Agenda
Advisory Committee on Model Civil Jury Instructions

October 15, 2019
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	Judge Andrew Stone, Chair
Subcommittees and subject area timelines	Tab 2	Judge Andrew Stone
Trespass and Nuisance Instructions	Tab 3	Cameron Hancock, Ryan Beckstrom
ACTL Cognitive Science Instructions	Tab 4	Judge Andrew Stone Judge Keith Kelly, Alyson McAllister, Lauren Shurman Peter Summerill Paul Simmons
Uniformity	Tab 5	Judge Keith Kelly, Alyson McAllister, Lauren Shurman
CV632. Threshold	Tab 6	Alyson McAllister
Other business		Judge Andrew Stone

Committee Web Page

Published Instructions

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

November 12, 2019 (Tuesday)
December 9, 2019
January 13, 2020
February 10, 2020

March 9, 2020
April 13, 2020
May 11, 2020
June 8, 2020
September 14, 2020
October 5, 2020
November 9, 2020
December 14, 2020

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
September 9, 2019
4:00 p.m.

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

Excused: Tracy H. Fowler

1. *Minutes*. On motion of Judge Kelly, seconded by Ms. Shapiro, the committee approved the minutes of the June 10, 2019 meeting.

2. *"Improving Jury Deliberations."* Mr. