Agenda
Advisory Committee on
Model Civil Jury Instructions

June 14, 2010
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	John Young
"Cause" and "fault" instructions. Negligence verdict form.	Tab 2	John Young
CV 2012. Noneconomic damages. Loss of consortium.	Tab 3	Frank Carney
Post Trial Surveys		John Young

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

Published Instructions: http://www.utcourts.gov/resources/muji/

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00 p.m.

September 13, 2010
October 12, 2010 (Tuesday)
November 8, 2010
December 13, 2010

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 10, 2010
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill

Excused: Honorable William W. Barrett, Juli Blanch, Tracy H. Fowler, David E. West

1. *Proximate Cause and Substantial Factor Revisited.* The committee discussed the request of Curt Drake and Scott Dubois to reconsider the causation instruction, CV209, in light of MUJI 1st 3.14. Mr. Dubois did not have time to draft an argument in favor of their position but submitted a section from a brief arguing for use of the MUJI 1st instruction. The argument, however, focused on the use of the term "proximate cause" and not on "substantial factor." The committee thoroughly considered using "proximate cause" at the time it adopted CV209 and rejected the term in favor of "cause," as defined in CV209. As Mr. Carney pointed out, MUJI 2d does not do away with proximate causation as an element of a negligence claim but only does away with the term "proximate" because jurors did not understand it.

Messrs. Simmons and Summerill submitted a memorandum discussing CV209 and explaining why they thought the committee was right in rejecting the "substantial factor" language of MUJI 1st 3.14 when it considered CV209 the first time, in 2005. Their position is that "substantial factor" is confusing in that it implies that, even if the defendant's conduct was a cause in fact of the plaintiff's harm, the defendant cannot be liable unless his conduct meets some threshold level, whereas the committee thought that, under the Liability Reform Act, the extent to which a defendant's conduct contributed to a plaintiff's harm is properly dealt with under the allocation of fault instruction (CV211) and not as a matter of proximate cause.

Messrs. Carney and Simmons discussed the origin of the "substantial factor" definition of proximate cause. Mr. Simmons noted that the definition was originally meant to avoid unjust results where a strict application of a foreseeability or "but for" test would deny liability. He thought that the instruction might be appropriate in a case where there are two or more causes, each of which would have been sufficient alone to cause the plaintiff's harm. Mr. Carney noted that, according to Professor Dobbs, the substantial factor test was meant to get around situations where two causes combine to cause a result that either cause, acting alone, would have caused.

Mr. Carney thought that foreseeability is the *sine qua non* of proximate causation and needs to be included in the jury instruction. Mr. Carney relied in part on *Raab v. Utah Railway Co.,* 2009 UT 61, 221 P.3d 219. Mr. Simmons noted that that case applied federal common law and not Utah law. Mr. Simmons thought that, under *Normandeau v. Hanson Equipment Inc.,* 2009 UT 44, foreseeability is first decided by the court as a

matter of law in determining whether the defendant owed the plaintiff a duty and did not need to be revisited in the context of proximate causation; if the jury decides it again as part of proximate cause, it can lead to inconsistent conclusions by the court and the jury. Mr. Simmons noted that proximate causation is a legal construct that consists of cause in fact and no good reason to relieve the defendant from liability for the harm he in fact caused. The latter part, in his opinion, should be a question of law for the court to decide.

After discussing other matters (see below) to give Mr. Lund a chance to join the meeting, the committee continued its discussion of proximate cause. Mr. Carney suggested that the committee note to CV209 be expanded to explain the varying positions of committee members on foreseeability and to explain why the committee rejected the "substantial factor" test. Mr. Simmons offered to draft a proposed addition to the comment. Mr. Humpherys asked that the comment also cover the situation he raised in an e-mail to the committee, where the defendant's negligence consists in failing to prevent harm.

