AGENDA
ADVISORY COMMITTEE
ON MODEL CIVIL JURY INSTRUCTIONS

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

January 10, 2005
4:00 to 6:00 p.m.

Welcome and approval of minutes	John Young
Standard of proof instructions.	Tim Shea
Duty owed by a disabled person. Restatement Torts 2d 283; 283B.	Jonathan Jemming
Remainder of Negligence Instructions.	Frank Carney

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00, Judicial Council Room

February 14, 2005
March 14, 2005
April 11, 2005
May 9, 2005
June 13, 2005
July 11, 2005
August 8, 2005
September 12, 2005
October 17, 2005 (3rd Monday)
November 14, 2005
December 12, 2005

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

MINUTES
Advisory Committee on Model Civil Jury Instructions
November 8, 2004
4:00 p.m.

Present: Francis J. Carney (acting chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Colin P. King, Stephen B. Nebeker, Paul M. Simmons, Jonathan G. Jemming

Excused: John L. Young (chair)

1. *Minutes.* On motion of Ms. Blanch, seconded by Judge Barrett, the committee approved the minutes of the October 18, 2004, meeting.

2. *Draft Preliminary and General Instructions.* The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee:

a. *2.24. Settling Defendants in Multi-party Cases.* Mr. Dewsnup questioned whether the terms of a settlement (as opposed to the fact of settlement) must be disclosed and whether the Liability Reform Act superseded *Slusher v. Ospital.* Mr. Ferguson noted that in practice he has always received copies of settlement agreements in multi-party cases when he has asked for them and that, even though *Slusher* was decided under pre-Liability Reform Act law, it recognized, in footnote 13, that "[i]f anything, concerns regarding secret settlement agreements apply more strongly under" the Liability Reform Act than under prior law. Some committee members thought that the terms of the settlement agreement should be disclosed to the judge and that it should be left to the judge's discretion whether to tell the jury about the terms. Mr. Dewsnup questioned whether the parties can disclose the terms of the agreement even to the judge if the settlement is confidential. Mr. Humpherys and Mr. King felt that the terms of a true *Mary Carter* agreement may need to be disclosed. After further discussion, the instruction was amended to read as follows:

02.24. Settling parties in multi-party cases.

Some of the parties have reached a settlement agreement in this matter.

There are many reasons why parties settle during the course of a lawsuit. Settlement does not mean that any party has conceded anything. You must still decide which party or parties, including [the settling parties], were at fault and how much fault each party should bear. In deciding how much fault should be allocated to each party you must not consider the settlement agreement as a reflection of the strengths or weaknesses of any party's position.

> You may consider the settlement in deciding how believable a witness is.

The Advisory Committee Note was revised to read: "The Court and the parties must decide whether the fact of settlement and to what extent the terms of the settlement will be revealed to the jury in accordance with the principles set forth in *Slusher v. Ospital,* 777 P.2d 437 (Utah 1989)." The committee decided not to quote or paraphrase the *Slusher* factors in the note. The committee also decided not to include the comment from former MUJI 2.24, on the grounds that it addresses evidentiary issues rather than jury instruction issues. Finally, the committee decided to include references to *Child v. Gonda,* 972 P.2d 425 (Utah 1998), as well as to *Slusher* and Utah Rule of Evidence 408.

b. *Other Preliminary Instructions.* The committee deferred consideration of the instructions on burden of proof, preponderance of the evidence and clear and convincing evidence until the next meeting, to allow Mr. Ferguson's subcommittee to complete its work on these instructions.

