Agenda
Advisory Committee on
Model Civil Jury Instructions

November 14, 2011
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
Assistance/Membership from Litigation Section	Tab 2	John Young
Instructions on ski resort injuries	Tab 3	David Cutt
Verdict form	Tab 4	Peter Summerill
Punitive damages	Tab 5	Frank Carney
Harris v. ShopKo Stores, Inc., 2011 UT App 329 (fn 2). Instructions 2018 and 2019	Tab 6	Tim Shea

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

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

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

December 12, 2011
January 9, 2012
February 13, 2012
March 12, 2012
April 9, 2012
May 14, 2012
June 11, 2012
September 10, 2012
October 9, 2012 (Tuesday)
November 13, 2012 (Tuesday)
December 10, 2012

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
September 12, 2011
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Deno Himonas, L. Rich Humpherys, Gary L. Johnson, John R. Lund, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey, David E. West. Also present: David A. Cutt

Excused: John L. Young (chair); Honorable William W. Barrett, Jr.; Tracy H. Fowler,

Mr. Shea conducted the meeting in Mr. Young's absence.

1. *CV131. Spoliation.* Mr. Johnson reported that he and Mr. Fowler had reviewed CV131 in light of Utah Rule of Civil Procedure 37(g) and recent case law. Mr. Fowler noted that the instruction implies that it is for the jury to decide whether a party intentionally spoliated evidence and questioned whether that was the law, or whether the court makes that determination as a preliminary matter under Utah Rule of Evidence 104. Mr. Humpherys thought that the issue of spoliation could arise in two ways: (1) as a rule 37(g) sanction, or (2) as a question for the jury. In the latter situation, the jury decides whether there was spoliation, and, if it finds that there was, it can draw the inference stated in the instruction. Mr. Ferguson thought the issue generally arises before trial, in the form of a motion in limine or motion for sanctions. Mr. Springer observed that rule 37(g) is not the exclusive remedy for spoliation. In an appropriate case, there may even be a cause of action for spoliation (although the Utah Supreme Court has yet to recognize such a claim). Mr. Humpherys noted that there was no case law saying that an adverse inference instruction could only be given as a rule 37(g) sanction. Mr. Shea suggested revising CV131 to read: "I have determined that [name of party] intentionally concealed, destroyed, altered, or failed to preserve [describe evidence]. You may assume that the evidence would have been unfavorable to [name of party]." Mr. Lund suggested that the committee note be revised to explain that the law is not clear whether spoliation is a question for the court or the jury. Mr. Johnson offered to draft such a note. Mr. Lund further thought that the issue generally plays out as a question of the sufficiency of the evidence. Mr. Summerill did not think a jury instruction was necessary. He thought that there was not enough direction in the case law and that any instruction would only cause confusion. He thought the issue should be left out of MUJI 2d until it is decided on appeal. He also thought that if there was an instruction it should say that spoliation creates an inference that the evidence would prove what the opponent claims it would prove. Mr. Carney noted that CACI has an instruction similar to CV131. Judge Himonas thought it should be a stock instruction and that in some cases, the question of spoliation should be left to the jury. Mr. Humpherys thought that it should be left to counsel how to argue the inference. He thought the issue could be covered by the instruction on the credibility of witnesses. Mr. Lund noted that CV131 begs the question of what is destruction, concealment, or

alteration of evidence. Mr. Ferguson noted that in his experience courts are reluctant to find that evidence was destroyed in a way that would lead to an adverse inference. Judge Toomey moved to accept the revised instruction, along with a revised note. Mr. Lund and Mr. Humpherys seconded the motion. The motion passed, with Mr. Summerill opposed.