Mr. Young noted that the Utah appellate courts have used both the "natural and continuous sequence" definition of proximate cause and the "substantial factor" definition and suggested that MUJI 2d contain alternative instructions, as in MUJI 1st. He noted that *Holmstrom v. C.R. England, Inc.,* 2000 UT App 239, 8 P.3d 281, the most recent Utah appellate court decision discussing the "substantial factor" test, should be cited in the references to CV209. Mr. Summerill suggested leaving CV209 as is and letting someone take up on appeal the issue of "substantial factor." Mr. Young noted that the court has had seventeen years to resolve the question raised by the alternative instructions in MUJI 1st and has not done so. Mr. Humpherys thought that if the case law supports alternative instructions, it is the committee's duty to include alternative instructions. Mr. Carney noted that the *Holmstrom* case, relying on the Restatment (Second) of Torts § 431, seems to be at odds with Dobbs, in that it suggests that negligence cannot be a substantial factor in bringing about harm if the harm would have occurred even if the actor had not been negligent. According to Dobbs, that was the very type of situation the "substantial factor" test was meant to address and provide a basis for liability. Mr. Summerill noted that the Utah cases seem to use the "substantial factor" and "natural and continuous sequence" definitions of proximate cause interchangeably. Mr. Shea noted that subparagraph (1) of CV209 could be taken as a definition of "substantial factor." Mr. Ferguson noted that both "proximate cause" and "substantial factor" are confusing, but for different reasons: jurors do not know what "proximate" means, and "substantial" is so broad and vague as to mean anything. None of the committee members were in favor of throwing out CV209, and none were in favor of adding an alternative instruction using a "substantial factor" test for causation. Dr. Di Paolo suggested that the committee note to CV209 be revised so that if someone

searches the instructions for "substantial factor," they will be directed to the committee note and so the issue will not have to come up again.

Mr. Shea will circulate revisions to CV209, and Mr. Simmons will propose additions to the committee note to CV209.

2. *Special Verdict Forms and General Tort Instructions.* Mr. Shea prepared draft special verdict forms for negligence cases involving one defendant with no comparative fault and for cases involving one defendant with comparative fault. The forms can be cut and pasted from the courts website into a Word document. The committee discussed the content of the forms. An attorney (Gary Ferguson) sent an e-mail to the committee chair objecting to the medical malpractice verdict form, which asks, "Did the defendant breach the standard of care?" and suggested that it should ask instead, "Was the defendant at fault?" or "Was the defendant negligent?" He thought asking whether the defendant breached the standard of care was not clear or simple enough for lay jurors to understand easily. Some committee members thought that the same language should be used throughout the tort instructions, but Mr. Young thought that different language could be used for medical malpractice cases. Mr. Carney noted that attorneys in a medical malpractice case before Judge Hilder had objected to asking "Was the defendant at fault?" because "fault" is defined in CV201 to include the element of causation, so the jury is, in effect, asked to determine causation twice. Mr. Simmons noted that that is because the statute defines "fault" as any actionable breach of legal duty "proximately causing or contributing to injury or damages," UTAH CODE ANN. § 78B-5-817(2), and CV201 is taken from the statutory definition. Mr. Ferguson noted that, in one sense, "negligence" also includes proximate causation. He noted that, by using "breach of the standard of care," the medical malpractice verdict form avoids the problem of conflating fault and causation. Mr. Shea noted that we should go through the instructions and identify all those that link fault to causation (such as CV1050). Mr. Carney suggested redefining "fault" in CV201 to eliminate the causation element, so that the second paragraph of that instruction would read, "Fault means any wrongful act or failure to act. The wrongful act or failure to act alleged in this case is [negligence, etc.]." Mr. Simmons noted that the instruction would also have to be revised to say that the jury still needs to find causation. The committee revised the first paragraph of CV201 to include an instruction that, if the jury finds that anyone was at fault, it must then decide whether that person's fault was a cause of the harm.

Mr. Young did not think the current jury instructions were hard for jurors to process. Mr. Carney agreed but noted that we do not want to create appealable issues in the instructions. Mr. Ferguson noted that, if we change the definition of "fault" to eliminate the causation element, someone will appeal the instruction on the grounds that it misstates the law as stated in the statutory definition of "fault." Mr. Humpherys thought that any error would be harmless.

Several committee members thought that the special verdict form should ask, (1) Was the defendant at fault?, and (2) Did the defendant's fault cause the plaintiff's harm?