3. *Proposed Introductory Statement.* Mr. Shea introduced a proposed introduction to the new instructions, which prompted a discussion of the following issues:

a. *Name.* The committee discussed what the instructions should be called. Suggestions included Model Utah Jury Instructions Second (MUJI 2d), MUJI Revised (MUJIR) and Utah Civil Jury Instructions.

b. *Approval.* Mr. Shea raised the issue of what Supreme Court approval of the new instructions will mean. The Court will want to be free to review the instructions as they arise in cases that come up for review, particularly where there has not been any Utah law on point. Mr. Shea suggested that the introduction could be worded more strongly if it came from the Court and not the committee.

c. *Release of Instructions.* Mr. King questioned whether the instructions should be released piecemeal. Doing so may raise problems where the new instructions use different terms from those used in MUJI. Mr. Shea suggesting adding a passage to the introduction to discuss the transition from the old instructions to the new. He also recommended adding a table showing where the former instructions are treated in the new instructions. The committee agreed to delete references to MUJI from the references in the new instructions and handle cross-references between the old and new instructions through the table.

d. *Public Comment.* A majority of the committee thought that the instructions should be released for public comment, even though public comment is not required and the comment period may further delay release of the instructions.

e. *Timing of Instructions.* At the committee's suggestion, Mr. Shea will revise the introduction to discuss when the instructions should be given during the course of a trial and refer to Utah Rule of Civil Procedure 47.

Ms. Blanch was excused.

4. *Negligence Instructions.* The committee revisited some of the negligence instructions it had previously approved.

a. *3.01. Verdict Form.* Mr. Dewsnup questioned whether the jury should be instructed in terms of the verdict form or in terms of the elements of the parties' claims and defenses, with special verdict forms included in their own section. The committee discussed when the jury should be given the special verdict form. After further discussion, the committee tentatively approved reading the special verdict form before the instructions on the substantive law of the parties' claims and defenses. Mr. Shea suggested that the instruction should be put in the general instructions, since it is not unique to negligence cases. It was also suggested that 3.01 could be used in place of 2.27.

b. *3.02. "Negligence" defined.* Dr. Di Paolo suggested calling the instruction *Definition of "Negligence."* The committee noted that ordinary people are not always careful and agreed to replace "an ordinary, careful person" with "a reasonably careful person" every time it appears in the instruction. The last line was revised to read: "You must decide whether the [defendant/plaintiff] was negligent by comparing his conduct with that of a reasonably careful person in similar situations." The committee approved the instruction as revised.

c. *3.03. Standard of Care for the Physically Disabled.* The committee debated whether instruction 3.03 accurately states the law. Some committee members thought that it should not be limited to physical disabilities.

Mr. Jemming will determine whether Utah has adopted sections 283 and 283B of the Restatement (Second) of Torts.

Mr. Dewnsup will propose a revised instruction 3.03.

5. *Next Meeting.* The next meeting will be Monday, December 13, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

01.402. Preponderance of the evidence.

When I tell you that a party must prove something or that a party has the burden of proof, I mean that the party must persuade you, by the evidence presented in court, that the fact is more likely to be true than not true.

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but I must emphasize to you that this is not a criminal case. In a civil case such as this one, a different level of proof applies: proof by a preponderance of the evidence. That is, proof that a fact is more likely to be true than not true.

Another way of saying this is proof by the greater weight of the evidence. In weighing the evidence, it is the quality and not the quantity of evidence that is important. One piece of believable evidence may weigh so heavily in your mind as to overcome a multitude of less believable evidence. The weight to be given to each piece of evidence is for you to decide. You should consider all the evidence that applies to a fact, no matter which party produced the evidence. After weighing all of the evidence, if you cannot decide whether a party has satisfied the burden of proof, you must conclude that the party did not prove that fact.

References.

Morris v. Farmers Home Mut. Ins. Co., 500 P.2d 505 (Utah 1972).
Alvarado v. Tucker, 268 P.2d 986 (Utah 1954).

Advisory Committee Notes.

Staff Notes.

Status: Not reviewed.

01.403. Clear and convincing evidence.

This case includes some facts that must be proved by a higher level of proof called “clear and convincing evidence”. When I tell you that a party must prove something by clear and convincing evidence, I mean that the party must persuade you, by the evidence presented in court, that it is highly probable that the fact is true. In other words, that there remains no serious or substantial doubt as to the truth of the fact. I will tell you specifically which of the facts must be proved by clear and convincing evidence.