2. *Verdict Form*. The committee continued its review of the proposed special verdict form for wrongful death cases. Mr. Humpherys noted that in personal injury cases, economic damages need to be broken out for several reasons. There may be liens that apply to some economic damages. It is also easier to figure interest on items of economic damages. And it is easier to adjust the verdict on appeal, if necessary, without having to retry the case. Mr. Carney noted that damages in a death case may need to be split between the heirs' damages for the wrongful death and the estate's damages for the decedent's personal injuries before he died (the survival claim). Mr. Johnson noted that the estate may also have claims for contractual damages, such as certain insurance benefits. Mr. Lund noted that, in a wrongful death case, the economic and noneconomic damages need to be broken out for each heir. Mr. Humpherys noted that failing to do so would only cause another lawsuit if the heirs cannot agree how to apportion damages among themselves. Mr. West suggested separating the estate's claim from the heirs' claims and including under the estate's damages past medical expenses, funeral and burial expenses, lost wages, and other economic damages. Mr. Carney suggested that the committee look at special verdicts proposed or used in actual death cases and offered to head up a subcommittee to propose any changes to the verdict form. Committee members should provide Mr. Carney with any verdict forms they have used in wrongful death cases in the past.

3. *Ski Instructions*. Mr. Cutt joined the meeting. Mr. Shea had circulated before the meeting the instructions that were given in Mr. Cutt's recent trial involving a skiing accident. Mr. Shea had edited them for style. He had also proposed combining them into a single instruction. Mr. Cutt liked Mr. Shea's edits but thought that the instructions should not be combined. He thought the term "inherent risks of skiing" should be capitalized to show that it is a term of art. Dr. Di Paolo thought that putting the phrase in quotation marks would have the effect of saying "the so-called inherent risks of skiing," which might denigrate the term. Mr. Lund suggested having someone from the skiing defense bar sign off on the instructions. The committee suggested Kevin Simon or Gordon Strachan of Strachan, Strachan & Simon, Ruth Shapiro of Christensen & Jensen, or Gainer Waldbillig. Mr. Cutt offered to talk to someone in the defense bar and invite them to sign off on the instructions or come to the next committee meeting. The committee agreed to use draft instructions (2) through (5) as edited by Mr. Shea as the starting point. Mr. Lund questioned whether "integral" in instruction (3) would be understandable to jurors. Mr. Cutt noted that it is the statutory language. He said that the cases go even further in defining "inherent risk of skiing." Dr. Di Paolo asked

whether the terms in instruction (3), subparagraph (2) ("hard pack, powder, packed powder, etc.") needed to be defined. Mr. Cutt said that the court should only include in the instruction the subparagraphs of instruction (3) that applied in the particular case. Consequently, Mr. Shea bracketed subparagraphs (1) through (8) of instruction (3). Mr. Lund noted that, if he were defending a ski case, he might want all of the subparagraphs included in the instruction. Mr. Cutt thought that the first paragraph of instruction (3) should say, "Inherent Risks of Skiing means those dangers or conditions which are an integral part of the sport of recreational, competitive, or professional skiing and which may include the following:" Mr. West thought that instruction (2) was not accurate. He noted that the statute has been modified by the case law and that a skier may recover from a ski area operator for injuries resulting from an "inherent risk of skiing" under some circumstances. If a hazard could have been eliminated through the exercise of reasonable care, the ski area operator can still be liable. Mr. West suggested that instruction (2) be revised to read, "Subject to the following instructions, no skier . . ." or something like that. Mr. Cutt noted that the statute has been amended to include snowboarders and others as well as skiers, and the instructions may need to be adapted accordingly in a particular case. The committee deferred further discussion of the instructions until they have been reviewed by the defense bar.

