

MINUTES

Advisory Committee on Model Civil Jury Instructions

April 8, 2019

4:00 p.m.

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

1. *Minutes*. On motion of Ms. McAllister, seconded by Ms. Shapiro, the committee approved the minutes of the March 11, 2019 meeting.

2. *Schedule*. Mr. Fowler noted that the Products Liability subcommittee will not be ready before the committee breaks for the summer.

3. *Trespass and Nuisance Instructions*. The committee continued its review of the Trespass and Nuisance Instructions, spending the rest of the meeting on *CV1211, Damages for Nuisance*. Ms. McAllister suggested that the instruction say that the jury may award “economic, non-economic, incidental, *and/or* nominal damages,” since more than one category of damages may be available in a given case. Others noted that nominal damages would never be awarded in addition to the other damage categories. Judge Stone suggested tracking *CV2141, Nominal damages (for breach of contract)* and noted that a recent case defined “nominal damages” as \$1. Mr. Hancock questioned the reference to “incidental” damages and noted that they are not defined anywhere in the instructions. Ms. Shurman noted that “incidental” damages are those that don’t flow directly from the nuisance and could be economic, non-economic, or both.

Dr. Di Paolo joined the meeting.

Mr. Mortensen thought “incidental” sounds like the damages are small or inconsequential. Mr. Simmons questioned whether the jury needs to distinguish between incidental and other damages; if not, it would not need to be instructed on them. The committee decided to omit “incidental damages” from the instruction and add the following statement to the committee note: “The committee concluded that ‘incidental damages’ are included in either economic or non-economic damages.”

Judge Stone noted that *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245 (Utah 1998), the case cited as a reference for the damage instruction, indicated that damages in a nuisance case are determined by balancing the harm to the plaintiff against the reasonableness of the interference with the plaintiff’s use and enjoyment of his or her land “in the context of wider community interests.” The committee thought that this language indicated that the jury is to determine damages within a range, the range extending from nominal damages on the low end to the full amount of the plaintiff’s harm. Depending on the jury’s balancing of the relevant considerations, the

damages could fall anywhere within that range. Mr. Hancock suggested using the language from *Walker Drug*.

The committee revised the instruction to read:

If you determine that [name of defendant] is liable to [name of plaintiff] for nuisance, you must award damages. To determine the amount of damages, you must consider:

- 1) the degree of [name of defendant]'s interference in the use and enjoyment of [name of plaintiff]'s land; and
- 2) the reasonableness of the interference in the context of wider community interests.

Considering these factors and the evidence at trial, you may award damages that range from “nominal damages” to the full amount of [name of plaintiff]’s economic and/or non-economic damages.

“Nominal damages” is an amount such as one dollar.

Economic and non-economic damages are defined in other instructions.

Dr. Di Paolo suggested saying that the jury may award economic damages, non-economic damages, or “a trivial amount,” to avoid the use of “nominal damages.” Mr. Mortensen objected to the use of “trivial.” Dr. Di Paolo suggested saying that the jury could award “an amount such as \$1,” avoiding the use of “nominal,” “trivial,” or “small.” Judge Kelly noted that it is important to tell the jury that they must award something if they find liability for nuisance, since an award of damages--even nominal damages--may have other consequences, such as allowing for an award of attorney’s fees to the prevailing party or providing a basis for abatement or other injunctive relief.

Dr. Di Paolo suggested saying that the jury could award damages up to the full amount “requested by” the plaintiff, but other committee members noted that the plaintiff does not always ask for a specific amount of damages but may choose to leave the amount up to the jury, particularly in the case of non-economic damages. Mr. Fowler thought that the instruction should say that the jury may award damages proved or established by the plaintiff. Ms. McAllister noted that there are other instructions explaining the plaintiff’s burden of proving damages.

Dr. Di Paolo said that the committee should avoid the use of “shall,” since it is not often understood or used correctly. She said that if something is required, the

committee should use “must”; if something is discretionary or advisory only, the committee should use “should.”

Dr. Di Paolo asked whether the instruction adequately covered a situation where the plaintiff suffers no actual damage. Some committee members thought that there will always be some harm to the plaintiff’s interest where the defendant is liable for a nuisance.

Ms. McAllister and Mr. Summerill noted that the definitions of economic and non-economic damages in the Tort Damages instructions (CV2003 and CV2004), which are referenced in the committee note, do not apply neatly to nuisance claims. The subcommittee may need to draft an instruction on non-economic damages specific to nuisance cases.

4. *Next meeting.* The next meeting is Monday, May 13, 2019, at 4:00 p.m.

The meeting concluded at 6:00 p.m.