References.

Jardine v. Archibald, 279 P.2d 454 (Utah 1955).
Greener v. Greener, 212 P.2d 194 (Utah 1949).
See also, Kirchgestner v. Denver & R.G.W.R. Co., 233 P.2d 699 (Utah 1951).

Advisory Committee Notes.

Staff Notes.

Status: Not reviewed.

MEMORANDUM

To: Phillip Ferguson

From: Jonathan Jemming

Re: Clear and Convincing and Preponderance Standards

I was asked by the committee to determine the law underpinning the clear and convincing and preponderance of the evidence standards. In particular, I was asked to determine whether there is any quantitative or numeric allocation of proof behind the standards. I will address the standards in turn:

First, there is not a quantitative formula behind the clear and convincing standard. However, there is a fairly consistent restatement of it in Utah caselaw. Under *Greener v. Greener*, for a matter to be "clear and convincing" to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. 212 P.2d 194 (Utah 1949); *see also Kirchgestner v. Denver & R.G.W.R. Co*., 233 P.2d 699 (Utah 1951). In *Jardine v. Archibald*, the Utah supreme court articulated that proof is convincing and clear which carries with it not only the power to persuade the mind as to probable truth or correctness of fact it purports to prove, but has element of clinching such truth or correctness, and for a matter to be clear and convincing to a particular mind it must at least have reached a point where there remains no serious or substantial doubt as to the correctness of the conclusion. 279 P.2d 454 (Utah 1955)(*criticized on other grounds by In re Swan's Estate,* 293 P.2d 682 (Utah 1956).

Second, there is also no numeric criterion articulated for the preponderance standard. However, its restatement in Utah caselaw is consistent. Under *Alvarado v.*

Tucker, "preponderance of the evidence" means the greater weight of the evidence or such degree of proof that the greater probability of truth lies therein. 268 P.2d 986 (Utah 1954). In *Alvarado*, the Utah supreme court found that a choice of probabilities creates only a basis for conjecture, on which a verdict cannot stand, and does not meet the requirement of a "preponderance of the evidence." *Id*. Under *Morris v. Farmers Home Mut. Ins. Co.*, the Utah supreme court held that proof by preponderance requires that evidence be such that reasonable minds acting fairly thereon could believe that the existence of fact is more probable or more likely than its nonexistence, so that person of ordinary prudence could believe fact with sufficient assurance to act upon it in relation to matters of serious concern in his own affairs. 500 P.2d 505 (Utah 1972).

Thus, while neither standard carries a quantitative or numeric value, the law in the area has remained consistent over time.

Addendum to Clear and Convincing and Preponderance of the Evidence Memo

Jimenez v. O'Brien, 213 P.2d 337 (Utah 1949)
"Clear, unequivocal and convincing evidence" is a higher degree of proof than a mere "preponderance of the evidence," and approaches that degree of proof, "beyond reasonable doubt", required in a criminal case.

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02.103. Standard of care for the physically disabled.

Physically disabled adults (for example, blind adults) are not held to the same standard of care as adults free from disability. A physically disabled adult must use the care that a person with a similar disability would use in a similar situation.

References.

Advisory Committee Notes.

Disability should be construed to mean physical disability and not deficiencies in mental competency. “Unless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances.” REST 2d TORTS §§ 283B. “If the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability.” REST 2d TORTS §§ 283.

Staff Notes.

Status: Reviewed.

MEMORANDUM

TO: MUJI COMMITTEE/TIM SHEA

FROM: JONATHAN G. JEMMING

DATE: DECEMBER 9, 2004

RE: STANDARD OF CARE FOR THE MENTALLY AND PHYSICALLY DISABLED AND FOR CHILDREN.

