Judicial Council Standing Committee on Model Utah Civil Jury Instructions

Agenda

September 9, 2024
4:00 to 6:00 p.m.
Via Webex

Welcome and Approval of May Minutes	Tab 1	Alyson
Public Comments re Removal of CV324 and Related Committee Note	Tab 2	Alyson
CV301C Committee Note	Tab 3	Alyson
Revisit defense letter re CV301C	Tab 4	Alyson
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Committee Web Page

Published Instructions

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

Next meeting: Oct. 21, 2024?

TAB 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 13, 2024
4:00 p.m.-6:00 p.m.

Present: Judge Brian D. Bolinder, William Eggington, Stewart Harmon, Michael Lichfield, John Macfarlane, Alyson McAllister, Doug Mortensen, Ricky Shelton, Jace Willard (staff), Kara H. North (staff)

Excused: Mark Morris, Ben Lusty

Guests: Mitch Rice, Monica Howard

1. *Welcome and Approval of Minutes*

Ms. McAllister welcomed the Committee. The Minutes from the April meeting were approved.

2. *Welcome to Judge Bolinder*

Ms. McAllister welcomed Judge Brian D. Bolinder, from the 7th District, who is the newest Committee member. All members of the Committee introduced themselves.

3. *CV 324 - Use of Alternative Treatment Methods*

The Committee previously voted to remove CV324 and the only remaining issue is whether to include a Committee Note explaining the reason for removing the instruction. Following discussion, Mr. Macfarlane moved to include a Committee Note providing as follows:

> The wording of the removed instruction could have suggested bias in favor of the Defendant. However, there may be circumstances in which some version of an alternative treatment methods instruction would be appropriate.

Ms. McAllister seconded. The Committee unanimously supported the motion.

4. *Public Comments re CV920, 930, 940 Series of Easement Instructions*

No public comments were received in response to the recently added CV920, CV930, and CV940 series of easement instructions. Accordingly, no further action is needed as to those instructions.

5. *Public Comments re CV301B and 301C – Establishing Breach of Standard of Care*

The Committee reviewed public comments received (including a letter signed by a number of defense attorneys) in response to the Committee Note recently added to CV301C.

Ms. McAllister noted that there was a lengthy discussion in the last meeting wherein the majority of the Committee felt that instructions CV301B and 301C as written are correct, and that the jury is specifically instructed to take the instructions as a whole regarding the burden of proof, and

there's no need to reiterate those instructions again in CV301C. Thus, the Committee previously added the *Meeks* case to the references, and added a Committee Note that confirms the Committee met and revisited the issue and felt it was an accurate representation of the law, and states that if someone wants to give 301B and 301C together, they can request that from the court. There was a minority on the Committee that felt that there could be more clarification in the instruction. This is what went out for public comment.

The Committee didn't change the instruction language, just added a Committee Note. The comments received request changes to the CV301C language. The concern is that the instruction as written creates a perception that the defense has a burden that the defense doesn't have.

Following discussion, the Committee agreed that the concerns raised in the public comments have already been considered by the Committee. Mr. Shelton moved that no action be taken in response to the public comments. Mr. Mortensen seconded the motion. The Committee unanimously supported the motion. No further action will be taken at this time.

6. CV___ Assault

Ms. McAllister welcomed Mitch Rice and Monica Howard to present proposed instructions on assault, malicious prosecution, and false arrest. They began with a draft instruction setting forth the elements for assault:

> [Name of plaintiff] claims that [name of defendant] assaulted [him]. To succeed on this claim, [name of plaintiff] must prove the following:
>
> (1) [name of defendant] acted with the intent
>
> (a) to cause harmful or offensive contact with [name of plaintiff]; or
>
> (b) to put [name of plaintiff] in imminent apprehension of a harmful or offensive contact; and
>
> (2) [name of plaintiff] was aware of [name of defendant]'s action and recognized the harmful or offensive contact was about to occur.

Members of the Committee expressed concerns regarding whether a lay jury would have difficulty understanding the phrase "imminent apprehension of," and discussed replacing that phrase with "fear of an imminent." Dr. Eggington will review corpus linguistics for the phrase "imminent apprehension" and consider whether alternate language might be preferable.

Ms. McAllister asked whether there are any recent federal district court cases using different language. Ms. Howard will research this issue.

7. CV___ Harmful of Offensive Physical Contact Defined

Mr. Rice presented a draft instruction defining "harmful or offensive contact" as follows:

> Contact is harmful or offensive if any of the following is true:

(1) [Name of plaintiff] did not consent to the contact either expressly or by implication; or

(2) [Name of plaintiff] expressly communicated that the contact was unwanted; or

(3) No reasonable person would consent to the contact.

Mr. Rice observed that the prior instruction didn't include a definition and felt including that would be helpful. The definition used in the draft is from *Wagner v. Utah Dep't of Human Servs*., 2005 UT 54, ¶ 51, 122 P.3d 599.

Following review of the *Wagner* case, Ms. McAllister thought the first sentence should be combined with subdivision (1) to define harmful or offensive conduct, and that subdivisions (2) and (3) described the conduct included. Mr. Rice and Ms. Howard both agreed, resulting in the following:

> Contact is harmful or offensive if [name of Plaintiff] did not consent to the contact either expressly or by implication. This includes all physical contact that:
>
> (1) [Plaintiff] expressly communicated was unwanted; or
>
> (2) No reasonable person would consent to the contact.

Ms. McAllister pointed out that the case says "directly," and asked Dr. Eggington whether "directly" or "expressly" was better. Dr. Eggington thought "directly" would be better. Following discussion, "directly" was substituted for "expressly" in the first sentence.

8. CV___ Malicious Prosecution

Mr. Rice presented the following draft malicious prosecution instruction:

> [Name of plaintiff] claims [name of defendant] harmed [him] through a malicious prosecution. To succeed on this claim, [name of plaintiff] must prove the following four elements:
>
> (1) [name of defendant] actively initiated or helped to continue criminal proceedings against [name of plaintiff]; and
>
> (2) [name of defendant] did not have probable cause to initiate or help to continue criminal proceedings; and
>
> (3) [name of defendant]'s primary motivation was something other than bringing a criminal to justice; and
>
> (4) The criminal proceedings against [name of plaintiff] ended in [name of plaintiff]'s innocence.

Mr. Rice referenced *Neff v. Neff*, 2011 UT 6, ¶ 52, 247 P.3d 380, for the instruction basis. The "helped to continue" language in subdivision (1) was used in place of "procured." After

discussion, the language “actively initiated” and “initiate” in subparagraphs (1) and (2) was simplified to “began” and “begin.”