Mr. Young noted that the committee had agreed at its last meeting to move the comparative fault instruction to the end of the instructions (series 2900), right before the special verdict forms. The committee discussed the placement of the fault, comparative fault, and causation instructions. Since they apply to most, if not all, tort cases, Mr. Shea suggested adding them to the general instructions (the 100 series) or making them a separate section (series 200) and renumbering all the other instructions accordingly. Dr. Di Paolo suggested that, if they are added to the general instructions, they could start as CV150. Mr. Young suggested making them the 1900 series, right before tort damages, and suggested moving CV201, CV209, CV210, CV211, and CV1050 to this new section. Mr. Simmons noted that CV1050 (the products liability comparative fault instruction) may need to stay in the product liability instructions because comparative fault is more limited in a products liability case; it may be limited to product misuse, assumption of risk, and ignoring a warning. Mr. Ferguson thought general instructions on fault and causation were going to go in each section so that one could find all the liability instructions necessary for a given case in one section, but Mr. Young noted that the committee has not always been consistent in doing so. Mr. Simmons noted that the motor vehicle instructions (series 600), for example, do not include any instructions on negligence or causation. Mr. Summerill noted that, whether the general instructions are included in each tort section or in a separate section, they should be separated out for the committee's use, so that the committee can develop a template and be consistent in the language used to explain the same concepts in each tort section.

3. *Other Topics.*

a. *Liability of Design Professionals.* Messrs. Young and Shea noted that the design professionals' liability subcommittee has submitted proposed instructions. Mr. Shea thought they needed a lot of work and offered to meet with the gang of three assigned to review the instructions (Messrs. Carney and Summerill and Ms. Blanch). Mr. Summerill asked how much leeway the gang of three has to revise the instructions. Mr. Young said that it can fix the language of the instructions but should refer substantive legal issues back to the subcommittee.

b. *Condemnation.* Mr. Young reported that Perrin Love should have the remaining condemnation instructions for the committee to review at the next meeting.

c. *Premises Liability*. Mr. Young reported that Jeff Eisenberg's subcommittee is trying to finish the premises liability instructions.

4. *CV202A, "Negligence" defined*. Mr. Shea circulated a proposed revision to CV202A, which includes the parties' contentions regarding how a party was negligent. The committee approved the instruction.

5. *Feedback*. Mr. Shea noted that, so far, the feedback he has received on MUJI 2d has been favorable, but we have to go out and solicit it. Mr. Ferguson noted that he had sent Messrs. Young and Shea five sets of jury instructions from Ruth Shapiro in his office. Mr. Carney reported that he talked to some judges about whether they needed further direction on which instructions to include in the preliminary instructions, at the start of the case, and which ones to include at the end of the case. They did not have any problem distinguishing the preliminary instructions from the final instructions. Mr. Summerill noted, from his recent trial, that the preliminary instructions are very repetitive. Mr. Shea asked whether we should survey judges and attorneys at the end of a case or whether he should copy the instructions used from the court file. The committee thought the latter would be too much work for Mr. Shea and that a survey would be more useful. Dr. Di Paolo noted that the committee needs to decide what it wants to learn from a survey. The committee responded that it wants to learn whether the MUJI 2d instructions are being used and what problems courts and litigants have encountered in using them. The committee suggested additional questions for the survey: Which MUJI 2d instructions were used? Did the court refuse to give any MUJI 2d instruction? If so, why? Which MUJI 1st instructions were used, if any? Did jurors submit questions to the court regarding any instruction? Messrs. Humpherys and Summerill thought it would be useful to get feedback from jurors, but the committee decided against doing so for fear that it would give one side or the other grounds to appeal on the grounds that the jurors did not properly understand or apply a given instruction. Mr. Shea noted that he can pull up a list of trials held each month. Mr. Young suggested that each month we look at the previous month's trials and assign committee members to call the judge or attorneys involved and solicit feedback on the jury instructions. Dr. Di Paolo said that we will have a better idea of what questions to ask after the first time we talk to judges or attorneys about their trials. She also suggested that, if there are a number of trials in a month, we would not have to talk to the attorneys and judge in every case but could take a random, objective sample of the cases.