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1. In cases involving the primary negligence of a mentally disabled actor, unless the actor is a child, insanity or other mental deficiency does not relieve liability for non-conformity with the standard of a reasonable man under like circumstances. However, in contributory or comparative negligence cases, insane actors cannot be negligent, but lesser degrees of mental impairment should be considered by the jury in determining the culpability of a disabled plaintiff.

From review of the only binding case law in this area, *Birkner v. Salt Lake County, et al.*, 771 P.2d 1053 (Utah 1989), it appears that the Utah supreme court has parsed the standard of care for mentally impaired clients. In cases involving the primary negligence of a mentally ill actor, the court has accepted the objective approach of holding the actor responsible for conduct which does not conform to the standard of a reasonable man under like circumstances. Alternatively, in contributory or comparative negligence cases, the court has determined that insane actors cannot be negligent, but lesser degrees of mental impairment should be considered by the jury in determining the culpability of plaintiffs.

In *Birkner*, the Utah supreme court seems to accept the historical application of the Restatement (Second) of Torts § 283B (1965) and the policy that persons suffering from impaired mental capacity are responsible for harm caused by their primary negligence: "[u]nless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like

circumstances." 771 P.2d at 1060 (quoting Restatement (Second) of Torts § 283B(1965)).[1]

The court, however, rejected this objective approach in contributory and comparative negligence cases involving mentally impaired parties. *Id*. Alternatively, it adopted the majority rule that those who are insane are incapable of negligence, but lesser degrees of mental impairment should be considered by the jury in determining whether a party is negligent. *Id.*

The unique facts of *Birkner* are summarized as follows: the defendant, a therapist at a county owned mental health facility, and a mentally ill plaintiff had consensual sexual relations during a therapy session. The plaintiff subsequently sued for sexual battery and negligence against the defendant (the county was also named as co-defendant under the doctrine of *respondeat superior*). At trial, the jury allocated to the plaintiff 10 percent fault for her damages.

Plaintiff appealed the jury's allocation of 10 percent fault to her on the theory that a mentally ill patient cannot be negligent in her own mental health treatment. The defendant county argued that the plaintiff was contributorily negligent by initiating and consenting to sexual

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[1] Comment (b) of the Restatement (Second) of Torts § 283B(1965) is revealing:

"The rule that a mentally deficient adult is liable for his torts is an old one, dating back at least to 1616, at a time when the action for trespass rested upon the older basis of strict liability, without regard to any fault of the individual. Apart from mere historical survival, its persistence in modern law has been explained as follows:

1. The difficulty in drawing any satisfactory line between mental deficiency and those variations temperament, intellect, and emotional balance which cannot, as a practical matter, be taken into account in imposing liability for damage done.

2. The unsatisfactory character of the evidence of mental deficiency in many cases, together with the ease with which it can be feigned, the difficulties which the triers of fact must encounter in determining its existence, nature, degree, and effect; and some fear of introducing into the law of torts the confusion which has surrounded such a defense in the criminal law. Although this factor may be of decreasing importance with the continued development of medical and psychiatric science, it remains at the present time a major obstacle to any allowance for mental deficiency.

3. The feeling that if mental defective are to live in the world they should pay for the damage the do, and that it is better that their wealth, if any, should be used to compensate innocent victims than that it should remain in their hands.

4. The belief that their liability will mean that those who have charge of them or their estates will be stimulated to look after them, keep them in order, and see that they do not do harm.

conduct with the therapist. The court, upholding the jury's verdict, reasoned:

> "Mental impairments and emotional disorders come in infinite degrees and with an infinite variety of types of impairment. Some person's disorders may have nothing to do with the exercise of sound judgment in contexts where a third person's negligence causes injury. A patient seeking professional help for a certain kind of disorder may be more or less negligent depending on the nature and extent of the disorder. Those same factors will also determine in part the extent of the therapist's negligence. To apply a categorical rule that no patient seeking therapy for a mental or emotional disorder can be charged with negligence would be unrealistic and cause damage to the principle of comparative negligence." *Id.* (emphasis added).