Mr. Macfarlane and Ms. McAllister suggested that additional language may be needed to clarify what is meant by a proceeding ending in a plaintiff’s “innocence” in subparagraph (4), given the *Neff* court’s indication that dismissal as part of a plea deal would not suffice. Mr. Rice and Ms. Howard will consider the need for other language to capture this aspect of the *Neff* decision.

9. CV___ Definition of Probable Cause in Malicious Prosecution Claim

Mr. Rice presented the following draft instruction defining “probable cause” for malicious prosecution:

> [Name of defendant] has probable cause for initiating or helping to initiate criminal proceedings against [name of plaintiff] if:
>
> > (1) [name of defendant] believes [name of plaintiff] was guilty; and
> >
> > (2) A reasonable man in [name of defendant]'s position would believe [name of plaintiff] was guilty; and
> >
> > (3) [name of defendant] is sufficiently informed as to the facts and applicable law to justify [name of defendant] initiating or helping to continue the criminal proceeding.

Mr. Rice again referenced *Neff v. Neff*, 2011 UT 6, 247 P.3d 380, to support this instruction. A citation to *Neff* was added to the listed references for this instruction. Other language was simplified, including changing the phrase “initiating or helping to initiate” in the first sentence and a similar phrase in subdivision (3) to “beginning or continuing.”

10. CV___ False Imprisonment

Mr. Rice presented the following draft instruction on false imprisonment:

> [Name of plaintiff] claims [name of defendant] falsely imprisoned [him]. To succeed on this claim, [name of plaintiff] must prove all the following elements:
>
> > (1) [Name of defendant] acted with intent to confine or restrain [name of plaintiff]; and
> >
> > (2) [Name of plaintiff] was [unlawfully or wrongfully] confined or restrained by [name of defendant]; and
> >
> > (3) [Name of plaintiff] knew that [he] was confined or restrained without [his] consent; or [name of plaintiff] was harmed by the confinement or restraint.
>
> [Name of plaintiff] can be confined or restrained by physical force or by verbal threats or by other conduct leading [him] to reasonably believe [he] is not free to leave.

Ms. McAllister raised questions about the definitions of unlawful and wrongful. Mr. Rice suggested that defining these terms might be challenging and would likely be addressed through attorney argument. Ms. McAllister suggested including a note to use "unlawful" with the option for attorneys to use "wrongfully" depending on the case.

Ms. McAllister questioned the need to add a provision regarding "direct or indirect conduct" from the Restatement (Second) of Torts, § 35(1)(b) to the instruction elements or a Committee Note. Mr. Rice and Ms. Howard to consider this question, which will be addressed further at the next meeting.

11. Summer schedule, other pending instructions, and adjournment

The next Committee meeting will be on August 12th and Mr. Willard will follow up with the product liability subcommittee. The meeting adjourned shortly after 6 PM.

TAB 2

Public Comments to CV324 Removal

FROM: James Driessen Wed, May 15, 2024 at 9:20 AM

Please accept the following comment:

Holistic medicine continues to gain mainstream acceptance. These services are not free and not "free to use" as a windfall by the defendant to reduce their liability. A plaintiff is required to mitigate damages and if any health rubric or treatment is used to decrease pain or speed healing, then the cost of the treatment may be considered direct damages or mitigation costs (either or both). A model jury instruction needs to be helpful, but not unfairly prejudicial to either side. What jurists often forget is that evidence and instructions are always "prejudicial." If it helps the jury decide one way or the other, it is "prejudicial" by definition. That is why model jury instructions need to clearly state the law in fair and accurate terms. A one-sentence model jury instruction on "[u]se of alternative treatment methods" would tend to cloud the issues rather than help clarify them. Likewise, the committee note about their reasoning for the removal now also clouds the current state of the law on "alternative treatment methods." The removal itself clouds the legal issue. The "problem" (if there was one with the instruction as highlighted in Turner 310 P.3d 1212) is that simply calling something "alternative," when such treatment has indeed become commonly accepted into mainstream medicine, can itself be unfairly prejudicial.

This model jury instruction could have been fixed simply by removing the word "alternative" in its title. A limiting change rather than removal would also make the proposed committee note much more acceptable under the "unfairly prejudicial" standard.

Comment

"Including the word "alternative" in the instruction could have suggested bias in favor of the Defendant. However, there may be circumstances in which some instruction for multiple or less common treatment methods would be appropriate."

Sincerely,

James Driessen, JD/MBA/BSME, Bar# 9473

Comment on CV324 - Use of Alternative Treatment Methods

From: Michael J. Miller Fri, Jun 28, 2024 at 11:28 AM

. . .
Dear MUJI Committee:

The undersigned attorneys from the Utah State Bar practice in the area of medical malpractice defense. We hereby write to **oppose** the Committee's removal of CV 324 from MUJI 2d. The reasons for our opposition are set forth below. We ask that CV 324 be returned to MUJI 2d and that public comment be allowed and considered before any changes to this instruction are adopted.

Procedural History of Removal of CV 324

The Committee made its decision to remove CV 324 without first giving notice of the proposed action and an opportunity to comment prior to its removal. The Committee's unilateral decision to remove CV 324 is seemingly unprecedented. A review of the Committee's meeting minutes reveals how this surprising action occurred.

MUJI is a Judicial Council Committee under the Utah Code of Judicial Administration. The Code of Judicial Administration does not prescribe procedures specific to MUJI Committee meetings. The MUJI Committee's official website also does not include any rules or procedures overseeing drafting or meetings. For now, Meeting Minutes provide the most insight into the jury instruction revision process.

Apparent Procedure

From June 2021 through May 2024, the Committee held 23 meetings. Meeting Materials indicate that the Committee received public comments nine times in this span. From the Minutes, the Committee generally waits to formally adopt instructions or amendments until after the public comment period. For example, in the January 2024 meeting, the Committee voted to formally adopt CV132A once it noted that there were no public comments. Similar processes were followed in the September 2023 meeting on CV107A, CV632, CV632A, and CV632D, all of which were approved after noting there were no public comments. In February 2023, the Committee voted to keep proposed language in CV1607 in the absence of public comments on the amendment.

Similarly, when there are public comments, the Minutes indicate that the Committee will present, discuss, and consider public comments before voting to adopt an amendment. The Committee followed this procedure for CV2021 in the January 2024 meeting. In February 2023, the Committee reviewed a public comment on CV135 before voting to approve proposed clarifying language.