4. *Correlation Table*. Mr. Carney presented a draft correlation table for the medical malpractice instructions, showing the corresponding sections of MUJI 2d for each of the MUJI 1st medical malpractice instructions. Mr. Carney proposed that, where MUJI 1st instructions have been intentionally omitted, the correlation table explain why. Judge Toomey noted that such a table would be very helpful for judges. Mr. Shea noted that he can put correlation tables on the committee's webpage but not on the MUJI 2d website, which he does not control. At the committee's request, Mr. Shea will talk to the courts' webmaster to see if a correlation table can be added to the MUJI 2d website. Mr. Carney offered to prepare a correlation table for the negligence instructions and noted that a similar table will need to be prepared for each of the other sections. Mr. Lund asked whether we should also have correlation tables from MUJI 2d to MUJI 1st. Dr. Di Paolo said it would be easy to change the order of the table to reverse the cross-references. Mr. Shea noted that the instructions will start showing the date each was approved and the date it was amended. Judge Toomey and Mr. Lund thought it would be helpful to have the MUJI 2d instructions in a book. Mr. Shea said that would be up to the legal publishers to decide whether they want to publish them.

5. *Website*. Mr. Summerill noted that it is cumbersome to build a set of jury instructions from the website and that it will only become more cumbersome as new sections are added. He suggested that Mr. Shea also speak to the webmaster about revising the procedure for building a set of jury instructions so that an attorney does not have to go through all of the instructions to pull out the ones he wants.

6. *Punitive Damages*. Mr. Carney noted that MUJI 1st included just one instruction on punitive damages. He proposed two instructions to be given in the first phase of the trial and two instructions to be given in the second phase if the jury decides that punitive damages are warranted. He suggested two approaches to the instructions: (1) using jury instructions actually used in punitive damage cases, or (2) coming up with a new set of instructions, as California did in CACI. He noted that CACI includes definitions of important terms used in the instructions. Mr. Lund expressed concern about having a single approach for punitive damages; he was concerned that it might not adequately deal with all of his affirmative defenses to a punitive damage claim. He also thought that the terms in the punitive damage statute (e.g., "willful and malicious" and "knowing and reckless indifference") needed to be defined for the jury. The committee generally agreed that the instructions should be more detailed, defining statutory terms, although Mr. Humpherys noted that the terms may be hard to define or may not have been defined by the case law yet, and the definitions may end up being circular. Dr. Di Paolo thought that some of the terms, such as malicious, are probably understood by most jurors, unless there is a special legal meaning for the term. Mr. Springer noted that terms used in any affirmative defenses may also need to be defined. Mr. Humpherys noted that proposed CV2029 subparagraph (4) needed to be revised. Under U.S. Supreme Court precedent, the effect of the conduct on the lives of others needs to be limited to others in Utah. Mr. Humpherys also noted that the defendant's poverty can be a consideration under subparagraph (1). Mr. Shea questioned whether the last paragraph of CV2026 was necessary, since the jury will be given the special verdict form. Mr. Humpherys thought that it was important for the jury to know why it is being asked to make a finding on punitive damages. Judge Toomey noted that, by telling the jury that, if it answers "Yes," the amount of punitive damages will be reserved for further consideration at a later time may influence the jury to find against punitive damages, so that they do not have to come back for further proceedings. Mr. Cutt suggested revising the first sentence of that paragraph to read, "In the Special Verdict form you will be asked whether punitive damages should be awarded" and deleting the second sentence of that paragraph. Mr. Lund suggested "assessed" instead of "awarded." Mr. Summerill asked whether the jury should be told that a percentage of any punitive damages awarded above a certain amount goes to the state. The committee decided not to include that in the instruction because there is no appellate case on point. Mr. Humpherys noted that he has seen attorneys ask that the jury be instructed on the presumptive ratio of punitive damages to compensatory damages of 9:1, under the U.S. Supreme Court decision in *Campbell v. State Farm*. The committee decided not to include such an instruction for lack of authority on point. Mr. Humpherys added that he believed it is for the court and not the jury to apply the ratio. At Mr. Shea's suggestion, subsection (2) of proposed CV2026 was revised to read:

> (2) it is proved by clear and convincing evidence that [name of defendant]'s conduct

(a) was willful and malicious, or

(b) was intentionally fraudulent, or

(c) manifested a knowing and reckless indifference toward, and a disregard of, the rights of others.