Thus, under current Utah case law, in cases of primary negligence, unless the actor is a child, insanity or other mental deficiency to not relieve the actor from the objective standard of care. However, in contributory or comparative negligence cases, insane actors may not be negligent, but lesser degrees of mental impairment should be considered by the jury in determining the culpability of a disabled plaintiff.

2. Utah law is silent regarding the standard of care for physically impaired parties. However, the Restatement (Second) of Torts § 283B (1965) states that if the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like disability.

Utah law is surprisingly silent regarding the standard of care for physically impaired parties. However, the traditional standard is summarized in the Restatement (Second) of Torts § 283C (1965): "[i]f the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under the disability."[2]

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2. The following comments and illustrations are provided to Restatement (Second) of Torts § 283B (1965):
"a. So far as physical characteristics are concerned, the hypothetical reasonable man may be said to be identical with the actor. Physical handicaps and infirmities, such as blindness, deafness, short stature, or a club foot, or the weaknesses of age or sex, are treated merely as part of the "circumstances" under which the reasonable man must act. Thus the standard of conduct for a blind man becomes that of a reasonable man who is blind. This is not a different

For commentary into the reasoning behind the different standards applicable to the mentally and physically impaired, please refer to comments (a) and (b) in Footnote 2.

3. As a general rule, a child must exercise that degree of care which ordinarily would be observed by children of the same age, intelligence and experience under similar experience. However, if the child participates in adult activities, such as operating a motor vehicle, they are held to the same standard of care as an adult.

Consistent with the Restatement (Second) of Torts § 283A, Utah law adheres to a subjective approach in determining the liability of children for negligent acts:[3] a "child must exercise that degree of care which would ordinarily would be observed by children of the same age, intelligence and experience under similar circumstances." *See Donohue v. Rolando,* 400 P.2d 12, 14 (Utah 1965)(six-year old on bicycle); *see also Morby v. Rogers*, 252 P.2d 231, 234

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standard from that of the reasonable man stated in § 283, but an application of it to the special circumstances of the case.

b. The same allowance is made for physical, as distinguished from mental, illness. Thus, a heart attack, or a temporary dizziness due to fever or nausea, as well as transitory delirium, are regarded merely as circumstances to be taken into account in determining what the reasonable man would do. The explanation for the distinction between such physical illness and the mental illness dealt with in § 283B probably lies in the greater public familiarity with the former, and the comparative ease and certainty with which it can be proved.

c. A person under such temporary or permanent physical disability may be required, under particular circumstances, to take more precautions than one who is not so disabled, while under other circumstances he may be required to take less. Thus, an automobile driver who suddenly and quite unexpectedly suffers a heart attack does not become negligent when he loses control of his car and drives it in a manner which would otherwise be unreasonable; but one who knows that he is subject to such attacks may be negligent in driving at all."

Illustrations:

1. A, a blind man, is walking down a sidewalk in which there is a depression. A normal man would see the depression and avoid it. A does not see it, and walks into it. A may be found not to be negligent.
2. A, a blind man, is walking down a sidewalk in which he knows that there is a dangerous depression. Without asking for assistance from anyone, A attempts to walk through the depression. A may be found to be negligent, although a normal person would not be negligent in doing so.

3. In part, the policy for applying a special standard for children, according to comment b in the Restatement, "arises out of the public interest in their welfare and protection, together with the fact that there is a wide basis of community experience upon which it is possible, to determine what is to be expected of them . . ."

(Utah 1953). However, a often cited exception exists to this rule: "[i]t is a well-established principle of tort law that a minor participating in an adult activity, such as operating a motor vehicle, is held to the same standard of care as an adult. *Summerill v. Shipley*, 890 P.2d 1042, 1044-45 (Utah Ct. App. 1995).