The Utah Judicial Council can also provide feedback on proposed instructions. In the December 2022 meeting, the Committee discussed Judicial Council feedback on instructions

on avoiding bias. If the Judicial Council does not approve or disapprove of a proposed instruction, the Committee can send the instruction to the Board of District Court Judges for review or publish the instruction for public comment. Ultimately, the Committee decides which to do. Based off Meeting Materials for December 2022, the Committee sends all proposed jury instructions to Utah State Bar members for public comment. Here, the Committee sent this instruction on avoiding bias to the Judicial Council because of the possibility of controversy in the community "about the existence and impact of implicit bias." However, the Materials indicate that this is not common, and the normal review process is to send proposed instructions for public comment.

The courts can also request that the Committee review certain instructions to be modified. For example, the Utah Supreme Court recommended the Committee review CV301C in Footnote 5 of *Meeks v. Peng*, 2024 UT 5, 545 P.3d 226. The Committee subsequently reviewed CV301C in the March 2024 meeting. This also appears to be uncommon because there were no similar instances in the last three years.

MUJI Committee Minutes on CV324

Minutes from the May 2024 meeting are still pending. Only the May Materials and the March Minutes discussing CV324 are available.

Todd Wahlquist from the Medical Malpractice Committee of the Utah Association for Justice was a guest at the March meeting and discussed potential issues with CV324. The Committee based its discussion on a case from eleven years ago, *Turner v. University of Utah Hospitals and Clinics*, 2013 UT 52, 310 P.3d 1212, wherein the trial judge issued a jury instruction based on CV324 for alternative treatment methods. Turner appealed the jury verdict of no negligence, alleging the district court erred by giving the instruction and that the jury was biased. The Supreme Court held that the lower court erred by including this instruction because there was "no evidence of any approved, alternate treatment method in the case."

Mr. Wahlquist advocated for the removal of CV324, telling the Committee that the instruction may lead the jury to side with the defense because the court instructs them that there is more than one way to treat the plaintiff as a matter of law. However, some argued that the word "may" leaves it within the discretion of the jury, or that the instruction should be given when there is evidence that there is more than one way to meet the standard of care. After this discussion, a majority voted to remove the instruction. While the Committee did remove the instruction, it decided that there may be times where the instruction is still appropriate. Consequently, the Committee chose to note the removal, but stated that parties can still submit the instruction to the court for consideration. Discussion was scheduled to continue on the topic in the May meeting, however, the Minutes are not published yet. The next Committee meeting is scheduled for August.

Critically, there were no public comments in February or March 2024, prior to the Committee's decision to remove CV324. Based on the Minutes, CV324 was only brought up in the March 2024 meeting, **so the public had no notice to send comments prior to the instruction's removal**. This is unusual based on Minutes reviewed from the last three years. It

is deeply concerning that advocacy by Mr. Wahlquist – an attorney who makes his living suing medical providers – prompted the Committee's decision to remove CV324 without public comment.

Prior Meeting Minutes include instances where the Committee "informally approves" instructions, putting off a final vote until the next meeting, as in January 2024 for CV925A and June 2021 for CV1055. However, the Committee removed CV324 rather than opting for an "informal" decision as it has done in the past. The March Minutes note that discussion on CV324 would continue at the next meeting, but the May Minutes are not published and so it is unclear if discussion occurred.

There is possibly one other example of the Committee removing instructions in the June 2021 Minutes. The Minutes indicate that the Committee struck "CV1056 Product Liability- No duty to make a safe product safer" altogether after comparison with CV1002. However, the Committee noted it thought that CV1056 contained instructions already in CV1002. While this is a possible example of unilateral removal, it was because of duplicative instructions. This seems sufficiently distinct from CV324 because here there are no existing instructions similar to CV324.

<u>CV 324 Should be Included in MUJI 2d</u>

CV 324 was included as an instruction as far back as MUJI. The inclusion of CV 324 is well supported in Utah law. Mr. Wahlquist cited to *Turner v. University of Utah Hospitals and Clinics*, 2013 UT 52, 310 P.3d 1212, to support the removal of CV 324. However, under *Turner*, there may still be times when it is appropriate to give the instruction. The instruction at issue in *Turner* expressly stated that "it is *not medical malpractice* for a provider to select one of the approved methods…[w]hen there is more than one method of treatment." 2013 UT 52 at ¶ 22 (emphasis added). There, the court was concerned that the instruction explicitly directed the jury to return a no negligence verdict if it found more than one method of treatment. *Id*. Here, CV324 does not explicitly instruct our juries that it is not medical malpractice when there is more than one method of treatment. MUJI 2d specifically revised the instruction to avoid this result. Rather, CV324 merely informs juries that the standard of care may include more than one acceptable method of treatment.

Moreover, the events at issue in *Turner* did not involve alternative methods of treatment. *Id*. at ¶ 24. There, the court held that there was no evidence to support the inclusion of the instruction because the defendant failed to show more than one method of treatment for the issue. *Id*. Accordingly, CV324 is still appropriate in cases where the condition at issue may be treated by a choice of accepted methods. Were this not the case, the court in *Turner* would have said not to use the alternative methods instruction anymore. Case law further provides that failure to treat a patient in the same way as another or to use a different method is not malpractice if the treatment used is approved by the medical community. *See Walkenhorst v. Kesler*, 92 Utah 312, 67 P.2d 654 (1937); *see also, Butler v. Naylor*, 1999 UT 85, 987 P.2d 41.

In addition, MUJI is consistent with numerous other states' jury instructions that give a version of an alternative method of treatment instruction. These states' instructions are

generally more detailed than Utah's and often include notes or case law from drafting committees. In states like New York, Ohio, Pennsylvania, and Wisconsin, the instruction notes specify that alternative methods should be mentioned when there is a showing that a condition has multiple acceptable treatments. Pennsylvania has the most detailed instructions, following the "two schools of thought" doctrine. However, numerous states outside Utah include jury instructions stating that doctors have discretion in choosing the method of treatment used, so long as the chosen method was performed with reasonable care. The following 18 states have very similar jury instructions.

Alabama

- Pattern instruction:
  - "You have heard evidence in this case about different or alternative methods of treatment. If (name of defendant) had the choice of different or alternative methods of treatment and chose a method that was within the standard of care, the fact that there was a bad result because of the method used, cannot, in and of itself, be the reason to find against (him/her). However, you can find against (name of defendant) if the method used by (him/her) was not within the standard of care, or if the method used was proper, but (name of defendant) did not follow the standard of care in carrying out that method." APJI 25.01.
- Notes on use:
  - This instruction is to be used when it is contended that the method of treatment chosen by the doctor is the basis for the alleged negligent conduct of defendant doctor. This instruction may be used in conjunction with APJI 25.00, which refers to elements of proof for medical malpractice.

