Agenda
Advisory Committee on
Model Civil Jury Instructions

December 13, 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
Committee membership		John Young
Premises Liability	Tab 2	Peter Summerill

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.

January 10, 2011 (Education Room)
February 14, 2011
March 14, 2011
April 11, 2011
May 9, 2011 (Education Room)
June 13, 2011
September 12, 2011
October 11, 2011 (Tuesday)
November 14, 2011
December 12, 2011

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
November 8, 2010
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, Diane Abegglen, and Justin Matkin (representing the Eminent Domain subcommittee)

Excused: Honorable William W. Barrett, Jr., John R. Lund, and David E. West

1. *Committee Membership*. The committee discussed adding new members to the committee. Judge Barrett has a hard time making the committee meetings because of his law-and-motion calendar on Mondays. The committee thought it could benefit from more judicial input on the committee. Mr. Young noted that Gary Johnson is nearing the end of his term as managing partner of Richards, Brandt, Miller & Nelson and is interested in serving on the committee again. Mr. Summerill suggested that Ryan Springer would also make a good addition to the committee. Mr. Young proposed adding Messrs. Johnson and Springer to the committee. He also asked committee members to come to the next meeting prepared to suggest one or two judges to add to the committee. Ms. Abegglen will check with the Chief Justice to make sure it is not a problem for the committee to add new members.

2. *Eminent Domain Instructions*. The committee continued its review of the eminent domain instructions.

a. *CV1617. Reasonable cost of repair or restoration as measure of severance damages.* Mr. Matkin noted that the subcommittee did not think the cost of repair instruction should be combined with the severance damage instruction. It rewrote CV1617. The new version is meant to replace the version the committee previously considered. It is meant to explain that the cost of cure is not to be added to severance damages but may be a measure of severance damages. The committee thought the word "cure" was problematic. Mr. Macklin noted that the issues that are usually disputed in these cases are (1) the cost of cure, and (2) whether it is feasible to cure the remaining property. Dr. Di Paolo noted that "feasible" connotes "doable," not that it is probable. Mr. Macklin said that awards of the cost of curing the property are often not used to cure the property. The committee revised the instruction to read:

CV1617. Reasonable cost of restoring the property as measure of severance damages.

Severance damages may be reduced or eliminated by restoring the remaining property.

> If you find that restoring the remaining property to its fair market value before the taking will eliminate severance damages, then you must award [name of property owner] the lesser of (1) the reasonable cost to restore the property, or (2) the full amount of severance damages, but not both.
>
> If you find that the remaining property cannot be restored to its fair market value before the taking, then you must award [name of property owner] the lesser of (1) the reasonable cost to partially restore the property to the extent possible, plus the remaining severance damages, or (2) the full amount of severance damages, but not both.
>
> [Name of the party asserting that severance damages should be reduced or eliminated] has the burden to prove that the restoration is feasible and reasonable.

Mr. Summerill asked if the references need to be updated. He suggested adding a reference to Utah Code Ann. § 78B-6-511. The committee note was replaced by a new note approved by the subcommittee. The committee revised the note to eliminate the use of "cure" and "cured":

> This instruction should be given if a party contends that severance damages can be reduced or eliminated by restoring the property to its fair market value before the taking. The Committee is unaware of any Utah law holding that the cost to restore is a proper measure, if the severance damages can be reduced but not eliminated through restoration.

b. *CV1622. Apportionment of just compensation between owner and tenant.* Mr. Macklin explained the rationale for the instruction: "just compensation" is a number that represents the fair market value of the property taken and any severance damages, and any award should not exceed the amount of just compensation. So if the jury finds that a tenant has a favorable lease for which he should be compensated, that amount is deducted from the landlord's recovery. Mr. Shea thought use of the term "bonus value" was confusing. The committee revised the first paragraph to read:

> After you determine the total amount of the just compensation, you must apportion it between [name of property owner] and [name of lessee]. [Name of lessee] is entitled to the difference between: . . .

"[A]nd" was inserted between subparagraphs (1) and (2), and the phrase "date that lease expires or end of term" was used in both subparagraphs. The first sentence of the last paragraph was deleted, and "if any" was deleted from the last bracketed phrase. The phrase "as a whole" was also deleted from the last sentence. Mr. Simmons asked whether the instruction needed to explain how to handle a taking where the lease had an option. The committee thought that would be handled as a fact question and would affect the jury's determination of the end of the lease term. The committee approved the instruction as revised.