Thus, a subjective standard of care applies to children, unless they cause harm when negligently engaged in adult activities such as the operation of motor vehicles.

November 17, 2004

VIA E-MAIL & U.S. MAIL

MUJI Committee Members

Re: Duty Owed by a Disabled Person
Subject: Proposed Instruction 3.3

Dear Committee Members:

As we left our last meeting, we were discussing what standard should apply to a physically or mentally disabled person. I have spent some time exploring some problems associated with this issue. They include:

1. What is the difference between a five-year-old child and a mentally retarded adult who has a mental capacity of age five?

2. Without expert testimony in some of the difficult cases, how can a lay juror address the issue of what a similarly disabled person would do?

3. What are the various situations where the standard of care should not be lowered for a physically or mentally disabled person?

Issues, such as the above, leave the proposed jury instruction that we were addressing very inadequate. My fear is that such an instruction may cause attorneys and judges to apply a simplistic approach to very difficult issues. Accordingly, I believe this instruction (which would be appropriate under certain circumstances) needs an extensive comment such as the following:

Comment

The Committee was concerned with this instruction's over-simplification of the issues involved with all cases involving physical and mental disabilities. Applying a lower standard of care due to mental or physical disability is very problematic and Utah law has not adequately addressed the emerging technology and science in this area.

There is a fundamental issue which remains unresolved under Utah law – what conduct and in what area of tort law should there be a reduced standard of care due to physical or mental impairment? The Committee has not tried to answer this issue but only provides this instruction as example of what may be used if there is such a reduced standard.

I look forward to our further discussion regarding the "impaired defendant" standard.

Very truly,

CHRISTENSEN & JENSEN, P.C.

L. Rich Humpherys

LRH/mg

02.101. “Fault” defined.

You must decide whether [names of persons on verdict form] were at fault. As used in these instructions and in the verdict form, the word “fault” has special meaning. Someone is at fault if:

1. that person’s conduct was [insert applicable causes of action]; and
2. that person’s conduct was the legal cause of [name of plaintiff]’s harm.

I will now explain what these terms mean.

References.

Utah Code Sections 78-27-37(2); 78-27-38; 78-27-40.
Haase v. Ashley Valley Medical Center, 2003 UT 360.
Bishop v. GenTec, 2002 UT 36.
Biswell v. Duncan, 742 P.2d 80, (Utah Ct. App. 1987).

Advisory Committee Notes.

“Fault” under the Comparative Negligence Act includes negligence, breach of warranty, and other breaches of duty. This instruction should be followed by those defining the specific duty (for example, negligence) and the instruction on legal cause.

Staff Notes.

Status: Reviewed.

02.102. “Negligence” defined.

We all have a duty to use reasonable care to avoid injuring others. Negligence means that a person did not use reasonable care. Reasonable care is simply what a reasonably careful person would do in a similar situation. A person may be negligent in acting or in failing to act.

The amount of care that is reasonable depends upon the situation. Ordinary circumstances do not require extraordinary caution. But some situations require more care because a reasonably careful person would understand that more danger is involved.

You must decide whether [names of persons on the verdict form] were negligent by comparing their conduct with that of an reasonably careful person in a similar situation.

References.

Mitchell v. Pearson Enters., 697 P.2d 240 (Utah 1985).
Meese v. BYU, 639 P.2d 720 (Utah 1981).

Advisory Committee Notes.

Staff Notes.

Status: Reviewed.

02.104. Amount of care required when children are present.

An adult must anticipate the ordinary behavior of children. An adult must be more careful when children are present than when only adults are present.

References.

Kilpack v. Wignall, 604 P.2d 462 (Utah 1979).
Vitale v. Belmont Springs, 916 P2d 359 (Utah App. 1996). (It is improper to give this instruction if the child is older than fourteen.)

Advisory Committee Notes.

This instruction should be used where there is evidence that a person knew or should have known that young children would be present. It is not intended to create a new duty to anticipate the presence of children.