California

- Pattern instructions:
  - "[A/An] [insert type of medical practitioner] is not necessarily negligent just because [he/she/nonbinary pronoun] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice." CACI No. 506.

Florida

- Pattern instructions:
  - Alternative 1: "If an individual health care provider [makes a diagnosis/provides treatment/follows a procedure] in a manner viewed as appropriate by other reasonably prudent health care providers with similar skill

and training, then the health care provider cannot be found negligent. In other words, an individual health care provider is not held to the methods of one group of reasonably prudent and similar health care providers over the methods of other reasonably prudent and similar health care providers."

[OR:]

- Alternative 2: "If more than one [method of diagnosis/method of treatment/procedure] is considered appropriate by reasonably prudent and similar health care providers, and an individual health care provider uses one of those [methods/procedures], he or she is not negligent merely because he or she chose the [method/procedure] that [choose from the following as appropriate: is not the most common or does not represent the most advanced (method/procedure)]. If the [method/procedure] utilized by the health care provider is approved by a respectable minority of the medical profession, then it meets the standard of care, and the provider may not be found negligent." 3 Fla. Forms Jury Inst. § 80.20.

- Notes on use:

  - Counsel is to choose between the two alternative jury instructions based on the evidence presented. Alternative 1 refers generally to evidence that various medical professionals hold different viewpoints. Alternative 2 refers specifically to evidence regarding the highest level of care or best-known technique. The Committee recommends Alternative 2 when, for example, an expert witness testifies and describes a quality of care and methods used at a specific hospital or research center, which may meet higher quality standards than those used by other medical professionals.

- Case law:

  - Alternative methods of care are not substandard even if not the best, most effective, or most common method of care available. Medical professionals are permitted to use individual judgment and discretion, within reason. *Baldor v. Rogers, 81 So. 2d 658* (Fla. 1954). If the method used is considered acceptable or appropriate by other reasonably skilled medical providers, liability does not arise. *Baldor v. Rogers, 81 So. 2d 658, 660* (Fla. 1954). Whether a minority method of treatment is reasonable is a question for the trier of fact. See *Russell v. Hardwick, 182 So. 2d* 241 (Fla. 1966); see also *Baldor v. Rogers, 81 So. 2d 658* (Fla. 1954) (emphasis added).

Hawaii

- Pattern instructions:

- “Where there is more than one recognized method of treatment, each of which conforms to the applicable standard of care, a physician does not breach the standard of care by utilizing one of these methods, provided such use conforms to the standard of care as defined by these instructions.” Haw. Civ. Jury Inst. No. 14.5.

Illinois

- Pattern instructions:
  - “If more than one method of treatment for a [condition or illness or injury] is reasonable and appropriate, a [specify type of health care provider]’s choice of one method over another is not, in itself, a failure to exercise the appropriate skill and care, even if injury results. In determining whether [name of defendant] was negligent, you must consider whether [describe method of treatment] was a proper method of treatment for [describe plaintiff’s condition].” 2 Ill. Forms Jury Inst. § 62.13.
- Notes on use:
  - This instruction is intended to clarify for the jury when expert testimony provides several different methods of treatment for a particular condition. The standard should be that of a reasonably well-qualified medical provider, rather than the highest level of care possible under the circumstances. Like Florida, here the Committee recommends this instruction especially when an expert witness is affiliated with a specific hospital or research center where treatment methods meet higher quality standards than those routinely used by other medical professionals.
- Case law:
  - Defendant doctor’s choice of one treatment method over another alone is not a departure from the standard of care, even if it results in injury. *Newell v. Corres, 466 N.E.2d 1085, 1088–1090* (1st Dist. 1984).

Indiana

- Pattern instructions:
  - “[Health care providers] are allowed broad discretion in selecting treatment methods and are not limited to those most generally used.
  - When more than one accepted method of treatment is available, the [type of health care provider] must use sound judgment in choosing which method to use.

- If a [type of health care provider] uses sound judgment in selecting from a variety of accepted treatments and uses reasonable care and skill in treating a patient, then the [type of health care provider] is not responsible if the treatment does not succeed.

- The fact that other methods existed or that another [type of health care provider] would have used a different treatment does not establish medical negligence." Ind. Model Civ. Jury Inst. 1525.

Minnesota

Minnesota distinguishes the instructions between failure of treatment and error in diagnosis, but the language is otherwise identical.

- Pattern instructions:

  - Failure of treatment: "A (doctor, dentist, specialist, advanced practice nurse or other healthcare provider) is not negligent (simply)(solely) because (his/her) efforts are unsuccessful.

  - A failure of treatment is not negligence if the treatment was an accepted treatment based on the information the (doctor, dentist, specialist, advanced practice nurse or other healthcare provider) had or reasonably should have had, when the choice was made.

  - A (doctor, dentist, specialist, advanced practice nurse or other healthcare provider) must use reasonable care to get the information needed to exercise his or her professional judgment. An unsuccessful treatment chosen because a (doctor, dentist, specialist, advanced practice nurse or other healthcare provider) did not use this reasonable care would be negligence."

  - Error in diagnosis: "A (doctor, dentist, specialist, advanced practice nurse or other healthcare provider) is not negligent (simply)(solely) because (his/her) efforts are unsuccessful.

  - An error in diagnosis is not negligence if the diagnosis was an accepted diagnosis based on the information the (doctor, dentist, specialist, advanced practice nurse or other healthcare provider) had or reasonably should have had, when the diagnosis was made.

  - A (doctor, dentist, specialist, advanced practice nurse or other healthcare provider) must use reasonable care to get the information needed to exercise his or her professional judgment. An error in diagnosis made because a (doctor,

dentist, specialist, advanced practice nurse or other healthcare provider) did not use this reasonable care would be negligence.]" CIVJIG 80.10.

New Hampshire

- Pattern instructions:

  o "[A/An] [insert type of medical practitioner] is not necessarily negligent just because [he/she] chooses one medically accepted method of treatment or diagnosis and it turns out that another medically accepted method would have been a better choice." 1 N.H. Civ. Jury Inst. NS13.102.

New Mexico

- Pattern instructions:

  o "Where there is more than one medically accepted method of [diagnosis] [treatment] [or] [care], it is not negligent for a [health care provider] to select any of the accepted methods." 13-1111 NMRA.

New York

- Pattern instructions:

  o "This paragraph should only be charged when there is evidence that the doctor made a choice among medically acceptable alternatives. See Caveat 2 below: A doctor is not liable for an error in judgment if (he, she) does what (he, she) decides is best after careful evaluation if it is a judgment that a reasonably prudent doctor could have made under the circumstances. In other words, a doctor is not liable for malpractice if he or she chooses one of two or more medically acceptable courses of action." NY PJI 2:150.

