

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

November 26, 2018

4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Marianna Di Paolo, Tracy H. Fowler, Honorable Keith A. Kelly, Douglas G. Mortensen, Ruth A. Shapiro, Lauren A. Shurman, Paul M. Simmons, Christopher M. Von Maack. Also present: Cameron M. Hancock, Chair of the Trespass and Nuisance subcommittee

Excused: Joel Ferre, Peter W. Summerill

1. *Use of MUJI.* Judge Stone noted that the Judicial Council supports the use of the model instructions. Some judges have not been using them because they think they are too long. Judge Stone and Judge Blanch presented on the model instructions at the conference for district court judges and encouraged them to use the instructions.

2. *Minutes.* On motion of Mr. Mortensen, seconded by Mr. Fowler and Ms. Shurman, the committee approved the minutes of the May 14, 2018 meeting.

3. *Implicit Bias.* Judge Stone noted that a national judicial organization has circulated a model jury instruction on implicit bias and some courts have adopted such an instruction. The chair may appoint a subcommittee to consider such an instruction. The committee members noted that they did not know whether such an instruction would improve jury service or make bias more likely.

4. *Trespass and Nuisance Instructions.* The committee reviewed the proposed trespass and nuisance instructions. Mr. Hancock noted that the subcommittee tried to update the MUJI 1st instructions with more current case law. The subcommittee was undecided on whether former MUJI 4.16, Private Nuisance, should be broken out into separate instructions. The MUJI 1st instructions cited to "IJI." No one knew what IJI was. Mr. Simmons noted that the convention in MUJI 2d is to use "[name of plaintiff]" and "[name of defendant]" for "plaintiff" and "defendant," respectively. Ms. Sylvester volunteered to make the necessary changes throughout the instructions.

Mr. Von Maack and Dr. Di Paolo joined the meeting.

a. *CV1211, Damages for Nuisance.* Mr. Mortensen thought that the instruction did not give the jury enough guidance on how it was to determine damages. Ms. Shurman and Ms. Shapiro agreed. They thought the instruction was confusing and needed clearer, plainer language. Dr. Di Paolo advised the subcommittee to write shorter sentences. Mr. Mortensen thought that the instruction should say that the jury may award economic damages, noneconomic

damages, or nominal damages. Judge Stone suggested cross-referencing the instructions on economic and noneconomic damages in a committee note. Mr. Von Maack asked whether damages should be added as an element of the cause of action, but the committee noted that it was not an element. Ms. Shurman noted that *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-49 (Utah 1998), discusses the damages awardable in a nuisance action. The subcommittee will rework the damage instruction and consider whether and under what circumstances noneconomic damages may be awarded in a nuisance action.

b. *Former MUJI 4.8, Trespass--Introductory Instruction.* Ms. Shurman questioned the use of “encroachment.” Dr. Di Paolo asked if it added anything to “invasion.” Ms. Shurman noted that the invasion has to be a “physical” invasion and suggested adding “physical” before “invasion.” Judge Stone asked if there was any difference between an “invasion” and an “intrusion.” Dr. Di Paolo thought that “encroachment” was clearer than “invasion.” “Invasion” implies a hostile, aggressive act. Judge Stone suggested “use” as a synonym, and Mr. Simmons suggested “entry on.” Judge Stone thought that “entry on” implied an action and wondered if it was broad enough to cover a case where someone merely allows his or her livestock to wander onto a neighbor’s property. Mr. Hancock noted that no mens rea is required other than the intent to do the act. Mr. Mortensen suggested reversing the order, to “encroachment or invasion.” Mr. Von Maack quoted a 1911 Utah case that defined trespass as the “wrongful entry on the lands of another.”