Staff Notes.

Status: Reviewed.

02.105. Negligence applied to children.

You must decide whether a child aged _____ was negligent. A child is not judged by the adult standard. Rather, a child is negligent if he does not use the amount of care that is ordinarily used by children of the same age, intelligence, knowledge and experience in similar circumstances.

References.

Donohue v. Rolando, 16 Utah 2d 294, 296-297, 400 P.2d 12,14 (1965).
Restatement (Second) of Torts § 283A (1965).
Restatement (Third) of Torts § 8 (1999).

Advisory Committee Notes.

This instruction describes the standard of care to be used when determining whether a child acted negligently, as opposed to MUJI 3.7, which addresses whether an adult acted negligently with regard to a child's behavior. Utah case law recognizes the 'like age, intelligence and knowledge' standard. See, Donohue v. Rolando, 16 Utah 2d 294, 296-297, 400 P.2d 12,14 (1965); and Summerill v. Shipley, 890 P.2d 1042, 1044 (Utah Ct. App. 1995).

Utah case authority rejects an arbitrary tripartite approach (less than 7 years old incapable of negligence, 7-14 years old rebuttable presumption that child incapable of negligence, and, 14 and older capable of negligence in same capacity as an adult.) See, Mann v. Fairborn, 12 Utah 2d 342, 346, 366 P.2d 603, 606 (1961) (criticizing Nelson v. Arrowhead Freight Lines, 99 Utah 129, 104 P.2d 225 (1940)).

Nonetheless, this instruction should not be given where the child is less than five years old. See, Kilpack v. Wignall, 604 P.2d 462, 466 (Utah, 1979) ("We note that a young child is generally presumed to be incapable of contributory negligence."); and Restatement (Third) of Torts § 8 (1999). Also, this instruction should not be given where the child is engaged in an 'adult' activity. See, Summerill v. Shipley, 890 P.2d 1042,1044 (Utah Ct. App. 1995).

Staff Notes.

The detail of the committee note seems incongruous given the topic, especially in relation to the minimal notes for other instructions.

Status: Reviewed.

02.106. Child participating in an adult activity.

A child participating in an adult activity, such as operating a motor vehicle, is held to the same standard of care as an adult.

References.

Summerill v. Shipley, 890 P.2d 1042, 1044 (Utah Ct. App. 1995).

Advisory Committee Notes.

Before giving this instruction the judge should make the preliminary decision whether an activity is an adult activity.

Staff Notes.

Status: Reviewed.

02.107. Amount of care for dangerous activities.

Because of the great danger involved, those who are engaged in [describe activity] must use extra care. The greater the danger, the greater the care that must be used.

References.

Advisory Committee Notes.

Before giving this instruction the judge should make the preliminary decision whether an activity is an ultra-hazardous activity.

Staff Notes.

Do we confuse the standard by entitling the instruction "dangerous" activities, and expressing in the note the threshold test of "ultra-hazardous" activities?

Status: Reviewed.

02.108. Amount of care required in controlling electricity.

Power companies and others who control power lines and power stations must use extra care to prevent people and their equipment from coming in contact with high-voltage electricity. The greater the danger, the greater the care that must be used.

References.

Lish v. Utah Power & Light Co., 493 P.2d 611 (Utah 1972).
Brigham v. Moon Lake Elec. Ass'n, 470 P.2d 393 (Utah 1970).
See also, Burningham v. Utah Power & Light, 76 F. Supp. 2d 1243 (D. Utah 1999) (no duty owed to trespasser on power pole.)

Advisory Committee Notes.

Staff Notes.

Status: Reviewed.

02.109 “Legal cause” defined.

If you decide that the conduct of a person named on the verdict form was [insert applicable cause of action], you must then decide whether that conduct was a legal cause of [name of plaintiff]’s harm. For the conduct to be a legal cause of harm, you must decide that all of the following are true:

1. there was a cause and effect relationship between the conduct and the harm;
2. the conduct played a substantial role in causing the harm; and
3. a reasonable person could foresee that harm could result from the conduct.