  - Caveat 2:

  o This instruction should only be used when there is a showing that defendant considered and chose among several medically acceptable alternatives.

Ohio

- Pattern instructions:

  o "DIFFERENT METHODS (ADDITIONAL). Although some other (physician) (surgeon) might have used a method of (diagnosis) (treatment) (procedure) different from that used by the defendant, this circumstance will not

by itself prove that the defendant was negligent. You shall decide whether the (diagnosis) (treatment) (procedure) used by the defendant was in accordance with the required standard of care." OJI-CV 417.03.

- Notes on use:

  - o This instruction should only be given if there is evidence that more than one method/diagnosis/treatment is acceptable for the medical condition. *See Pesek v. University Neurologists Assoc*., 87 Ohio St.3d 495.

Oklahoma

- Pattern instructions:

  - o "Where there is more than one medically accepted method of [diagnosis/treatment], a physician has the right to use his/her best judgment in the selection of the [diagnosis/treatment], after securing the informed consent of the patient, even though another medically accepted method of [diagnosis/treatment] might have been more effective." Vernon's Okla. Forms 2d, OUJI-CIV 14.3.

Pennsylvania

- Pennsylvania has adopted a "two schools of thought" doctrine when allegations involve the doctor's error choosing between various treatment methods. The doctor has a burden to demonstrate sound judgment when deciding between treatment methods. There is no liability when the chosen method is acceptable by a "considerable number" of colleagues in the same or similar practice or specialty.

- Pattern instructions:

  - o "Where competent medical authority is divided, a physician will not be held responsible if, in using their judgment, the physician followed a course of treatment advocated by a considerable number of recognized and respected professionals in their given area of expertise. This is known as the 'two schools of thought' doctrine.

  - o [Name of defendant] claims that, in treating [name of plaintiff], [he] [she] [they] consciously chose to follow a course of treatment. [Name of defendant] has the burden of proving, by a fair preponderance of the evidence, that a considerable number of recognized and respected professionals advocated the same course of treatment, that [he] [she] [they] [was] [were] aware of these professionals advocating this same course of treatment at the time [he] [she] [they] treated [name of plaintiff], and that in treating [name of plaintiff] [he] [she] [they] consciously chose to follow their recommended course of treatment.

If you decide that [name of defendant] has met this burden of proof, then you should find for [name of defendant].” Pa. SSJI (Civ) 14.50.

- Case law:

  - It is improper to instruct the jury on the “two schools of thought” doctrine when the question is whether the doctor properly diagnosed the plaintiff’s condition. *Morganstein v. House*, 547 A.2d 1180 (Pa. Super. 1988) (emphasis added). The doctrine is applicable only where a condition has more than one method of accepted treatment. *Jones v. Chidester*, 610 A.2d 964, 965 (Pa. 1992). If medical authority is divided, a doctor will not be held responsible if, in the exercise of the doctor’s judgment, they followed a course of treatment "advocated by a considerable number of recognized and respected professionals in his given area of expertise." Id. The burden of proving that there are two schools of thought falls to the defendant, but "[t]he proper use of expert witnesses should supply the answers.” Id.

South Carolina

- Pattern instructions:

  - “A physician [cardiologist, dermatologist, surgeon, etc.] is not bound to use any particular method of treatment if among physicians [cardiologists, dermatologists, surgeons, etc.] of ordinary skill and learning, more than one method of treatment is recognized. It is proper for a physician [cardiologist, dermatologist, surgeon, etc.] to adopt any recognized method. The fact that some other method of treatment existed, or some other physician [cardiologist, dermatologist, surgeon, etc.] might or would have used or advised a different method, does not establish negligence on the part of the physician [cardiologist, dermatologist, surgeon, etc.]” S.C. Requests to Charge- Civ., 27-2.

Tennessee

- Pattern instructions:

  - “When there is more than one accepted method of diagnosis or treatment, and no one of them is used exclusively and uniformly by all physicians of good standing, a physician is not negligent for selecting an accepted method of diagnosis or treatment that later turns out to be unsuccessful. This is true even if the method is one not favored by certain other physicians.” 8 Tenn. Prac. Pattern Jury Instr. T.P.I.- Civ. 6.14 (2023 ed.)

Virginia

- Pattern instructions:

- “It was the duty of the defendant to exercise that degree of skill and diligence [practiced/rendered] by a reasonably prudent [physician/dentist/nurse/hospital/health care provider] based on the standard of care found by the jury to be applicable in this case in accordance with [another instruction of the court/Instruction No. [number of instructions]]. If you believe from a preponderance of the evidence that the defendant failed to perform the foregoing duty, then the defendant was negligent. If you further believe from such evidence that any such negligence was the proximate cause of injury to the plaintiff, then you shall find your verdict in favor of the plaintiff.” Va. Prac. Jury Inst. § 41:2.

- Notes on use:

    - A difference in views between medical professionals regarding treatment or medical judgment exercised is insufficient to support a malpractice action where it is shown that the judgment exercised is an acceptable method of treatment under the circumstances.

West Virginia

- Pattern instructions:

    - “Sometimes the standard of care for treating a patient involves consideration of different methods of diagnosis or treatment that are widely and generally recognized within the medical community. A [insert type of health care provider] must use [his/her] professional judgment in choosing what [he/she] believes to be the most effective [treatment/diagnosis] option in a given situation. Just because a [insert type of health care provider] chooses one recognized method of [treatment/diagnosis] instead of another does not mean [he/she] breached the standard of care. When there is more than one recognized method of [treatment/diagnosis] used by [insert type of health care provider], a reasonable and prudent [insert type of health care provider] may select one of the recognized options of [treatment/diagnosis].

    - However, a [insert type of health care provider] who uses a widely and generally recognized method of treatment or diagnosis must utilize the method with the degree of care, skill and learning that would be provided by a reasonable and prudent [insert type of health care provider] in the same or similar circumstances.” W.V. Pattern Jury Instr. Civ. § 505.

Wisconsin

- Pattern instructions:

- "Use this paragraph only if there is evidence of two or more alternative methods of treatment or diagnosis recognized as reasonable: If you find from the evidence that more than one method of (treatment for) (diagnosing) (plaintiff)'s (injuries) (condition) was recognized as reasonable given the state of medical knowledge at that time, then (doctor) was at liberty to select any of the recognized methods . (Doctor) was not negligent because (he) (she) chose to use one of these recognized (treatment) (diagnostic) methods rather than another recognized method if (he) (she) used reasonable care, skill, and judgment in administering the method." WIS JI-CIVIL JI-1023.