6. *Next Meeting*. The next meeting is Monday, June 14, 2010, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

1) CV201 "Fault" defined.

Your goal as jurors is to decide whether [name of plaintiff] was harmed and, if so, whether anyone is at fault for that harm. If you decide that more than one person is at fault, you must then allocate fault among them.

Fault means any wrongful act or failure to act ~~that causes harm to the person seeking recovery~~. The wrongful act or failure to act alleged in this case is [negligence, etc.]

Your answers to the questions on the verdict form will determine whether anyone is at fault. We will review the verdict form in a few minutes.

2) CV209 "Cause" defined.

I've instructed you before that ~~the concept of~~ fault ~~includes~~ is a wrongful act or failure to act. ~~that~~ You must also determine whether a person's fault causes harm.

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word. "Cause" means that:

(1) the person's act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence;

and

(2) the person's act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

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

Committee Notes

The term "proximate" cause should be avoided. While its meaning may be understood by lawyers, the lay juror may be unavoidably confused by the similarity of "proximate" to "approximate." The committee also rejected "legal cause" because jurors, looking for fault, may look only for "illegal" causes. Charrow, Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions (1979) 79 Colum. L. Rev. 1306.

The Utah Code includes "proximate" cause in its definition of "fault" in Section 78B-5-817, but did not define the term. We intend to simplify the description of the traditional definition, but not change the meaning.

In Mitchell v. Gonzales, 819 P.2d 872 (Cal. 1991), the supreme court of California held that use of the so-called "proximate cause" instruction, which contained the "but for" test of cause in fact, constituted reversible error and should not be given in California negligence actions. The court determined, using a variety of scientific studies, that this instruction may improperly lead jurors to focus on a cause that is spatially or temporally closest to the harm and should be rejected in favor of the so-called "legal cause" instruction, which employs the "substantial factor" test of cause in fact. CACI 430 reflects this adjustment in the law; embracing the "substantial factor" test and abandoning the term "proximate cause."

Recognizing additional studies of the confusion surrounding "legal cause," the court also recommended that "the term 'legal cause' not be used in jury instructions; instead, the simple term 'cause' should be used, with the explanation that the law defines 'cause' in its own particular way." Id., at 879 (citation omitted). These recommendations have since been integrated into the California jury instructions.

Foreseeability relates both to the issue of duty and to the issue of proximate cause. Duty is a legal issue for the court to decide. See Normandeau v. Hanson Equip., Inc., 2009 UT 44, ¶¶ 17-18, 215 P.3d 152. It is not clear how foreseeability differs when it goes to the issue of duty from when it goes to the issue of proximate cause. Compare id. ¶ 18 (the "specific mechanism" of injury "is more properly an issue of proximate cause than one of duty") & ¶ 20 ("Foreseeability as a factor in determining duty does not relate to the specifics of the alleged tortious conduct but rather to the general relationship between the alleged tortfeasor and the victim."), with Steffensen v. Smith's Mgmt. Corp., 862 P.2d 1342, 1346 (while "foreseeability is required to meet the test of negligence and proximate cause," the defendant's "precise action" does not have to be foreseeable; all that has to be foreseeable is "a likelihood of an occurrence of the same general nature") (emphasis in original) (quoting Rees v. Albertson's, Inc., 587 P.2d 130, 133 (Utah 1978)). Compare also, e.g., McCain v. Florida Power Corp., 593 So.2d 500, 502 (Fla. 1992) ("The duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others. The proximate causation element, on the other hand, is concerned with whether and to what extent the defendant's conduct foreseeably and substantially caused the specific injury that actually occurred.") (citations omitted), with Yonce v. SmithKline Beecham Clinical Labs., Inc., 680 A.2d 569, 579 (Md. Ct. Spec. App.) ("foreseeability is an element in the determination of a duty and in the determination of proximate cause and is defined the same in each," namely, "whether the general type of harm sustained was foreseeable"), cert. denied, 685 A.2d 452 (Md. 1996). Some committee members thought that, if the court submits the question of negligence to the jury, it has already determined that the defendant's conduct could reasonably be foreseen to produce a harm of the same general nature as the plaintiff suffered

and that the jury should not be asked to decide this issue again, at the risk of reaching a contrary conclusion.