There may be more than one legal cause of the same harm.

References.

Advisory Committee Notes.

The term “proximate” cause should be avoided. While its meaning is readily understandable to lawyers, the lay juror may be unavoidably confused by the similarity of “proximate” to “approximate.”

Staff Notes.

Status: Reviewed.

02.110. Allocation of fault.

In this case you will be called upon to allocate fault among [names of persons on the verdict form]. This must be done on a percentage basis and the total amount of fault must add up to one hundred percent. You will be given further instructions about fault and causation after you hear the evidence, but you should keep in mind that an important part of your deliberations will ultimately be to allocate the percentages of fault.

References.

Advisory Committee Notes.

Staff Notes.

Should this be part of the "parties" instructions or part of the "fault" instructions?

Combine with "comparative fault".

Status: Reviewed.

02.111. Comparative fault.

You must decide and record on the verdict form a percentage of fault for the conduct of each party based on the gravity or seriousness of the conduct. The total fault must equal 100%.

For your information, [name of plaintiff]'s total recovery will be reduced by the percentage of fault that you attribute to [name of plaintiff]. If you decide that [name of plaintiff]'s fault is 50% or greater, [name of plaintiff] will recover nothing. When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage of fault. I will make that calculation later.

References.

Utah Code Sections 78-27-37(2); 78-27-38; 78-27-40.
Haase v. Ashley Valley Medical Center, 2003 UT 360.
Bishop v. GenTec, 2002 UT 36.
Biswell v. Duncan, 742 P.2d 80, (Utah Ct. App. 1987).

Advisory Committee Notes.

The judge should ensure that the verdict form is clear that fault should only be assessed as to those parties for whom the jury finds both breach of duty and causation.

Staff Notes.

The definition of fault includes both breach of duty and legal cause. Is the percentage the jurors are to decide based on "seriousness of the conduct", level of breach or contribution to causation?

Combine with "allocation of fault".

Status: Reviewed.

02.112. Violation of a safety law.

Violation of a safety law is evidence of negligence unless the violation is excused. [name of plaintiff] claims that [name of defendant] violated a safety law that says:

[Summarize or quote the statute, ordinance or rule.]

If you decide that [name of defendant] violated this safety law, you must decide whether the violation is excused.

The defendant claims the violation is excused because:

1. Obeying the law would have created an even greater risk of harm.
2. He could not obey the law because he faced an emergency that he did not create.
3. He was unable to obey the law despite a reasonable effort to do so.
4. He was incapable of obeying the law.
5. He was incapable of understanding what the law required.

If you decide that [name of defendant] violated the safety law and that the violation was not excused, you may consider the violation as evidence of negligence. If you decide that [name of defendant] did not violate the safety law or that the violation should be excused, you must disregard the violation and decide whether [name of defendant] acted with reasonable care under the circumstances.

References.

Child v. Gonda, 972 P.2d 425 (Utah 1998).
Gaw v. State ex rel. Dep't of Transp., 798 P.2d 1130 (Utah Ct. App. 1990).
Jorgensen v. Issa, 739 P.2d 80 (Utah Ct. App. 1987).
Hall v. Warren, 692 P.2d 737 (Utah 1984).
Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162 (Utah 1978).
Thompson v. Ford Motor Co., 16 Utah 2d 30; 395 P.2d 62 (1964).

Advisory Committee Notes.

Before giving this instruction, the judge should decide whether the safety law applies. The safety law applies if:
1. the plaintiff belongs to a class of people that the law is intended to protect; and
2. The law is intended to protect against the type of harm that occurred as a result of the violation.

The judge should include the instruction on excused violations only if there is evidence to support an excuse and include only those grounds for which there is evidence.

Staff Notes.

Should this be grouped with the "evidence" instructions?

Status: Reviewed.