Agenda
Advisory Committee on Model Civil Jury Instructions

September 8, 2014
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	Juli Blanch – Acting Chair
Introduction of New Staff		Alison Adams-Perlac
Committee Update		Alison Adams-Perlac
Survival Claim	Tab 2	Nancy Sylvester
Punitive Damages Instructions	Tab 3	Rich Humpherys

Committee Web Page

Published Instructions

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

October 14, 2014 (Tuesday)
November 10, 2014
December 8, 2014
January 12, 2015
February 9, 2015
March 9, 2015
April 13, 2015
May 11, 2015
June 8, 2015
September 14, 2015
October 13, 2015
November 9, 2015
December 14, 2015

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 9, 2014
4:00 p.m.

Present: Juli Blanch (acting chair), Alison Adams-Perlac, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons

Excused: John R. Lund, Ryan M. Springer, Honorable Andrew H. Stone, Peter W. Summerill

Ms. Blanch presided.

1. *Minutes.* Mr. Humpherys moved to approve the minutes of the May 12, 2014 meeting. Mr. Johnson 2d. The motion passed without opposition.

2. *Supreme Court Update.* Ms. Adams-Perlac reported on the meeting that she, John Young, and Judge Denise Lindberg had with the Utah Supreme Court. The court suggested that the committee be moved under the umbrella of the bar. Ms. Adams-Perlac's sense was that the court was concerned that it is perceived as being too closely tied to MUJI 2d, even though the instructions are not approved by the court. Judge Lindberg, Mr. Young, and Ms. Adams-Perlac spoke against the idea and suggested ways to revitalize the jury instruction committees, such as term limits and involving younger members of the bar. The court took the matter under advisement. Ms. Adams-Perlac said that she has been working on an article for the *Utah Bar Journal* encouraging suggestions for jury instructions and encouraging members to apply for the committee. She will probably wait for a new chair to be appointed before submitting it to the bar journal.

3. *Punitive Damage Instructions.* The committee continued its review of the punitive damage instructions.

a. *CV2026. Punitive damages–introduction.* Mr. Humpherys noted that he had removed the definition of "malicious conduct" from the instruction because the term was not defined in the Utah cases. Mr. Ferguson suggested saying in a committee note that the term has not been defined by Utah appellate courts. The definition of "knowing and reckless indifference" was taken from *Behrens v. Raleigh Hills Hospital,* 675 P.2d 1179, 1187 (Utah 1983). Mr. Humpherys asked to what extent the issue of punitive damages is governed by the statute (Utah Code Ann. § 78B-8-201) and to what extent it is governed by the common law (including pre-statute common law). (*Behrens* predated the statute, and its definition was not defining the statutory standard but was taken from a Wyoming case.) There is also an issue as to how much, if any, of *Crookston v. Fire Insurance Exchange,* 817 P.2d 789 (Utah 1991), survives the more recent U.S. Supreme Court punitive-damage decisions. Mr. Simmons suggested listing the predicates for punitive damages separately and in brackets, e.g.: "[¶] [willful

and malicious] [¶] [intentionally fraudulent] [¶] manifested a knowing and reckless indifference toward, and a disregard of [name of plaintiff]'s rights]." Because of the way the elements are listed in the statute, the committee chose to leave "willful and malicious" and "intentionally fraudulent" together, but bracketed, to show that one or both may not apply in a given case. The committee thought that the third option ("knowing and reckless indifference") is pleaded in almost every case seeking punitive damages. Mr. Simmons also questioned whether "[name of plaintiff]'s rights" should be replaced with the statutory language ("the rights of others"). Mr. Humpherys noted that the Supreme Court has held that due process forbids a state from using punitive damages to punish a defendant for injury that it inflicts on a nonparty, *see Philip Morris, USA v. Williams*, 549 U.S. 346, 353 (2007) (cited with approval in *Westgate Resorts, Ltd. v. Consumer Prot. Grp., LLC*, 2012 UT 55, ¶ 10, 285 P.3d 1219, meaning that the effect of the defendant's conduct on others is not a proper consideration. Mr. Simmons noted the apparent inconsistency in this holding and the principal that the amount of punitive damages should be sufficient to deter similar misconduct in the future. Judge Harris noted that plaintiffs generally do not like the last sentence of the instruction because they think that juries will be reluctant to award punitive damages if they think it will mean more work for them. Some committee members thought it was in keeping with the philosophy of telling jurors the consequences of their actions. Dr. Di Paolo suggested making the language more neutral, e.g., "I will then give you further instructions." Judge Harris thought it was a matter to be handled by the special verdict form. Mr. Humpherys agreed that it was not a legal matter; he did not object to striking it. Dr. Di Paolo and Mr. Ferguson suggested striking the entire last paragraph. Mr. Johnson noted that there may not be a special verdict form. Ms. Adams-Perlac suggested putting the last sentence of the last paragraph in brackets and letting the attorneys argue their positions as to whether or not it should be given to the jury. Dr. Di Paolo asked whether "ordinary care" in the preceding paragraph needed to be defined. For example, the instruction could say "an extreme departure from ordinary care, that is, the care a reasonable person would provide . . . ." Mr. Ferguson suggested inserting the definition of "ordinary care" from the negligence instructions. He also asked whether "intentionally fraudulent" was redundant and whether "intentionally" could be deleted. He thought it suggested a higher standard than merely proving fraud by clear and convincing evidence. Judge Harris thought that the committee should not deviate from the statutory language. Mr. Humpherys suggested adding the following language from *Behrens:* "Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence." Mr. Simmons thought that the committee should not deviate from its policy of not defining things by what they are not. Mr. Johnson added that, if the evidence showed that the defendant made a mere mistake or error of judgment, the matter would generally be dealt with by a motion before the case