Utah appellate courts sometimes define "proximate cause" in terms of "that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred" or "one which sets in operation the factors that accomplish the injury," see, e.g., Mahmood v. Ross, 1999 UT 104, ¶ 22, 990 P.2d 933 (citations omitted), and sometimes in terms of a cause that is a "substantial factor" or plays a "substantial role" in causing the injury, see, e.g., Holmstrom v. C.R. England, Inc., 2000 UT App 239, ¶ 45, 8 P.3d 281. It is not clear whether courts intend any difference by their choice of definition. Cf., e.g., Doe v. Garcia, 961 P.2d 1181, 1185 (Idaho 1998) (a "substantial factor" is "one that 'in natural or probable sequence, produced the damage complained of' or one 'concurring with some other cause acting at the same time, which in combination with it, causes the damage'") (citation omitted).

The "substantial factor" test has been criticized as unhelpful to juries. See, e.g., 1 Dan B. Dobbs, The Law of Torts § 171, at 416 (2001) ("The substantial factor test is not so much a test as an incantation. It points neither to any reasoning nor to any facts that will assist courts or lawyers in resolving the question of causation. . . . It invites the jury's intuition.") (footnotes omitted).

The committee considered the "substantial factor" alternative of MUJI 3.14 and rejected it on the grounds that, under the Utah Liability Reform Act, Utah Code Ann. §§ 78B-5-817 through -823, the extent to which a defendant's conduct contributed to an injury is properly considered under allocation of fault (CV211) and not causation.

Although Holmstrom v. C.R. England, Inc., 2000 UT App 239, 8 P3d 281, uses the term "substantial factor," it treats the term as, essentially, the "but for" test of causation. It suggests that there can be no liability in the very circumstances that the "substantial factor" test was intended to cover--two tortfeasors whose acts independently were sufficient to cause the harm. See id. ¶ 46 (citations omitted). See also 1 Dobbs, supra, § 171, at 416 ("such cases represent the single most justified use for the substantial factor test") (footnote omitted).

This instruction cannot cover every circumstance. See Jury Instruction Forms: Utah 15.6 note, at 50 (1957) ("Most of the difficulty with proximate cause seems to arise from trying to state a definition which will be of universal application in various hypothetical situations."). Counsel and judges may need to modify this instruction or use the phrase "substantial factor" or some other definition in unusual cases, such as the case of two tortfeasors either of whose negligence would have been sufficient to cause the harm, or cases in which the actor's fault consists of failing to prevent harm caused by a third party.

3) CV211 Allocation of fault.

If you decide that more than one person is at fault, you must decide each person's percentage of fault. This allocation of fault must be done on a percentage basis, and must total 100%. Each person's percentage should be based upon how much that person's fault ~~contributed to~~ caused the harm.

You may also decide to allocate a percentage of fault to the plaintiff. [Name of plaintiff]'s total recovery will be reduced by the percentage of fault that you attribute to [him]. 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.

4) CV309 “Cause” defined.

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word.

"Cause" means that:

(1) the person’s act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence; and

(2) the person’s act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

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

Committee Notes

This instruction tracks the MUJI 2nd instruction on causation. For a further explanation of this instruction, see the Committee Notes to Instruction 209.

Include reference to CV209 also in CV407 “Cause” defined.

5) CV1015 Negligence. Definition of “Negligence.”

[Name of plaintiff] seeks to recover damages based upon a claim that [he] was injured due to [name of defendant]’s negligence. You must decide whether [name of defendant] was negligent.

Negligence means that a [manufacturer/designer/tester/inspector] did not use reasonable care in [designing/manufacturing/testing/inspecting] the product [to avoid causing a defective and unreasonably dangerous condition] [to eliminate

any unreasonable risk of foreseeable injury]. Reasonable care means what a reasonably careful [manufacturer/designer/tester/inspector] would do under similar circumstances. A person may be negligent in acting or failing to act.