<u>CV 324's Use in Utah Trials</u>

Not only is CV 324 well supported by Utah law and in instructions from other jurisdictions, but its use is also common in medical malpractice cases tried in Utah. CV 324 has been given in several Utah trials including *Knowles v. Smith*, Case No. 190401925 (4th Dist. Ct. Utah County); *Gillins v. Gardner*, Case No. 150400088 (4th Dist. Ct. Utah County) *Bolda v. Brian*, Case No. 180907031 (3rd Dist. Ct. Salt Lake County); *Spivey v. Douglas*; Case No. 180302125 (3rd Dist. Ct. Tooele County); and *Nelson v. Jahn*, Case No. 190300289 (3rd Dist. Ct. Tooele County).

<u>Conclusion</u>

We have now demonstrated why CV 324 should be included in the MUJI 2d. We acknowledge that CV 324 may not be appropriate in every case, but there is no reason it should not be included. Judges should be allowed the discretion to give the instruction when supported by the evidence – just like every other instruction. The unilateral removal of CV 324 from MUJI 2d without public comment was inappropriate, and we ask the Committee not to make any unilateral removal of any instruction in the future. We welcome the opportunity to discuss CV 324 at a future meeting of the Committee.

Respectfully,

Electronically signed, with permission, by the following:

STRONG & HANNI
Michael Miller
Kathleen Abke
Karmen Schmid
Dustin Johnson
Savanna Jones

KIPP & CHRISTIAN
Shawn McGarry
Nan Bassett
Kirk Gibbs
Chelsey Phippen
Katie Conrad

NELSON NAEGLE
Brandon Hobbs
Cortney Kochevar
Kristina Ruedas
Greg Soderberg

EPPERSON & OWENS
Steve Owens
David Epperson
Scott Epperson

RICHARDS, BRANDT, MILLER & NELSON
Rafael Seminario

BURBIDGE, VAN KOMEN, TANNER & SCRUGGS
Nate Burbidge
Patrick Tanner

James Egan

Paul Van Komen
Elliot Scruggs

HALL, PRANGLE & SCHOONVELD
Shelley Doi-Taketa

KIRTON McCONKIE
Mary Essuman
Justin Pendleton

CAMPBELL, WILLIAMS, BEECH & HALL
Vaun Hall
Derek Williams

SPENCER FANE
Brian Miller
Christopher Droubay
Joel Taylor

JONES SKELTON
Michael Collins

RENCHER ANJEWIERDEN
Greg Anjewierden
Cami Schiel

TAB 3

CV301C "Standard of care" defined.

A [health care provider] [doctor] is required to use that degree of learning, care, and skill used in the same situation by reasonably prudent [providers] [doctors] in good standing practicing in the same [specialty] [field]. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as either "medical negligence" or "medical malpractice." (They mean the same thing.)

The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

References
Meeks v. Peng, 2024 UT 5, paras. 34-43, --- P.3d ----.
Lyon v. Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony).
Jensen v. IHC Hosps., Inc., 2003 UT 51, �96, 82 P.3d 1076.
Schaerrer v. Stewart's Plaza Pharmacy, 2003 UT 43, 79 P.2d 922.
Dalley v. Utah Valley Regional Med. Ctr., 791 P.3d 193, 195 (Utah 1990).
Dikeou v. Osborn, 881 P.2d 943, 947 (Utah 1981).
Chadwick v. Nielsen, 763 P.2d 817, 821 (Utah 1981).
Kent v. Pioneer Valley Hospital, 930 P.2d 904 (Utah App. 1997).
Robb v. Anderton, 863 P.2d 1322 (Utah App. 1993).
Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).

MUJI 1st Instruction
6.2

Committee Notes
The Committee has met and considered footnote 5 from the *Meeks* decision, and determined that the instructions, when read together, accurately reflect the law. CV301B states it is the plaintiff's burden to prove breach of the standard of care, and proving the standard of care is implicit in that instruction. Additionally, CV301C is generally read immediately after CV301B. If either party has additional concerns, it may be appropriate to combine CV301B and CV301C into a single instruction to further clarify that the burden is on the plaintiff. A minority of the Committee advocated amending the language of the instruction regarding the burden of proof.

In *Nielson v. Pioneer Valley Hospital*, 830 P.2d 270 (Utah 1992), and *Brady v. Gibb*, 886 P.2d 104 (Utah App. 1994), the courts held that instructions similar to this should not be given in conjunction with a "common knowledge" or res ipsa loquitor instruction unless the plaintiff is also alleging breach of a different standard of care.

Instruction CV129, Statement of opinion, should not be given when this instruction is used, as it instructs the jurors that they may disregard expert testimony.

Instruction CV324, Use of alternative treatment methods, should also be given when defendant claims to have used an alternative treatment method.

Committee Amended
March 2024; March 2014.

TAB 4

CV301B Elements of a medical negligence claim.

To establish that (name of defendant) was at fault, (name of plaintiff) has the burden of proving two things, a breach of the standard of care, and that the breach was a cause of (name of plaintiff)'s harm.

References
Meeks v. Peng, 2024 UT 5, ¶¶ 34-43, --- P.3d ----.

Committee Amended
March 2014.

CV301C "Standard of care" defined.

A [health care provider] [doctor] is required to use that degree of learning, care, and skill used in the same situation by reasonably prudent [providers] [doctors] in good standing practicing in the same [specialty] [field]. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as either "medical negligence" or "medical malpractice." (They mean the same thing.)

The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

References
Meeks v. Peng, 2024 UT 5, ¶¶ 34-43, --- P.3d ----.
Lyon v. Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony). Jensen v. IHC Hosps., Inc., 2003 UT 51, ¶ 96, 82 P.3d 1076.
Schaerrer v. Stewart's Plaza Pharmacy, 2003 UT 43, 79 P.2d 922.
Dalley v. Utah Valley Regional Med. Ctr., 791 P.3d 193, 195 (Utah 1990).
Dikeou v. Osborn, 881 P.2d 943, 947 (Utah 1981).
Chadwick v. Nielsen, 763 P.2d 817, 821 (Utah 1981).
Kent v. Pioneer Valley Hospital, 930 P.2d 904 (Utah App. 1997).
Robb v. Anderton, 863 P.2d 1322 (Utah App. 1993).
Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).

MUJI 1st Instruction
6.2

Committee Notes

The Committee has met and considered footnote 5 from the *Meeks* decision, and determined that the instructions, when read together, accurately reflect the law. CV301B states it is the plaintiff's burden to prove breach of the standard of care, and proving the standard of care is implicit in that instruction. Additionally, CV301C is generally read immediately after CV301B. If either party has additional concerns, it may be appropriate to combine CV301B and CV301C into a single instruction to further clarify that the burden is on the plaintiff. A minority of the Committee advocated amending the language of the instruction regarding the burden of proof.