Mr. Summerill noted that the court explained the last phrase in *Daniels v. Gamma W. Brachytherapy, LLC,* 2009 UT 66, 221 P.3d 256. Mr Summerill also noted that the punitive damages statute speaks of both "acts or omissions" and that the jury instruction should do so as well.

7. *Next Meeting*. The next meeting will be Tuesday, October 11, 2011, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

LITIGATION SECTION
OF THE UTAH STATE BAR

August 3, 2011

John L. Young
Young Hoffman
170 S Main St. Suite 1125
Salt Lake City, UT 84101

Re: Civil Jury Instruction Committee

Dear John:

Confirming our phone conversation today, on behalf of the Executive Committee of the Litigation Section of the Utah State Bar I am interested in offering assistance to the Civil Jury Instruction Committee. The Executive Committee's mission includes supporting the courts and the associated committees.

I have been in practice for 28 years and have tried cases in Utah, Idaho, and Minnesota. I am at Petersen & Associates which is the Branch Legal Office of Farmers Insurance. My current emphasis is torts (auto and premises liability) and construction defect. I have tried products liability and professional liability (accountant and attorney) cases as well. Although I am a defense attorney I believe the attorneys that I oppose find me to be fair and balanced in my approach.

Thank you for your consideration and know that I am willing to assist in any way you feel appropriate.

Thank you again for your assistance,

Kent R. Holmberg
Litigation Section Executive Committee

Tab 3

Approved by the committee and since removed from the website:

(1) ~~CV 1110. Recovery for injury to ski resort patrons.~~

~~[Name of defendant] claims that [he] is not liable for that part of [name of plaintiff]'s harm that was caused by one or more of the risks of skiing. To succeed on this claim, [name of defendant] must prove that [name of plaintiff]'s harm that was caused by [describe applicable conditions in Utah Code Section 78B-4-402(1)(a)-(h)].~~

Proposed:

(2) CV 1110. No liability for inherent risks of skiing.

No skier may recover from any ski area operator for injury resulting from any of the inherent risks of skiing.

(3) CV 1111. Inherent risks of skiing defined.

"Inherent risks of skiing" means those dangers or conditions which are an integral part of the sport of recreational, competitive, or professional skiing, and may include the following:

(1) changing weather conditions;

(2) snow or ice conditions as they exist or may change, such as hard pack, powder, packed powder, wind pack, corn, crust, slush, cut-up snow, or machine-made snow;

(3) surface or subsurface conditions such as bare spots, forest growth, rocks, stumps, streambeds, cliffs, trees, and other natural objects;

(4) variations or steepness in terrain, whether natural or as a result of slope design, snowmaking or grooming operations, and other terrain modifications such as terrain parks, and terrain features such as jumps, rails, fun boxes, and all other constructed and natural features such as half pipes, quarter pipes, or freestyle-bump terrain;

(5) impact with lift towers and other structures and their components such as signs, posts, fences or enclosures, hydrants, or water pipes;

(6) collisions with other skiers;

(7) participation in, or practicing or training for, competitions or special events; and

(8) the failure of a skier to ski within the skier's own ability.

(4) CV 1112. Types of inherent risks of skiing.

There are two types of inherent risks of skiing :

The first are risks that skiers want to confront, like steep grades, powder, jumps and moguls. [Name of defendant] has no obligation to eliminate these types of risks.

The second are risks that skiers do not want to confront, such as bare spots, rocks, trees, and other natural objects, or impact with lift towers and other structures. Such risks are also inherent in skiing, but [name of defendant] must use reasonable care to eliminate risks of this second type.

(5) CV 1113. Burden of proving inherent risks of skiing.

[Name of defendant] has the burden of proving that the risk(s) in this case are "Inherent Risks of Skiing." If you find that [name of defendant] has met this burden, [name of plaintiff] has the burden of proving that the risk(s) in this case are of the second type and that [name of defendant] did not use reasonable care to eliminate them.

Tab 4

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 not, answer "No." At least six jurors must agree on the answer to all of the required questions, 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.