For example, a [designer/manufacturer/tester/inspector] of a product might be required to use more care if a prudent [designer/manufacturer/tester/inspector] would understand that more danger is involved in the use of the product. In contrast, a [designer/manufacturer/tester/inspector] of a product may be able to use less care because a prudent [designer/manufacturer/tester/inspector] would understand that less danger is involved in the use of the product.

The [designer/manufacturer/tester/inspector] of the product owes a duty of reasonable care to any persons who the [designer/manufacturer/tester/inspector] expects would use the product.

6) CV1050 Comparative fault.

[Alternative A.]

[Name of defendant] claims that [name of plaintiff] was at fault and that [name of plaintiff]'s fault was a caused ~~or contributed to~~ of the harm. This is called comparative fault.

Comparative fault is [negligence] [misuse] [assumption of risk] [or other misconduct] by [name of plaintiff] ~~that causes or contributes to the harm~~.

[Name of defendant] has the burden of proving [name of plaintiff]'s comparative fault ~~by a preponderance of the evidence~~ and that the fault was a cause of the harm.

Any comparative fault of [name of plaintiff] does not bar [his] recovery unless you apportion 50% or more of the total fault to [name of plaintiff]. In other words, [name of plaintiff] may recover from [name of defendant(s)] if [name of defendant(s)]'s fault is greater than [name of plaintiff]'s.

If you allocate 50% or more of the total fault of all parties listed on the verdict form to [name of plaintiff], then [name of plaintiff] will recover nothing. If you allocate less than 50% of the total fault to [name of plaintiff], then I will reduce [name of plaintiff]'s total damages you have determined by the percentage of fault you attribute to [name of plaintiff].

[Alternative B.]

[Name of defendant] claims that [name of plaintiff] was at fault and that [name of plaintiff]'s fault was a caused ~~or contributed to~~ of the harm. This is called comparative fault.

Comparative fault is [misuse] or [assumption of risk] by [name of plaintiff] ~~that causes or contributes to the harm~~.

[Name of defendant] has the burden of proving [name of plaintiff]'s comparative fault ~~by a preponderance of the evidence~~ and that the fault was a cause of the harm.

If you determine that both [name of plaintiff] and [name of defendant] were at fault in causing [name of plaintiff]'s harm, then you must determine the percentages of fault attributable to [name of plaintiff] and [name of defendant]. You must also determine the total damages [name of plaintiff] has sustained as a result of the harm. Then I will then reduce the total amount of damages by the percentage of [name of plaintiff]'s fault.

7) CV299A Special Verdict - One Defendant (No Comparative Fault)

MEMBERS OF THE JURY:

Please answer the following questions *in the order they are presented*. If you find that the issue has been proved by a preponderance of the evidence, answer "Yes." If you find that the evidence is equally balanced or that the greater weight of evidence is against the issue, answer "No."

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.

(1) Was [name of defendant] ~~negligent~~ at fault? (Check one.)

☐ Yes ☐ No

(If you answer "Yes," please answer Question 2. If you answer "No," stop here, sign the verdict form and advise the bailiff.)

(2) Was this ~~negligence~~ fault a cause of any harm to [name of plaintiff]? (Check one.)

☐ Yes ☐ No

(If you answer Yes," please answer question 3. If you answer "No," stop here, sign the verdict form and advise the bailiff.)

(3) What amount, if any, would fairly compensate [name of plaintiff] for [his] harm? *(Answer this only if you checked "Yes" on both Questions (1) and (2).)*

(a) Economic Damages:

(1) Past Medical Expenses	$_____
(2) Future Medical Expenses:	$_____
(3) Past Lost Wages:	$_____
(4) Future Lost Wages:	$_____

(5) Other Economic Damages: $_____

(b) Noneconomic Damages: $_____

Total Damages: $_____

(When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.)

_____ _____

Date Jury Foreperson

8) CV299B. Special Verdict - One Defendant (Comparative Fault)

MEMBERS OF THE JURY:

Please answer the following questions *in the order they are presented*. If you find that the issue has been proved by a preponderance of the evidence, answer "Yes." If you find that the evidence is equally balanced or that the greater weight of evidence is against the issue, answer "No."

