note our disagreement with the court's determination that Brinkerhoff needed an expert to reduce her future medical damages to present value. Model Utah Jury Instruction CV2021 provides direction on how to calculate future damages, and while having an expert testify about that calculation is usually preferred, such expert testimony is not required when a party like Brinkerhoff claims future damages. *See* Model Utah Jury Instructions 2d CV2021 (2023), https://legacy.utcourts.gov/muji/inc_list.asp?action=showRule&id=20#2021 [<https://perma.cc/C2UA-63AZ>].

Brinkerhoff v. Fleming, 2023 UT App 92, ¶ 19 n.4.

CV2021 Present cash value.

If you decide that [name of plaintiff] is entitled to damages for future economic losses, then the amount of those damages must be reduced to present cash value. This is because any damages awarded would be paid now, even though the plaintiff would not suffer the economic losses until some time in the future. Money received today would be invested and earn a return or yield.

To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely invested, will provide [name of plaintiff] with the amount of money needed to compensate [name of plaintiff] for future economic losses. In making your determination, you should consider the earnings from a reasonably safe investment.

References

Florez v Schindler Elevator, 2010 UT App 254 (Absence of life expectancy evidence does not preclude award of future medical costs as damages.)
Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc., 2004 UT App 322, 110 P.3d 710, cert. denied (Utah 2005).
Bennett v. Denver & Rio Grande Western R. Co., 213 P.2d 325 (Utah 1950).

MUJI 1st Instruction

27.11.

Committee Notes

Utah law is silent on whether inflation should be taken into account in discounting an award for future damages to present value. The United States Supreme Court, however, has ruled that inflation should be taken into account when discounting to present value. See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

Utah law is silent on whether plaintiff or defendant bears the burden of proving present cash value. Other jurisdictions are split. Some courts treat reduction to present value as part of the plaintiff's case in chief. See, e.g., *Abdulghani v. Virgin Islands Seaplane Shuttle, Inc.*, 746 F. Supp. 583 (D. V.I. 1990); *Steppi v. Stromwasser*, 297 A.2d 26 (Del. Super. Ct. 1972). Other courts treat reduction to present value as a reduction of the plaintiff's damages akin to failure to mitigate, on which the defendant bears the burden of proof. See, e.g., *Energy Capital Corp. v. United States*, 47 Fed. Cl. 382 (Fed. Cl. 2000), *aff'd in part, rev'd in part on other grounds*, 302 F.3d 1314 (Fed. Cir. 2002); *CSX Transp., Inc. v. Casale*, 441 S.E.2d 212 (Va.1994). There is a good discussion of the issue in *Lewin Realty III, Inc. v. Brooks*, 771 A.2d 446 (Md. Ct. Spec. App. 2001), *aff'd*, 835 A.2d 616 (Md.

2003), holding the burden to be on the defendant. It cites *Miller v. Union P.R. Co.*, 900F.2d 223, 226 (10th Cir.1990), as support.

There are several Utah cases holding that the burden is on the defendant to show that a damage award should be reduced, but they deal with failure to mitigate, not reduction to present value. See *Covey v. Covey*, 2003 UT App 380, 29, 80 P.3d 553; *John Call Eng'g, Inc. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah Ct. App. 1990).

Expert testimony on annuities as relevant to present value of future damages is permitted. *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322, 110 P.3d 710, cert. denied (Utah 2005). Annuity tables and their related data also are permitted. See *Schlatter v. McCarthy*, 113 Utah 543, 196 P.2d 968 (1948). The Court of Appeals has said that "while having an expert testify about [the present value] calculation is usually preferred, such expert testimony is not required when a party like [the plaintiff] claims future damages." *Brinkerhoff v. Fleming*, 2023 UT App 92, ¶ 19 n.4. ~~But Utah law is silent on whether expert testimony, government tables or other evidence is necessary before a jury is charged to calculate present cash value. Other jurisdictions require evidence before the jury can be instructed to calculate present cash value. See *Schiernbeck v. Haight* 7 Cal.App.4th 869, 877, 9 Cal.Rptr.2d 716 (1992), citing *Wilson v. Gilbert*, 25 Cal.App.3d 607, 614, 102 Cal.Rptr. 31 (1972).~~

TAB 5

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	2023
632, 632A-632D	Minimum Injury Requirements Update	Alyson McAllister and Samantha Slark	Appeared on Agenda September 2023. Public comment to be addressed in October 2023.	Oct. 2023
132A	Remote Testimony	John Macfarlane	Appeared on Agenda September 2023.	Oct. 2023
2021	Present Cash Value Update	Alyson McAllister		Oct. 2023
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Prescriptive Easement draft CV920-925 addressed at January, February, April, and May 2023 meetings. Easement by Necessity draft CV930-931 addressed at April 2023 meeting. Easement by Implication CV940-941 addressed at April and May 2023 meetings. Easement by necessity and implication were approved at the July meeting. Robert Fuller and Robert Cummings addressed Chris Hogle feedback re prescriptive easement CV922 and 924 at Sept. meeting. Robert Cummings will draft and circulate to his group new CV925 instruction to be presented at Oct. meeting.	Nov. 2023
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	Nov. 2023?
2400	Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Kigan Martinaeu	Appeared on Agenda March 2022. Currently 5 members – 3 defense, 2 plaintiffs. Will work on one more plaintiffs attorney.	?
	Unjust Enrichment	David Reymann	Stacy was researching and following up on these instructions.	
1700	Abuse of Process	David Reymann	Instructions were shared in the past, were these completed? Marianna could only find notes as to intention to form this subcommittee.	

2700	Directors and Officers Liability	Adam Buck	Lauren has been working with Adam to fill this group and has reached out regarding a timeframe.	
2500	Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals.	
2300	Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee.	
	Case law updates	TBD	Previous chairs or group leads may have feedback.	

Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022, December 2022
135	Pretrial Delay	December 2022, February 2023
107A	Avoiding Bias	May 2023