[Name of defendant A]

Question (1) Was [name of defendant A] at fault? (If you answer "Yes," answer Question (2). If you answer "No," answer Question (3).) ☐ Yes ☐ No

Question (2) Was [name of defendant A]'s fault a cause of [name of decedent]'s death? (Regardless of your answer, answer Question (3).) ☐ Yes ☐ No

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[Name of defendant B]

Question (3) Was [name of defendant B] at fault? (If you answer "Yes," answer Question (4). If you answer "No," go to the next set of instructions.) ☐ Yes ☐ No

Question (4) Was [name of defendant B]'s fault a cause of [name of decedent]'s death? (Regardless of your answer, go to the next set of instructions.) ☐ Yes ☐ No

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Next set of instructions: If both Questions (2) and (4) are unanswered or answered "No," stop here, have the foreperson sign the verdict form, and advise the bailiff. If either Question (2) or (4) is answered "Yes," answer Question (5).

[Name of decedent]

Question (5) Was [name of decedent] at fault? (If you answer "Yes," answer Question (6). If you answer "No," answer Question (7).) ☐ Yes ☐ No

Question (6) Was [name of decedent]'s fault a cause of [his] own death? (Regardless of your answer, answer Question (7).) ☐ Yes ☐ No

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[Name of third party]

Question (7) Was [name of third party] at fault? (If you answer "Yes," answer Question (8). If you answer "No," answer Questions (9)-(12).) ☐ Yes ☐ No

Question (8) Was [name of third party]'s fault a cause of [name of decedent]'s death? (Regardless of your answer, answer Questions (9)-(12).) ☐ Yes ☐ No

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Comparative fault

Question (9) What percent of the fault that caused [name of decedent]'s death is attributable to [name of defendant A]. (If your answer to either (1) or (2) is "No," then enter zero.) _____ %

Question (10) What percent of the fault that caused [name of decedent]'s death is attributable to [name of defendant B]. (If your answer to either (3) or (4) is "No," then enter zero.) _____ %

Question (11) What percent of the fault that caused [name of decedent]'s death is attributable to [name of plaintiff]. (If your answer to either (5) or (6) is "No," then enter zero.) _____ %

Question (12) What percent of the fault that caused [name of decedent]'s death is attributable to [name of third party]. (If your answer to either (7) or (8) is "No," then enter zero.) _____ %

The total must equal 100% 100%

If [name of plaintiff]'s fault is 50% or more, stop here, have the foreperson sign the verdict form, and advise the bailiff. If [name of plaintiff]'s fault is less than 50%, answer Questions (13) and (14). Do not deduct from the damages any percentage of fault that you have assessed to [name of plaintiff]. The judge will make any necessary deductions later.

Damages: Survival Claim

Question (13) What amount fairly compensates the Estate of [name of decedent] for:

Medical Expenses…… $ _____

Funeral Expenses…… $ _____

Lost Wages…… $ _____

Other Economic Damages…… $ _____

Non-economic Damages…….. $ _____

Total…….. $ _____

Damages: Wrongful Death Claims

Question (14) What amount fairly compensates [name of heir #1] for the loss of love, companionship, society, care, protection and affection of [name of decedent] …… $ _____

Question (15) What amount fairly compensates [name of heir #2] for the loss of love, companionship, society, care, protection and affection of [name of decedent] …….. $ _____

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.

_____ Sign here ► _____

Date Jury Foreperson

Committee Notes

The verdict form must be tailored to fit the circumstances of the case. Add or remove sections about parties as needed to account for different tortfeasors. Similarly, in the section on comparative fault, add or remove lines as needed to account for different tortfeasors. In the section on damages, add or remove lines as needed to describe the damages of each heir and of each decedent. Some damages for the estate may be authorized only if the decedent survives for a time after injury.

Tab 5

(1) CV 2026. Punitive damages. (Trial Phase One).

