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

February 14, 2005
4:00 to 6:00 p.m.

Welcome and approval of minutes	John Young
Standard of proof. Preponderance of the evidence. Clear and convincing evidence.	Tim Shea
Standard of care of the physically disabled.	Jonathan Jemming
Standard of care of children.	Paul Belnap Jonathan Jemming
Amount of care for dangerous activities. Amount of care required in controlling electricity. "Fault" defined. "Legal cause" defined. Allocation of fault. Comparative fault. Violation of a safety law.	Frank Carney Tim Shea

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

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
January 10, 2004
4:00 p.m.

Present: Paul Belnap, Juli Blanch, Frank Carney, Ralph Dewsnup, Tracy Fowler, Rich Humpherys, Jonathan Jemming, Timothy Shea, David West, John Young (chair).

Excused: Paul Simmons, Judge William Barrett, Marianna Di Paolo, Colin King, Phillip Ferguson, Stephen Nebeker.

1. Minutes. Mr. Young called the meeting to order. The committee approved the minutes of the November 8, 2004 meeting.

2. Standard of proof. Mr. Shea presented a draft instruction on preponderance of the evidence and clear and convincing evidence based on provisions of the current MUJI and the instructions of other states. After discussion the committee decided that a burden of proof instruction should be separate from the standard of proof instructions.

Preponderance of the evidence. Mr. Dewsnup stated that the current MUJI instruction adequately described the greater weight of evidence. He suggested using the term "persuasive" rather than "convincing" to avoid confusion with the instruction on clear and convincing evidence. Mr. Young indicated that he thought the phrase "more likely true than not true" was a good addition. Mr. Dewsnup stated that the draft's closing, which instructs the jury to find a fact not proved if the evidence is evenly balanced, should include the corollary that if the evidence shows the burden of proof to have been met, then the jury should take the fact as proved. Mr. Shea will prepare another draft for the committee to consider.

Clear and convincing evidence. The committee discussed whether introducing the requirement that a fact must be "highly probably" to meet the standard was sound. After discussion, the committee decided to delete this phrase from other states and use the traditional Utah description "that there remains no serious or substantial doubt as to the truth of the fact."

The committee asked for a committee note that the judge should specify for the jury which elements must be held to the clear and convincing standard. This might be done in an instruction or as part of the verdict form. If the judge gives the clear and convincing evidence instruction at the start of the trial and for some reason those issues do not go to the jury (settlement, directed verdict, etc.) the judge should instruct the jury that those matters are no longer part of the case. Mr. Shea will prepare another draft for the committee to consider.

3. Standard of care of the mentally disabled, physically disabled, and children. The committee discussed the research by Mr. Jemming and Mr. Humpherys.

Mental disability. Mr. Jemming stated that the Utah Supreme Court has distinguished between insanity and lesser forms of mental disabilities and between primary negligence and comparative negligence. Mr. Jemming indicated that in primary negligence, the regular standard

of care applies and that "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." Mr. Jemming contrasted this with comparative negligence in which the Court held that an insane person could not be negligent, but that lesser mental disabilities should be considered by the jury. *Birkner v. Salt Lake County, et al.*,771 P.2d 1053 (Utah 1989). Mr. Jemming stated that the Court's conclusions may be limited to the circumstances of the case.

Physical disability. Mr. Jemming indicated that Utah case law does not address issues regarding the standard of care owed by a person with a physical disability. The Restatement of Torts 2d §283C provides that a person with a physical disability must use the same care as a reasonable person with a similar disability.

Children. Mr. Jemming stated that Utah law follows the general rule that a child must exercise the same standard of care as a child of like age, knowledge and experience but that a child engaging in an adult activity would be held to the standard of care of an adult.

Mr. Humpherys expressed concern that the proposed jury instructions inadequately describe the standard to be applied. That a child of fewer years might have the greater knowledge. That the law appears to distinguish between a child and an adult with the mental capacity of a child. That the standard should not change depending on whether the negligence was "primary" or contributory. Mr. Humpherys suggested a committee note that the law imposing a reduced standard of care is uncertain and that the instruction should be given only if the court first decides that a reduced standard applies.