3. *Premises Liability Instructions*. The committee noted that the premises liability subcommittee under the chairmanship of Jeffrey Eisenberg had not proposed any instructions. Mr. Summerill volunteered to help with the instructions. He proposed drafts of two instructions (CV1101, "Elements of claim for harm because of property condition," and CV1102, "Duty of property owner"). The instructions assume that the injured person was a business invitee. He noted that we also need instructions defining business visitor or invitee, licensee, and trespasser and instructions dealing with attractive nuisance, permanent vs. temporary conditions, and statutes such as the Inherent Risk of Skiing Act, among other things. He thought the MUJI 1st instruction on open and obvious danger was now subsumed under comparative fault. Mr. Carney noted that he had mediated a premises liability case that recently settled and volunteered to ask the attorneys in that case (Lynn Harris and Ruth Shapiro) for their proposed jury instructions. Mr. Summerill noted that Darren Davis had recently lost a slip-and-fall trial against Snowbird. Mr. Ferguson suggested that Mitch Rice, who represents Wal-Mart, might also be a resource for premises liability instructions. Mr. Shea offered to put the MUJI 1st instructions into plain English. Messrs. Ferguson and Summerill offered to review his draft. The committee deferred further discussion of the premises liability instructions until the next meeting.

The meeting concluded at 5:45 p.m.

Next Meeting. The next meeting will be Monday, December 12, 2010, at 4:00 p.m.

Tab 2

Premises Liability

(1)CV1101. Duty to invitee.

[Name of plaintiff] claims that [name of defendant] failed to use reasonable care to discover unsafe conditions and to repair, replace, or adequately warn about them. To succeed in this claim, [name of plaintiff] must prove that [name of defendant]:

[(1) held [his] property open to the public or that [name of defendant] held [his] property open for a purpose directly or indirectly connected to [his] business; and]

(2) knew or should have known of [describe condition]; and

(3) knew or should have known that [describe condition] presented an unreasonable risk of harm; and

(4) knew or should have known that [name of plaintiff] would not discover [describe condition] or that [name of plaintiff] would fail to protect [himself].

In deciding whether [name of defendant] used reasonable care to discover or correct the condition, you may consider, among other factors, the following:

(a) the location of the property; or

(b) the likelihood that someone would come onto the property in the same manner as [name of plaintiff] did; or

(c) the likelihood of harm; or

(d) the probable seriousness of the harm.

References

Jex v. JRA, Inc., 2008 UT 67, 196 P.3d 576.

Hale v. Beckstead, 2005 UT 24, 116 P.3d 263

Carlile v. Wal-Mart, 2002 UT App 412, 61 P.3d 287

Canfield v. Albertsons, Inc., 841 P.2d 1224 (Ut. Ct. App. 1992).

Glenn v. Gibbons & Reed Co., 265 P.2d 1013 (1954).

Restatement (Second) of Torts § 343 (1965)

MUJI 1

11.2; 11.3

Committee Notes

If the status of the plaintiff as an invitee is not disputed, the court does not need to give bracketed paragraph (1) to the jury.

(2)CV1102. Duty to licensee for an activity on the property.

[Name of plaintiff] claims that [name of defendant] failed to use reasonable care in [describe activity]. To succeed in this claim, [name of plaintiff] must prove that:

[(1) [name of plaintiff] entered or remained on [name of defendant]'s property with [name of defendant]'s express or implied permission; and]

(2) [name of defendant] knew or had reason to know that [name of plaintiff] would not realize the danger involved in [describe activity]; and

(3) [name of plaintiff] did not know or have reason to know of [describe activity] or did not know or have reason to know of its danger.

References

Lambert v. Western Pac. R. Co., 135 Cal. App. 81, 26 P.2d 824 (1933).

Restatement (Second) of Tort § 341 Activities Dangerous to Licensees (1965).

MUJI 1

11.4; 11.5

Committee Notes

If the status of the plaintiff as a licensee is not disputed, the court does not need to give bracketed paragraph (1) to the jury.

(3)CV1103. Duty to licensee for a condition on the property.

[Name of plaintiff] claims that [name of defendant] failed to use reasonable care to repair, replace, or adequately warn about [describe condition]. To succeed in this claim, [name of plaintiff] must prove that:

[(1) [name of plaintiff] went onto [name of defendant]'s property with [name of defendant]'s express or implied permission; and]

(2) [name of defendant] knew or had reason to know of [describe condition]; and

(3) [name of defendant] knew or had reason to know that [describe condition] presented an unreasonable risk of harm; and

(4) [name of defendant] knew or had reason to know that [name of plaintiff] would not discover [describe condition] or realize its danger; and

(5) [name of plaintiff] did not discover [describe condition] or did not realize its danger.

References

Lambert v. Western Pac. R. Co., 135 Cal. App. 81, 26 P.2d 824 (1933).

Stevens v. Salt Lake County, 25 Utah 2d 168, 171, 478 P.2d 496 (1970).

Restatement (Second) of Tort §342 Dangerous Conditions Known to Possessor (1965).

MUJI 1

11.4; 11.6

Committee Notes

If the status of the plaintiff as a licensee is not disputed, the court does not need to give bracketed paragraph (1) to the jury.

(4)CV1104. General duty to a trespasser.

If you find that [name of plaintiff] entered or remained on [name of defendant's] property without [invitation / permission / privilege / consent], then, generally, [name of defendant] owes [name of plaintiff] no duty to use reasonable care:

(1) to put the property in a safe condition; or

(2) to [describe activity] so as not to endanger [name of plaintiff].