In addition to actual damages, [name of plaintiff seeks to recover punitive damages. Punitive damages may be awarded only if:

(1) you award compensatory damages; and if

(2) it is proved by clear and convincing evidence that the acts or omissions of [name of defendant] were a result of:

(A) willful and malicious conduct; or

(B) intentionally fraudulent conduct; or

(C) conduct that manifests a knowing and reckless indifference toward the rights of others and a disregard of the rights of others.

In the Verdict form, you will be asked whether punitive damages should be awarded. If you answer that question "no," your deliberations on punitive damages are finished. If you answer the question "yes," you will decide the amount of punitive damages at a later time.

References

Utah Code Section 78B-8-201.

Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991).

MUJI 1st Instruction

27.20

Committee Notes

(2) CV 2027. Definitions.

Another option: replace the phrases in 2026 with these definitions of what the phrases mean.

To prove that [name of defendant]’s conduct was “willful and malicious” [name of plaintiff] must prove that [name of defendant] intentionally acted or failed to do an act and that [name of defendant] knew that serious injury was a probable result.

To prove that [name of defendant]’s conduct “manifests a knowing and reckless indifference toward the rights of others, and a disregard of the rights of others,” [name of plaintiff] must prove that [name of defendant] knew of a substantial risk and proceeded to act or failed to act while consciously ignoring that risk.

References

“willful and malicious”

Golding v. Ashley Cent. Irr. Co., 793 P.2d 897, 901 (Utah 1990).

Brown v. Frandsen, 426 P.2d 1021, 1022 (Utah 1967).

“knowing and reckless”

Daniels v. Gamma W. Brachytherapy, LLC, 2009 UT 66, ¶ 42, 221 P.3d 256, 269

For a definition of “intentionally fraudulent” see Instruction CV1801. Elements of fraud.

MUJI 1st Instruction

Committee Notes

In Ewell v. United States, 579 F.Supp. 1291 (D.Utah 1984), aff'd, 776 F.2d 246 (10th Cir.1985), the federal district court defined ‘willful and malicious’ based upon a prior holding of the Utah Supreme Court in Brown v. Frandsen, 426 P.2d 1021, 1022 (Utah 1967). The Utah Supreme Court then approved the definition adopted by the federal district court in Ewell. “[T]he standard quoted by the federal court from Brown v. Frandsen which incorporates the elements of knowledge of the dangerous condition and of the fact that serious injury is a probable result, and inaction in the face of such knowledge, is consistent with Utah case law... We, therefore, are inclined to adopt the interpretation of the term “willful or malicious.” Golding v. Ashley Cent. Irr. Co., 793 P.2d 897, 901 (Utah 1990).

The definition of “willful and malicious” adopted by Brown v. Frandsen, 19 Utah 2d 116, 118, 426 P.2d 1021, 1022 (1967) and applied to Section 57-14-6 in Golding v. Ashley Cent. Irr. Co., 793 P.2d 897, 901 (Utah 1990): “Willful misconduct is the intentional doing of an act, or intentional failure to do an act, with knowledge that serious injury is a probable result.”

(3) CV 2028 Vicarious punitive damages liability. (Trial Phase One).

You may find [name of defendant] liable for punitive damages resulting from the acts or conduct of [his] agent only if you find at least one of the following to be true:

(1) [name of defendant] or a managerial agent authorized the agent's specific conduct that caused the injury and the manner in which that conduct was carried out; or

(2) the agent was unfit and [name of defendant] or its managerial agent was reckless in retaining the agent; or

(3) the agent was employed in a managerial capacity and was acting within the scope of employment; or

(4) [name of defendant] or a managerial agent ratified or approved the agent's specific conduct that caused the injury.

References

Johnson v. Rogers, 763 P.2d 771 (Utah 1988).

Restatement (Second) of Torts § 909 (1977).

Restatement (Second) of Agency § 217C (1957).

MUJI 1st Instruction

25.20

Committee Notes

(4) CV 2029 Punitive damages as punishment. (Trial Phase Two).