Dr. Di Paolo asked whether MUJI 4.8 was necessary. She thought that the tort of trespass was defined by its elements, which are set out in CV1201 and CV1202 (former MUJI 4.9 and 4.10). She suggested taking out the second sentence of MUJI 4.8. Mr. Mortensen preferred to leave it in. Dr. Di Paolo noted that a juror could be confused by two definitions of trespass, one in MUJI 4.8 and the other in the elements instruction. Mr. Simmons agreed. The committee decided to delete MUJI 4.8 and move the reference to *Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass’n*, 2006 UT App 387, 145 P.3d 1177, to CV1201.

c. *CV1201, Trespass to Real Property (former MUJI 4.9).* At Mr. Simmons’s suggestion, “had [ownership/lawful possession] of” was changed to “[owned/lawfully possessed]” in subparagraph 1. Dr. Di Paolo questioned the use of “object” in subparagraph 2. She noted that “object” implies something inanimate and may not be broad enough to cover wandering livestock, for example. She suggested replacing it with “thing.” But Judge Stone noted that “thing” could cover particulates (such as smoke or odors), which are generally covered by nuisance doctrine. Ms. Shapiro and Ms. Shurman noted that trespass is meant to protect one’s right to possession of his or her property, not necessarily

his or her right of enjoyment, which is protected by nuisance law. Judge Stone questioned whether an owner not in possession of property would have standing to complain of a temporary trespass on the property. Mr. Hancock noted that he could if, for example, a person drove his car into a structure on the property, damaging it. Mr. Simmons thought any question as to standing would be decided as a matter of law before trial and would not go to the jury.

Judge Kelly joined the meeting.

Mr. Mortensen suggested changing the first sentence of the instruction to read, "To establish trespass," instead of "To award the plaintiff damages for trespass," since one can have a trespass claim even if he or she has suffered no damage. Judge Kelly questioned whether noneconomic damages are available for a trespass. The subcommittee will look at that issue. Ms. Shurman noted that *Walker Drug* says that typically the measure of damages in trespass and nuisance cases involving a permanent injury includes "consequential losses to the use of the land or from discomfort or annoyance to the possessor."

The committee revised CV1201 to read:

In this action, [name of plaintiff] seeks to recover damages from [name of defendant] for a trespass to [name of plaintiff]'s property.

To establish trespass against the property involved in this case, [name of plaintiff] must prove that:

1. [name of plaintiff] [owned/lawfully possessed] the property;
2. [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property by physically entering or encroaching upon [or causing some thing to physically enter or encroach upon] [name of plaintiff]'s land;
3. [name of defendant] intended to perform the act that resulted in the unlawful entry or encroachment upon [name of plaintiff]'s property; and
4. [name of defendant] had no right to do the act that constituted the unlawful entry or encroachment upon [name of plaintiff]'s property.

d. *CV1202, Trespass to Personal Property (former MUJI 4.10)*. Ms. Sylvester revised CV1202 to conform to the changes to CV1201.

e. *CV1204, Consent (former MUJI 4.11 & 4.12)*. At Mr. Mortensen's suggestion, the committee combined former MUJI 4.11 and 4.12 into one instruction, labeled "Consent." It noted that the subcommittee had found no implied consent cases in the context of trespass in Utah and thought that the instruction should therefore be more generic. Dr. Di Paolo noted that "express" should be "expressed." She further noted that implication is complicated and can depend on many things, including culture.

Ms. Shurman was excused.

Mr. Von Maack noted that the Restatement treats consent as a privilege. Mr. Simmons asked whether the instruction should say that the trespass cannot exceed the scope of the consent. The committee tentatively revised the instruction to read:

[Name of defendant] asserts that [he/she/it] was given consent by [name of plaintiff] or [name of plaintiff]'s agent to [use/enter upon] [name of plaintiff]'s property, and that [name of defendant] is thus not liable for trespass.

[Name of defendant] is not liable for trespass to the extent [he/she/it] can establish that [name of plaintiff] consented to the entry or encroachment upon the property.

Consent means permission to enter or encroach upon property was communicated. Consent can be expressed or implied.

Dr. Di Paolo thought that putting in the extent or scope of the consent turns trespass into something different. Ms. Shapiro questioned whether the issue shifts the burden back to the plaintiff to prove that the defendant exceeded the scope of the consent. Judge Stone asked the subcommittee to revisit the consent instruction with these issues in mind.

5. *Christopher M. Von Maack*. This was Mr. Von Maack's last committee meeting. Mr. Von Maack has been asked to chair the Utah Supreme Court Professionalism Counseling Board. Mr. Von Maack was thanked for his service and given a certificate.

6. *Next meeting*. The next meeting is Monday, December 10, 2018, at 4:00 p.m.

The meeting adjourned at 6:00 p.m.