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.

(1) Was [name of defendant] ~~negligent~~ at fault? (Check one.)

☐ Yes ☐ No

(If you answer "Yes," please answer Question 2. If you answer "No," stop here, sign the verdict form and advise the bailiff.)

(2) Was this ~~negligence~~ fault a cause of any harm to [name of plaintiff]? (Check one.)

☐ Yes ☐ No

(If you answer "Yes," please answer Question 3. If you answer "No," stop here, sign the verdict form and advise the bailiff.)

(3) Was [name of plaintiff] also ~~negligent~~ at fault? (Check one.)

☐ Yes ☐ No

(If you answer "Yes," please answer Question 4. If you answer "No," please skip Questions 4 and 5 and go on to Question 6.)

(4) Was [name of plaintiff]'s ~~negligence~~ fault a cause of [his] own harm?

☐ Yes ☐ No

(If you answered Question 4 "Yes," please answer Question 5. If you answered Question 4 "No," please skip Question 5 and go on to Question 6.)

(5) Assuming all of the negligence totals 100%, what percentage is attributable to:

[Name of Defendant]: _____ %
[Name of Plaintiff]: _____ %
Total: 100 %

Stop here if [name of plaintiff]'s negligence is 50% or more; do not answer Question (6).

(Please answer Question 6 if you checked "Yes" on both Questions (1) and (2). Do ***not*** *deduct from the damages any percentage of negligence that you have assessed to plaintiff. The judge will make any necessary deductions later.)*

(6) What amount, if any, would fairly compensate [name of plaintiff] for [his] harm?

(a) Economic Damages:
(1) Past Medical Expenses $_____
(2) Future Medical Expenses: $_____
(3) Past Lost Wages: $_____
(4) Future Lost Wages: $_____
(5) Other Economic Damages: $_____
(b) Noneconomic Damages: $_____
Total Damages: $_____

(When six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and advise the bailiff that you have reached a verdict.)

_____ _____
Date Jury Foreperson

Advisory Committee Note

~~Question (1) Was [name of defendant] negligent? We use the term "negligent" advisedly. "Negligence" is commonly used in two different senses: as a cause of action (with all of its elements, including causation) and as shorthand for breach of the duty to use reasonable care. In question (1), we intend the latter meaning, as the term is defined in CV202A, which does not include causation as part of the definition.~~

~~Question (2) Was this negligence a cause of any harm to [name of plaintiff]? In this question, we intend that the jury decide whether plaintiff was harmed and whether defendant's breach of the duty of care caused that harm, as defined in CV209.~~

Question (3)/(6) What amount, if any, would fairly compensate [name of plaintiff] for [his] harm? There must be some evidence to support each item of damages listed on the verdict form. The court should delete or add items, as needed to conform to the evidence.

Tab 3

(1) CV2012 (Modified). Noneconomic damages loss of consortium.

Noneconomic damages include loss of consortium. Loss of consortium is loss of the benefits that one spouse expects to receive from the other, such as companionship, cooperation, affection, aid and sexual relations.

To award damages for loss of consortium, it must be proven that [name of plaintiff] has suffered

(1) a significant permanent injury that substantially changes her lifestyle and

(2) one or more of the following:

(a) incapability of performing the types of jobs she performed before the injury; or

(b) inability to provide the companionship, cooperation, affection, aid or sexual relations she provided before the injury.

(2) CV2012. (current) Noneconomic damages. Loss of consortium.

Noneconomic damages include loss of consortium. Loss of consortium is loss of the benefits that one spouse expects to receive from the other, such as companionship, cooperation, affection, aid and sexual relations.

To award damages for loss of consortium, it must be proven that [name of plaintiff] has suffered

(1) a significant permanent injury that substantially changes [his] lifestyle and

(2) one or more of the following:

(a) a partial or complete paralysis of one or more of the extremities;

(b) significant disfigurement; or

(c) incapability of performing the types of jobs [he] performed before the injury.