In *Nielson v. Pioneer Valley Hospital*, 830 P.2d 270 (Utah 1992), and *Brady v. Gibb*, 886 P.2d 104 (Utah App. 1994), the courts held that instructions similar to this should not be given in conjunction with a "common knowledge" or res ipsa loquitor instruction unless the plaintiff is also alleging breach of a different standard of care.

Instruction CV129, Statement of opinion, should not be given when this instruction is used, as it instructs the jurors that they may disregard expert testimony.

Instruction CV324, Use of alternative treatment methods, should also be given when defendant claims to have used an alternative treatment method.

Public Comments on CV301B (Elements of a medical negligence claim) and CV301C ("Standard of care" defined) (with minor formatting changes).

FROM: Cami Schiel   Tue, Mar 12, 2024 at 2:21 PM

I disagree with the proposed changes/edits/review of the MUJI panel for

CV301B Elements of a medical negligence claim.
CV301C "Standard of care" defined.

If the plaintiff has the burden of proof to show that the medical provider breached the standard of care, then it should be the plaintiff's expert's burden to show that the medical provider more likely than not breached the standard of care. Thus, the MUJI should read something along the lines of:

CV301C "Standard of Care" defined: …The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute as to whether or not plaintiff's expert showed the medical provider more likely than not breached the standard of care.

If the medical expert cannot show that the medical provider more likely than not breached the standard of care, then plaintiff has not met his burden.

Cami R. Schiel
Attorney

rencher | Anjewierden
460 South 400 East
Salt Lake City, Utah 84111

FROM: Nan Bassett Fri, Apr 12, 2024 at 2:34 PM

Below is a comment regarding the jury instructions identified in the subject line above. This comment specifically relates to the "Notice of Published Modul Utah Civil Jury Instructions" emailed on March 12, 2024, which set today, April 12, 2024 as the comment deadline.

The undersigned attorneys comment on updated CV301C "Standard of care" defined, and submit related comments as follows:

NECESSARY REVISION TO UPDATED CV301C; RELATED REVISION TO CV302; and, INCLUSION OF CV129

The updated MUJI 2d CV301C should be revised to specify that the plaintiffs have the burden of proof. Likewise, CV302 should be updated to be consistent with CV301C. Finally, CV129, "Statement of opinion" should also be given.

ARGUMENT

I. The Updated CV301C Inappropriately Suggests that Defendants are Required to Put Forth Rebuttal Experts

The updated CV301C wrongly implies that defendants must put on expert testimony to rebut a plaintiff's standard of care experts. CV301B (Elements of a medical negligence claim) accurately instructs that the plaintiff has the burden of proof to establish medical malpractice. However, CV301C then suggests otherwise, implying that the burden shifts to defendants to disprove negligence by putting on their own standard of care experts, merely because plaintiffs have presented an expert to offer standard of care testimony.

The instruction states that expert testimony is required to establish the standard of care and informs the jurors they may not use their own standard of care. That is accurate. However, what makes the language confusing and suggests that defendants are required to put on their own standard of care expert is the statement: "the experts may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute." Without necessary context, this wrongly suggests that rebuttal experts are a necessity – that the jury must hear from defense experts or be forced to accept the opinions of the plaintiff's standard of care experts.

This does not accurately reflect the law. In fact, it is directly contrary to *Lyon v. Bryan*, which is cited in the references to CV301C, and which states that "*[a] jury is not required to believe an expert witness, even when that expert's opinion is unchallenged by the opinion of an opposing expert*." *Lyon v. Bryan*, 2011 UT App 256, ¶ 10, 262 P.3d 1199. (Emphasis added) (citation omitted); *See also* CV301C References, *citing Lyon v. Bryan*. To demonstrate just how much latitude a jury is given with regard to believing an expert, the court compared fact witnesses to expert witnesses, observing,

> A jury's latitude to weigh the credibility of witnesses is extraordinarily broad. We will override a jury's acceptance of factual testimony only if the fact testified to is physically impossible or when the falsity of the testimony is apparent, without any resort to inferences or deductions. *When it assesses expert testimony, a jury's latitude is even broader. A jury is not required to believe an expert witness even when that expert's opinion is unchallenged by the opinion of an opposing expert.*

Id., ¶ 10 (emphasis added).

While *Lyon v. Bryan* is a case involving a jury's rejection of an unrebutted causation expert in a medical malpractice case, the same applies to a standard of care expert because, like standard of care, causation in a medical malpractice case must generally be established by expert testimony. *See Killebrew v. Ruiz*, 2020 UT 6, ¶ 11, 459 P.3d 1005. ("To ensure that the jury is not left to speculate, plaintiffs may not provide just any evidence of proximate cause: They must generally produce expert testimony that the medical professional's negligence proximately caused the plaintiff injury."). (Citations omitted) (emphasis in original). Even with that requirement the *Lyon v. Bryan* court determined, rightfully, that defendants are not required to put on rebuttal experts.

Therefore, the updated CV301C should be revised to specify that the plaintiffs have the burden of proof, to keep it consistent with CV301B. CV302, which is the same instruction as CV301C, but for nurses, should be changed to mirror CV301C.

CV129, "Statement of opinion" should also be given, contrary to the committee note stating that CV129 should not be given when CV301C is given. That instruction instructs jurors that they may disregard expert testimony. As demonstrated above, a jury can in fact reject expert testimony, even if unrebutted.

II. Instructing Jurors That They Can Reject Expert Testimony is not Inconsistent With Precluding Them From Using Their Own Standard of Care

The important and long standing jury function discussed above is not inconsistent with instructing the jury that the standard of care must be established by expert testimony and that the jury cannot apply its own standard of care. Rather, it simply means that a jury can determine that plaintiff's expert has not established a standard of care at all. In fact, it must be that way, or a jury could be forced to accept the testimony of a plaintiff's standard of care expert, even in the face of evidence challenging the credibility of testimony offered by that expert. The following two examples are illustrative:

> Example 1: Under direct examination the plaintiff's expert points to a professional guideline and testifies that it sets the standard of care. Under cross examination, defense counsel points to language in the same guidelines stating that the guidelines do not replace professional medical judgment and are not intended to set the standard of care.

Example 2: Under direct examination the plaintiff's expert testifies that the standard of care required the defendant to provide a specific treatment for a specific condition. Under cross examination, defense counsel points to an article authored by the expert at the same time the care was provided, stating that the standard of care requires a different treatment for the same condition.