ever goes to the jury. Dr. Di Paolo had a problem with the phrase "mere inadvertence," which she did not think lay jurors would understand. Ms. Adams-Perlac thought that "inadvertence" and "mistake" were roughly synonymous. Judge Harris thought that the language from *Behrens* should be a separate paragraph. Mr. Humpherys thought it should also be bracketed because it would not apply in every case. For example, it would not apply in an assault, fraud, or defamation case. The committee approved the instruction as modified.

b. *CV2027. Punitive damages discretionary.* Some committee members thought the instruction was largely duplicative of CV2026. Judge Harris said whether it was necessary may depend on how the special verdict form is worded. In a trial he had where the plaintiffs were seeking punitive damages, the jury was asked, "Is the plaintiff entitled to punitive damages?" Judge Harris did not think any more was needed, since CV2026 tells the jury when a plaintiff is entitled to punitive damages. Mr. Humpherys thought the question on the special verdict form should be, "Was the defendant's conduct willful and malicious," etc.? He noted that just because the jury finds that the defendant's conduct justifies an award of punitive damages does not mean that the jury will want to award punitive damages. He thought that, unless the court asks the jury if the defendant's conduct meets one of the standards for punitive damages, the jury could award punitive damages for other reasons, for example, because the jurors did not like the defendant or thought he lied on the witness stand. The committee decided to delete CV2027 and to add the following language to the end of CV2029: "Whether or not to award a specific amount or any amount of punitive damages is left entirely up to you."

c. *CV2028. Purpose of punitive damages.* At Judge Harris's suggestion, the committee decided to delete CV2028 as a separate instruction and to add it to the end of the first paragraph of CV2026. The committee approved this revision to CV2026.

d. *CV2029. Amount of punitive damages.* Mr. Humpherys suggested deleting the first sentence of CV2029, but Judge Harris disagreed. At Mr. Ferguson's suggestion, "[If you]" was deleted from the beginning of the sentence, since the instruction will only be given after the jury decides to award punitive damages (unless the punitive damage phase is not bifurcated from the liability phase of the trial and all punitive damage instructions are given together). Judge Harris suggested deleting the phrase "but should not be arbitrarily selected," but Mr. Johnson disagreed. He thought it was required by due process. Mr. Humpherys asked how a lay juror would understand the sentence "The amount must be . . . in proportion to the [name of plaintiff]'s harm." Dr. Di Paolo thought that jurors would understand that to mean that they have to weigh the harm and make any award of punitive damages roughly balance. The committee thought

that would be error since an award of punitive damages can be much less than a compensatory award or, presumptively, up to nine times the compensatory award. Ms. Blanch questioned whether the jury should be told anything about proportionality or whether proportionality is simply a matter for the court to deal with in post-trial motions. Mr. Humpherys suggested changing the sentence to read, "The amount must be reasonable and bear some relationship to [name of plaintiff]'s harm." He also suggested adding a committee note regarding the court's role in determining proportionality. The committee approved the instruction as revised, subject to approval of the wording of the committee note.

Judge Harris was excused.

e. *CV2030. Punitive damages.* The committee changed the beginning of the instruction to read, "In determining punitive damages, you may not award . . . ," and changed "[forum state]" to "[Utah]." Because there was no longer a quorum, however, the committee deferred a vote on approving the instruction as modified.

4. *Next meeting.* Barring any action by the Utah Supreme Court in the interim, the next meeting will be Monday, September 8, 2014, at 4:00 p.m. There will be no committee meetings in July and August.

The meeting concluded at 5:50 p.m.

Tab 2

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 noneconomic 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-3-106.

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 is 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 general damages to $100,000; if the general damages awarded are greater than allowed, the judge can reduce the amount.