[You must decide whether [name of spouse] was [name of plaintiff]’s spouse at the time of [name of plaintiff]’s injury. "Spouse" means the legal relationship established between a man and a woman as recognized by the laws of Utah.]

You must allocate fault as I have instructed you in Instruction 211 including [name of spouse] in your allocation. If you decide that the [combined] fault of [name of plaintiff]’s and [name of spouse]'s is 50% or greater, [name of spouse] will recover nothing for loss of consortium. If you decide that [name of plaintiff] has no claim against [name of defendant], then [name of spouse] also has no claim. As with other damages, do not reduce the award by [name of plaintiff]'s and [name of spouse]’s percentage of fault. I will make that calculation later.

From: Francis Carney

To: Rob Jeffs

Rob:

How did MUJI 2d work in your recent trial?

-Were there any instructions that proved to be a problem?

-Were there any missing instructions that should have been there?

Are there any other comments that you might have to improve MUJI 2?

I will share your thoughts with the Advisory Committee.

Thanks,
Frank

From Rob Jeffs:

Frank,

I really liked the Muji 2d jury instructions. We got into a disagreement about the Verdict Form. Tawni and Eric represented to the Court that they had communicated with you about the problems in the form because the instruction on “Fault” also includes the issue of causation. They claimed that there was a potential of Jury confusion because the verdict has a separate question on causation of the “harm”. The Judge agreed with them and gave a Special Verdict that required the Jury to find that the nurses breached the standard of care and that the breach caused my client a harm. The problem with the Verdict form using those terms is that the other instructions refer at various times to “fault”. There is a problem with the loss of consortium instruction. Attached is the instruction we used that corrects the problem. As drafted the instruction requires that the person be unable to work in order to get a recovery for inability to engage in sexual relations or function as a spouse.

From Frank Carney

Thanks, Rob.

Yes, I have talked to Eric several times (even before your case) about the perceived problem with the special verdict form. We fixed it at last night's meeting of the Advisory Committee, although not in the way Eric wanted or that we originally intended. Instead of using "breach of the standard of care" on the verdict form, we are sticking with "fault" and we took out "cause" from the definition of "fault" in the instruction. That way, we can still use "fault" in the SV form, for all actions, instead of having to change it to "negligence" or "breach of warranty" or whatever.

Thanks for the consortium instruction. We will put it on the agenda.

From Frank Carney

Rob:

Explain this for me a bit more. As I read the statute, to award damages for loss of consortium there must be both a "significant permanent injury to a person that substantially changes that person's lifestyle" and (i) a partial or complete paralysis of one or more of the extremities or (ii) significant disfigurement or (iii) incapability of the person of performing the types of jobs the person performed before the injury.

So a person could have a significant permanent injury such as a paralyzed leg, but still be able to perform her job, and still recover for loss of consortium. I don't see that the instruction requires loss of the ability to work, as it's phrased in the alternative:

To award damages for loss of consortium, it must be proven that [name of plaintiff] has suffered (1) a significant permanent injury that substantially changes [his] lifestyle and (2) one or more of the following: (a) a partial or complete paralysis of one or more of the extremities; (b) significant disfigurement; or (c) incapability of performing the types of jobs [he] performed before the injury.

"Inability to provide the companionship, cooperation, affection, aid or sexual relations she provided before the injury" is not in the statute, but I see it as still something that you have to prove in order to recover for loss of consortium. In other words, you have to prove loss of consortium PLUS these other statutory predicates in order to recover for loss of consortium.

If the sexual relations are still the same as before the injury, and you haven't lost any, one surely does not get to recover for their loss even if one has a paralyzed leg. Or are out of work. But if sexual relations or other aspects of consortium have been damaged, you don't need to prove you can't work anymore in order to recover for that loss.

What am I missing here?

From Rob Jeffs:

My recollection is that the problem we struggled with is if a housewife is unable to perform her "job" as a housewife or homemaker that would or should meet the criteria for recovery and then you recover for the loss of companionship, cooperation, sexual relations. I agree that ultimately the problem may be in the statute itself and not the instruction. The instruction may conform to the statute.