Mr. Humpherys noted that Utah has a statute, Section 31A-22-303(1)(a)(iv), which requires liability coverage when a driver is overcome by an unforeseen seizure.

Mr. Belnap and Mr. Jemming will further research the standard of care for children. Mr. Jemming will further research the standard of care for persons with disabilities.

4. Fault defined. The committee decided that the instruction should list each of the grounds of comparative fault listed in the comparative negligence act. It was also noted that the first numbered paragraph is not grammatically correct. Mr. Shea will prepare another draft for the committee to consider.

5. Negligence defined. The committee approved the instruction defining negligence.

6. Amount of care required when children are present. The committee approved the instruction.

7. Child participating in an adult activity. The committee approved the instruction.

8. Amount of care for dangerous activities. Mr. Carney questioned whether the instruction is necessary since this instruction merely repeats the principle stated in the definition of negligence. Mr. Shea questioned whether the reference to "ultra-hazardous activities" in the committee note

is confusing since the rest of the instruction speaks of “dangerous” activities. The meeting was adjourned before the committee concluded its review of this instruction.

9. Adjournment. The committee adjourned at 6:00 pm.

01.401. Burden of proof.

When I instruct you that a party must prove something or that a party has the burden of proof, it means that the party must produce [a preponderance of the evidence] [clear and convincing evidence] that shows the following:

[List the elements of the claim.]

MUJI 1st Reference.

02.16.

References.

Advisory Committee Notes.

The judge may give the instructions on the burden of proof and standards of proof at the start of the trial to introduce the jurors to the concepts by which they will be evaluating the evidence.

Staff Notes.

Status: Reviewed.

01.402. Preponderance of the evidence.

When I tell you that a party must prove something by a "preponderance of the evidence," 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.

Another way of saying this is proof by the greater weight of the evidence. In weighing the evidence, it is the persuasive quality and not the quantity of evidence that is important. One piece of persuasive evidence may weigh so heavily in your mind as to overcome a multitude of less persuasive 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 presented the evidence.

After weighing all of the evidence, if you decide that the evidence regarding a fact is evenly balanced, then you must find that the fact has not been proved. On the other hand, if you decide that a fact is more likely true than not, then you must find that the fact has been proved.

MUJI 1st Reference.

02.18.

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: Reviewed.

01.403. Clear and convincing evidence.

Some facts in this case 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, to the point that there remains no serious or substantial doubt as to the truth of the fact.

Proof by clear and convincing evidence requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

I will tell you specifically which of the facts must be proved by clear and convincing evidence.

MUJI 1st Reference.

02.19.

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.

In giving the instruction on clear and convincing evidence, the judge should specify which elements must be held to this higher standard. This might be done in an instruction and/or as part of the verdict form. If the judge gives the clear and convincing evidence instruction at the start of the trial and for some reason those issues do not go to the jury (settlement, directed verdict, etc.) the judge should instruct the jury that those matters are no longer part of the case.

Staff Notes.

Status: Reviewed.

02.103. Standard of care of 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 reasonable person with a similar disability would use in a similar situation.

MUJI 1st Reference.

03.05.

References.

Advisory Committee Notes.

Proposed New Note: The standard of care for the physically disabled should be distinguished from the standard for the mentally disabled. Under REST 2d Torts § 283C "[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." This is not necessarily a diminished standard, but is subjective in that a party's circumstances, i.e. their physical disability, must be considered in determining whether the actor breached the standard of care.

However, a different approach exists for the mentally disabled. Under REST 2d Torts § 283B "[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." Cited in Birkner v. Salt Lake County, et al., 771 P.2d 1053 (Utah 1989). While Birkner also appears to create a distinction in cases involving either "primary" or comparatively negligent mentally impaired actors, the distinction is factually specific and appears limited to the narrow context of conduct between a therapist and a patient with limited mental impairment. Id. at 1060.

Former Draft Note: 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.