In these situations, a jury should be able to determine that plaintiffs have not satisfied their burden of establishing the applicable standard of care. This does not mean the jurors are establishing their own standard of care, but simply determining that plaintiffs' experts have failed to establish a standard of care at all.

PROPOSED INSTRUCTION

Based on the foregoing, we propose the following CV301C instruction:

CV301C "Standard of care" defined

> A [health care provider] [doctor] is required to use that degree of learning, care, and skill used in the same situation by reasonably prudent [providers][doctors] in good standing practicing in the same [specialty][field]. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as either "medical negligence" or "medical malpractice." (They mean the same thing).
>
> The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. Expert witnesses may disagree as to what the standard of care is and what it requires. It will be your responsibility to determine whether plaintiffs have met their burden of establishing the standard of care.

CV302 ("Standard of care" for nurses defined) also should be revised accordingly, and CV129 should be given in addition to CV301C and/or CV302.

Dated this 12th day of April, 2024

Nan T. Bassett

Shawn McGarry

Kirk G. Gibbs

Chelsey Phippen

Katia Conrad

Greg Anjewierden

Cami Schiel

Michael J. Collins

Brian P. Miller

Christopher Droubay

Joel Taylor

Christian W. Nelson

Brandon Hobbs

Cortney Kochevar

Kristina H. Ruedes

Vaun Hall

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Elliott Scruggs

Michael J. Miller

Kathleen J. Abke

Dustin M. Johnson

Justin Pendleton

Mary Essuman

Stephen W. Owens

Scott H. Epperson

James Egan

Tawni Anderson

Shelley Doi-Taketa

Rafael Seminario

TAB 5

CV2015 Survival claim.

If you decide that [name of defendant]'s fault was a cause of [name of decedent]'s harm, you must award economic and non-economic damages for the period of time that [name of decedent] lived after the injuries, regardless of whether [name of defendant]'s fault caused the death.

References

Utah Code Section 78B-3-107.
In re Behm's Estate, 117 Utah 151, 213 657 (1950).
Allen v. United States, 588 F. Supp. 247 (D. Utah 1984).
Platis v. United States, 288 F. Supp 254 (D. Utah 1968), aff'd, 409 F.2d 1009 (10th Cir. 1969).

Committee Notes

There was no Utah law at the time this was drafted regarding the meaning of "survival," and whether the decedent must be conscious to bring a survival action.

The statute limits the amount of non-economic (general) damages to $100,000; if the non-economic damages awarded are greater than allowed, the judge can reduce the amount.

Under Utah's comparative negligence statute, any negligence of decedent is, in effect, imputed to the plaintiff: thus, if decedent is found to be more than 50% negligent all recovery is denied. Kelson v. Salt Lake County, 784 P.2d 1152 (Utah 1989)

Committee Amended
Amended September 8, 2014.

Until March 2019 the statute did include the $100,000 cap, but that was removed in 2019:

~~(e) In no event shall an award of general damages available under the circumstances described in Subsection (1)(b) or (1)(c) against any wrongdoer or any insurer exceed $100,000 regardless of available liability, uninsured or underinsured motor vehicle coverage.~~

GENERAL DAMAGES AMENDMENTS, 2019 Utah Laws Ch. 387 (H.B. 328)

Since then the statute has no cap. Here is the current statute:

§ 78B-3-107. Survival of action for injury or death to individual, upon death of wrongdoer or injured individual--Exception and restriction to out-of-pocket expenses

(1)(a) A cause of action arising out of personal injury to an individual, or death caused by the wrongful act or negligence of a wrongdoer, does not abate upon the death of the wrongdoer or the injured individual. The injured individual, or the personal representatives or heirs of the individual who died, has a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages, subject to Subsection (1)(b).

> (b) If, prior to judgment or settlement, the injured individual dies as a result of a cause other than the injury received as a result of the wrongful act or negligence of the wrongdoer, the personal representatives or heirs of the individual have a cause of action against the wrongdoer or personal representatives of the wrongdoer for special and general damages which resulted from the injury caused by the wrongdoer and which occurred prior to death of the injured individual from the unrelated cause.
>
> (c) If the death of the injured individual from an unrelated cause occurs more than six months after the incident giving rise to the claim for damages, the claim shall be limited to special damages unless, prior to the injured individual's death:
>
> > (i) written notice of intent to hold the wrongdoer responsible has been mailed to or served upon the wrongdoer or the wrongdoer's insurance carrier or the uninsured motorist carrier of the injured individual, and proof of mailing or service can be produced upon request; or
> >
> > (ii) a claim for damages against the wrongdoer or against the uninsured motorist carrier of the injured individual is the subject of ongoing negotiations between the parties or persons representing the parties or their insurers.
>
> (d) A subsequent claim against an underinsured motorist carrier for which the injured individual was a covered person is not subject to the notice requirement described in Subsection (1)(c).

(2) Under Subsection (1) neither the injured individual nor the personal representatives or heirs of the individual who dies may recover judgment except upon competent satisfactory evidence other than the testimony of the injured individual.

(3) This section may not be construed to be retroactive.

TAB 6

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.	2024
1700	Assault / False Arrest / Malicious Prosecution	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch Rice and Monica Howard presented draft instructions in May 2024. Will return with proposed revisions in October.	Oct. 2024
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.	
	Linguistics and Law	Bill Eggington, Judge Kelly, John Macfarlane, Michael Lichfield, Robert Cummings, Clark Cunningham, Jesse Egbert, Scott Jarvis	Identifying instructions in need of plain-language adjustments	
301B and 301C	Med Mal	Alyson McAllister	Meeks v. Peng, 2024 UT 5, ¶ 43, n.5 asked Committee to consider revisions. Addressed at March 2024 meeting; revisions sent out for public comment. Public comments	Sept. 2024

			addressed at May 2024 meeting. To be revisited at Sept. 2024 meeting.	
324	Use of Alternative Treatment Methods	Pete Summerhill/UAJ	At March 2024 meeting, concerns were discussed re when/how instruction is being used. Committee voted to remove instruction and discussed possible language to include in Committee Note. Committee approved Committee Note at May 2024 meeting. Public comments to be reviewed at Sept. meeting.	Sept. 2024
2015	Survival Claim	Alyson McAllister	Revision to Committee Note needed due to legislative amendment removing damages cap.	Sept. 2024

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
632, 632A-632D	Minimum Injury Requirements Update and New	October 2023
132A	Remote Testimony	October 2023
2021	Present Cash Value Update	October 2023
900	Easements (prescriptive 920-925, easement by necessity 930-931, and easement by implication, 940-941)	February 2024