[However, ... [Follow with 1104A through 1104C, as applicable]

References:

Kessler v. Mortenson, 2000 UT 95, 16 P.3d 1225, 1230 (rejecting 'allurement' basis for attractive nuisance doctrine in Brown v. Salt Lake City, 33 Utah 222, 93 P. 570, 572 (1908)).

Connor v. Union Pac. R.R. Co., 972 P.2d 414, 417 (Utah 1998).

Whipple v. Am. Fork Irr. Co., 910 P.2d 1218, 1220 (Utah 1996)(citing and quoting Restatement (Second) of Torts §§ 333-339).

MUJI 1

11.7; 11.8

Committee Notes:

The court in Whipple adopted the Restatement §§ 333-339 as the "more accurate" statement of the law regarding the duty owed by a possessor of land. While a possessor does not generally owe a duty to trespassers, there are several exceptions enumerated in the Restatement §334-339. Only those exceptions at issue should be given as part of the jury instructions. The last exception is the 'attractive nuisance doctrine,' formerly MUJI 11.1. The conditions of the attractive nuisance doctrine, as described in section 339, impose a reasonable balance between the interests of the property owner and the interests of children.

(5)CV1104A Duty to a trespasser for an activity on the property.

... [name of plaintiff] claims that [name of defendant] owes a duty to use reasonable care in [describe activity/force]. To succeed in this claim, [name of plaintiff] must prove that:

(1) [name of defendant] knew or should have known

[(a) that trespassers constantly intruded upon a limited area of the property in dangerous proximity to [describe activity/force], or]

[(b) that [name of plaintiff] was on the property in dangerous proximity to [describe activity/force];] and

(2) [name of defendant] is in immediate control of [describe activity/force]; and

(3) [name of plaintiff] did not discover [describe activity/force] or did not realize its danger.

References:

Restatement (Second) of Tort §334 (1965).

Restatement (Second) of Tort §336 (1965).

Restatement (Second) of Tort §338 (1965).

Committee Notes

Instruct the jury on paragraphs (1)(a) and/or (1)(b), depending on the evidence.

(6)CV1104B Duty to trespasser for an artificial condition on the property.

... [name of plaintiff] claims that [name of defendant] owes a duty to use reasonable care to warn about [describe condition]. To succeed in this claim, [name of plaintiff] must prove that:

(1) [name of defendant] knew or should have known

[(a) that trespassers constantly intruded upon a limited area of the property in dangerous proximity to [describe condition], or]

[(b) that [name of plaintiff] was on the property in dangerous proximity to [describe condition];] and

(2) [describe condition] is an artificial condition that [name of defendant] created or maintained; and

(3) [name of defendant] knew that coming in contact with [describe condition] likely would cause death or seriously bodily harm; and

(4) [describe condition] is of such a nature that [name of defendant] had reason to believe that trespassers would not discover it or would not realize its danger; and

(5) [name of plaintiff] did not discover [describe condition] or did not realize its danger.

References:

Restatement (Second) of Tort §335 (1965).

Restatement (Second) of Tort §337 (1965).

Committee Notes

Instruct the jury on paragraphs (1)(a) and/or (1)(b), depending on the evidence.

(7)CV1104C Duty to trespassing child for an attractive nuisance on the property.

... [name of plaintiff] claims that [name of defendant] owes a duty to use reasonable care to eliminate the danger from [describe condition] or to protect children from the danger. To succeed in this claim, [name of plaintiff] must prove that:

(1) [describe condition] is an artificial condition; and

(2) [name of defendant] knew or had reason to know that [describe condition] involves an unreasonable risk of death or serious bodily harm; and

(3) [name of defendant] knew or had reason to know that children were likely to intrude on the property in dangerous proximity to [describe condition]; and

(4) [name of child], because of [his] youth, did not discover [describe condition] or did not realize its danger; and

(5) the benefit to [name of defendant] of maintaining [describe condition] and the burden of eliminating the danger are slight compared to the risk to children.

References:

Restatement (Second) of Tort §339 (1965).

MUJI 1

11.1

(10)CV1106. Duty to persons on a public way.

[Name of plaintiff] claims that [name of defendant] failed to use reasonable care to discover conditions creating an unreasonable risk of harm to persons on [describe public way] and to repair the condition. To succeed in this claim, [name of plaintiff] must prove that:

(1) [name of defendant] created [describe condition] or it was created with [name of defendant]'s consent or acquiescence; and

(2) [name of defendant] did not use reasonable care to make [describe condition] safe after [name of defendant] knew or should have known of it; and

[(3) [name of defendant] knew or should have known that [name of plaintiff] would deviate from the [describe public way] and encounter the [describe condition.]

References:

Schulz v. Quintana, 576 P.2d 855, 856 (Utah 1978).

Restatement (Second) Torts, §§ 364-370 (1965).

Bracketed paragraph (3) should be given for conditions existing wholly on the land of the defendant, but which a plaintiff may only encounter through an innocent deviation from the public way e.g. a trench adjacent to a public sidewalk which the plaintiff may step into in the dark by virtue of having left the public sidewalk.