The first line may be misleading: “Physically disabled adults (for example, blind adults) are not held to the same standard of care as adults free from disability.” A comment to the Restatement suggests that the standard of care of the physically disabled is merely an application of the general rule to special circumstances. It's not so much that the standard of care is less, but that the disability should be considered as one of the circumstances in determining whether the

conduct was reasonable. The same principle might apply to the standard of care of the mentally disabled and of children .

Should we have an instruction on standard of care of the mentally disabled?

Status: Reviewed.

02.105. Standard of care of 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 similar age, intelligence, knowledge or experience in similar circumstances.

MUJI 1st Reference.

None.

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.

Proposed New Note:
This instruction should not be given if the child is engaged in an 'adult' activity. See Summerill v. Shipley, 890 P.2d 1042, 1044 (Utah Ct. App. 1995).

However, it is unclear whether this instruction should be given if the child is less than seven years old. In S.H. By and Through Robinson v. Bistryski, the Utah Supreme Court states that children under the age of seven are legally incapable of negligence. 923 P.2d 1376, 1382 (Utah 1996)(citing Nelson v. Arrowhead Freight Lines Ltd., 104 P.2d 225, 228 (Utah 1940)). However, given the backdrop of additional Utah case-law that is left un-addressed by Bistryski, combined with it's factually specific nature, it is unclear whether a presumption that children under seven years old are wholly incapable of negligence exists in Utah.

Former Draft Note: 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.

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.

MUJI 1st Reference.

03.08.

References.

Advisory Committee Notes.

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

Staff Notes.

Do we even need this as a separate instruction? It is based on MUJI 3.8, which is a restatement of 3.6. MUJI 3.6 is incorprated into the new definition of negligence.

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.

MUJI 1st Reference.

03.09.

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.

02.101. "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 gave rise to a claim for [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.

MUJI 1st Reference.

03.01.

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 in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product.

This instruction should be followed by those defining the specific duty (for example, negligence) and the instruction on legal cause.

Staff Notes.

See proposed instruction 2.101a, which in essence is the same as this instruction, only omitting the first sentence of paragraph 2 as obsolete under the Comparative Negligence Act.

Renumber so that this instruction immediately precedes the instruction on legal cause.

Status: Reviewed.

02.101a "Fault" defined.

When I say that you must decide whether a person was at fault, I mean that you must decide whether that person's [failure to] act was the legal cause of [name of plaintiff]'s injury.

MUJI 1st Reference.

03.01.

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.

UnderUtah Code Section 78-27-37(2) "fault" means:
(1) any actionable breach of a legal duty proximately causing or contributing to the injury;
(2) any act proximately causing or contributing to the injury; and
(3) any omission proximately causing or contributing to the injury.
The first of these is merely a restatement of four of the elements of most civil liability claims: duty; breach; causation; damages. The second two include any act or omission that is the proximate cause of the injury, whether actionable or not. That is, whether the act or omission is a breach of duty or not. Any act or omission that is a breach of duty giving rise to a cause of action will also qualify as fault under the broader terms of items (2) or (3), rendering the actionable-breach-of-duty clause mere surplusage.
All three items require proximate cause - that is, what these instructions label "legal cause." Legal cause includes actual cause, which in turn requires an act or omission. Therefore, under the Comparative Negligence Act, "fault" means "legal cause."

This instruction should be followed by those defining the specific duty (for example, negligence) and the instruction on legal cause.

Staff Notes.

Renumber so that this instruction immediately precedes the instruction on legal cause.

Status: Not 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.

MUJI 1st Reference.

03.13; 03.14; 03.15.

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.

02.109a "Legal cause" defined.

Legal cause means that [name of person]'s [failure to] act:

(1) caused the harm directly or set in motion events that caused the harm in a natural and continuous sequence;
(2) played a substantial role in causing the harm; and
(3) could be expected by a reasonable person to cause the harm.

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

MUJI 1st Reference.

03.13; 03.14; 03.15.

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: Not 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 100%. 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.

MUJI 1st Reference.

None.

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.

MUJI 1st Reference.

03.17; 03.18; 03.19.

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.

MUJI 1st Reference.

03.11.

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.