Comment [NS1]: This was updated based upon the amendment of 78B-3-107 during the 2014 legislative session.

Under Utah's comparative negligence statute, any negligence of decedent is, in effect, imputed to the wrongful death 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)

Amended Dates:

August 29, 2014

September 10, 2012.

Utah Code Ann. § 78B-3-107 (West)

Amendments during 2014 Legislative Session:

"~~(~~(1)(a~~)~~) A cause of action arising out of personal injury to a person, or death caused by the wrongful act or negligence of ~~another~~a wrongdoer, does not abate upon the death of the wrongdoer or the injured person. ~~–~~The injured person, or the personal representatives or heirs of the person 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 person 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 person have a cause of action against the wrongdoer or personal representatives of the wrongdoer for special ~~damages,~~ and general damages ~~not to exceed $100,000,~~ which resulted from the injury caused by the wrongdoer and which occurred prior to death of the injured party from the unrelated cause. General damages may not exceed $100,000.

"~~(~~(c~~)~~) If the death of the injured party 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 ~~expiration of the six months,~~injured party's death:

(i) written notice of intent to hold the wrongdoer responsible has been ~~given~~mailed to or served upon the wrongdoer or the wrongdoer's insurance carrier or the uninsured motorist carrier of the injured party, 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 party 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 party was a covered person is not subject to the notice requirement described in Subsection (1)(c).(e) In no event shall the general damage award exceed $100,000 regardless of available liability, uninsured or underinsured motor vehicle coverage.

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

~~"(3) This section may not be construed to be retroactive."~~Utah Code Ann. § 78B-3-107 (West)

Tab 3

Draft: August 28, 2014

Punitive Damages

(1) 2026. Punitive damages – introduction. Instruction approved 06092014. Committee Notes need approval.

In addition to compensatory damages, (name of plaintiff) also seeks to recover punitive damages against (name of defendant). Punitive damages are intended to punish a wrongdoer for extraordinary misconduct and to discourage others from similar conduct. They are not intended to compensate the plaintiff for [his][her][its] loss.

Punitive damages may only be awarded if (name of plaintiff) has proven by clear and convincing evidence that (name of defendant)'s conduct:

(1) was [willful and malicious] [intentionally fraudulent]; or

(2) manifested a knowing and reckless indifference toward, and a disregard of, [name of plaintiff]'s rights.

"Knowing and reckless indifference" means that (a) (name of defendant) knew or should have known that such conduct would, in a high degree of probability, result in substantial harm to another; and (b) the conduct must be highly unreasonable conduct, or an extreme departure from ordinary care, in a situation where a high degree of danger or harm would be apparent to a reasonable person.

[Punitive damages are not awarded for mere inadvertence, mistakes, errors of judgment and the like, which constitute ordinary negligence.]

[Some of the questions on the Special Verdict form will ask if (name of plaintiff) has proved by clear and convincing evidence that (name of defendant)'s conduct (a) was [willful and malicious] [intentionally fraudulent], or (b) manifested a knowing and reckless indifference and disregard of (name of plaintiff)'s rights. If you answer "yes" to any of these questions, I will then give you further instructions.]

References

Utah Code § 78B-8-201(a) (West 2014).

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012).

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 568 (1996).

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19-20 (1991).

Behrens v. Raleigh Hills Hospital, 675 P.2d 1179 (Utah 1983).

Committee Notes

1. "Malicious conduct" has not yet been defined under Utah law. ~~A party wishing to offer a definition may do so with the approval of the court.~~

2. The committee was divided on whether the last two paragraph (in brackets) of this instruction ~~may be stricken upon argument of the parties~~should be given.

3. In *Crookston v. Fire Insurance Exchange*, the Utah Supreme Court held that the following factors must be considered in assessing the amount of punitive damages to be awarded: "(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." 817 P.2d 789, 808 (Utah 1991) (internal citations omitted).

4. The United States Supreme Court has held that due process prevents the use of punitive damages to punish a defendant for an injury that it inflicts on a nonparty. “Due process does not permit courts to adjudicate the merits of other parties' hypothetical claims under the guise of the reprehensibility analysis. Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct, for nonparties are not normally bound by another plaintiff's judgment.” *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 410. (2003).

(2) 2027. Amount of punitive damages. Instruction approved 06092014. Committee Note needs approval.

Now that you have decided to award punitive damages, you must determine the amount. Punitive damages should be the amount necessary to fulfill the two purposes of punitive damages, to punish past misconduct and to discourage future misconduct. Your decision should not be arbitrary. The amount must be reasonable and bear some relationship to the (name of plaintiff)’s harm. Whether or not to award a specific amount or any amount of punitive damages is left entirely up to you.