You have previously found that punitive damages are proper in this case, and thus you may award such sum as, in your judgment, would be reasonable and proper as a punishment of [name of defendant] for such wrongs, and as a wholesome warning to others not to offend in like manner. If such punitive damages are given, you should award them with caution and you should keep in mind that they are only for the purpose just mentioned and not as the measure of actual damages.

References

MUJI 1st Instruction

27.20

Committee Notes

(5) CV 2030 Amount of punitive damages. (Trial Phase Two).

In determining the amount of punitive damages, you should take into account these factors:

(1) the relative wealth of [name of defendant];

(2) the nature of the alleged misconduct;

(3) the facts and circumstances surrounding such conduct;

(4) the effect of the conduct on the lives of the consumers and others in Utah;

(5) the probability of future recurrence of the misconduct;

(6) the relationship of the parties; and

(7) the amount of actual damages awarded.

References

Crookston v. Fire Ins. Exchange, 817 P.2d 789 (Utah 1991).

MUJI 1st Instruction

Committee Notes

Tab 6

(1) CV2018 Aggravation of symptomatic pre-existing conditions.

A person who has a [physical, emotional, or mental] condition before the time of [describe event] is not entitled to recover damages for that condition or disability. However, the injured person is entitled to recover damages for any aggravation of the pre-existing condition that was caused by [name of defendant]'s fault, even if the person's pre-existing condition made [him] more vulnerable to physical [or emotional] harm than the average person. This is true even if another person may not have suffered any harm from the event at all.

When a pre-existing condition makes the damages from injuries greater than they would have been without the condition, it is your duty to try to determine what portion of the [specific harm] to [name of plaintiff] was caused by the pre-existing condition and what portion was caused by the [describe event].

If you are not able to make such an apportionment, then you must conclude that the entire [specific harm] to [name of plaintiff] was caused by [name of defendant]'s fault.

References

Robinson v. All-Star Delivery, 992 P.2d 969, 972 (Utah 1999).

Tingey v. Christensen, 1999 UT 68, 987 P.2d 588 (Utah 1999).

Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 (1966).

Harris v. ShopKo Stores, Inc., 2011 UT App 329.

Florez v Schindler Elevator, 2010 UT App 254 (Absence of life expectancy evidence does not preclude award of future medical costs as damages.)

MUJI 1st Instruction

27.6.

Committee Notes

This instruction is not intended to suggest that the verdict form include a line-item allocation of what part of the harm can be apportioned to the pre-existing condition, and what part to the defendant's fault. That question is answered by the jury's award of damages and should not be confused with allocation of comparative fault.

(2) CV2019 Aggravation of dormant pre-existing condition.

A person who has a [physical, emotional, or mental] condition before the time of [describe event] is not entitled to recover damages for that pre-existing condition or disability.

However, if a person has a pre-existing condition that does not cause pain or disability, but [describe event] causes the person to suffer [describe the specific harm], then [he] may recover all damages caused by the event.

References

Harris v. ShopKo Stores, Inc., 2011 UT App 329.

Ortiz v. Geneva Rock Products, Inc., 939 P.2d 1213, (Utah App. 1997).

Turner v. General Adjustment Bureau, Inc., 832 P.2d 62, (Utah App. 1992).

Biswell v. Duncan, 742 P.2d 80 (Utah App. 1987).

MUJI 1st Instruction

27.7.

Committee Notes

Unlike Instruction CV2018, Aggravation of symptomatic pre-existing conditions, this instruction is designed for asymptomatic conditions that are aggravated by an injury.

(3) Suggested by Harris v. ShopKo Stores, Inc., 2011 UT App 329 (fn 2).

A person who has a latent, dormant or asymptomatic condition, or a condition to which the person is predisposed, may recover the full amount of damages that proximately result from injuries that aggravate the condition. In other words, when a latent condition does not cause pain, but that condition plus the injury brings on pain by aggravating the preexisting, dormant or asymptomatic condition, then it is the injury, not the dormant or asymptomatic condition, that is the proximate cause of pain and disability.