References

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).
Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 440-42 (2001).
BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-83 (1996).
Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811 (Utah 1991).

Committee Notes

1. The Utah Supreme Court has opined regarding the ratios that apply in determining whether a punitive damage award is excessive. “The general rule to be drawn from our past cases appears to be that where the punitives are well below $100,000, punitive damage awards beyond a 3 to 1 ratio to actual damages have seldom been upheld and that where the award is in excess of $100,000, we have indicated some inclination to

overturn awards having ratios of less than 3 to 1." *Crookston v. Fire Insurance Exchange,* 817 P.2d 789, 811 (Utah 1991).

The Court also provided guidance for trial courts considering challenges to punitive damage awards based on excessiveness in post-trial motions. "[W]e find that guidelines emerge for trial courts faced with challenges to punitive damage awards on the grounds of excessiveness under rule 59(a)(5). If the ratio of punitive to actual damages falls within the range that this court has consistently upheld, then the trial court may assume that the award is not excessive. In denying a rule 59(a)(5) motion for a new trial, the trial court need not give any detailed explanation for its decision if the punitive damage award falls within this ratio range. If the award exceeds the ratios set by our past pattern of decision, the trial court is not bound to reduce it. However, if such an award is upheld, the trial judge must make a detailed and reasoned articulation of the grounds for concluding that the award is not excessive in light of the law and the facts. The judge's articulation should generally be couched in terms of one or more of the seven factors we earlier listed as proper considerations in determining the amount of punitive damages, unless some other factor seems compelling to the trial court. For example, a trial court might conclude that an award should stand, despite a ratio that is higher than we have generally approved, because the defendant displayed an extremely high degree of malice, e.g., actual intent to harm or a high degree of likelihood of great harm based on the reprehensible nature of the act." *Id*.

The Crookston Court did not provide guidance whether the presumptive ratios should be disclosed to the jury. It is the committee's view that a review of presumptive ratios is for the trial and appellate courts to consider in post judgment proceedings when the award is attacked based on excessiveness.

One of the guideposts in *BMW of North America, Inc. v Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996) is the comparison of the punitive damage award to civil or criminal penalties. The cases are not clear whether evidence of civil or criminal penalties may

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be introduced to the jury as a basis for determining the amount of punitive damages, or whether this is solely for the trial or appellate courts to consider in post judgment proceedings regarding excessiveness.

(3) 2028. Punitive damages.

In determining the amount of punitive damages ~~necessary to achieve the proper level of punishment and deterrence~~, you may not award any punitive damages for the purpose of punishing (name of defendant) for [his] [her] [its] conduct in states other than Utah. You may only consider [defendant's] conduct that may cause harm toward the [plaintiff]. You may not punish [defendant] for harm caused to other people who are not in this lawsuit. ~~or for the purpose of changing (name of defendant)'s conduct outside of Utah~~.

Authority: *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred;" "[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. "due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensib98ility analysis"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-75 & 585 (1996) ("While each State has ample power to protects its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012). ("At issue in this case is the Constitution's Due Process Clause, which, as explained by the Supreme Court in *Philip Morris USA v. Williams,*[7] "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." "A plaintiff may show harm to others in order to demonstrate reprehensibility." But "a jury may not ... use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."

References

State Farm Mut. Auto. Ins. Co. v. Campbell, No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003).

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 570-75 & 585 (1996).

Committee Notes

(4) 2029 Crookston Factors

In determining the amount of damages, you may also consider any evidence regarding the following: (1) the relative wealth of [defendant]; (2) the nature of the alleged misconduct; (3) the facts and circumstances surrounding such conduct; (4) the effect of [defendant's] conduct on [plaintiff]; the probability of future reoccurrence of the misconduct; (6) the relationship of the parties; and (7) the amount of actual damages awarded.

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Crookston v. Fire Insurance Exchange, 817 P.2d 789, 811 (Utah 1991). The "harm to others", Crookston factor number 4, is no longer valid. See *Westgate Resorts v Consumer Protection Group, LLC*, 285 P.3d 1219, 1222-1223 (Utah 2012).

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(5) 2029 Reprehensibility

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In deciding what level of punishment and deterrence is warranted, you may consider the potential or actual harm to other people who are not in this lawsuit, but only for the purpose of assessing the reprehensibility of [defendant's] conduct. Harm to other people may not be used determine the amount of punitive damages.

Westgate Resorts v Consumer Protection Group, LLC, 285 P.3d 1219, 1222-1223 (Utah 2012). "A plaintiff may show harm to others in order to demonstrate reprehensibility." This is because "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general

public, and so was particularly reprehensible." But "a jury may not ... use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."

Philip Morris v. Williams, 549 U.S. 346 (2007)

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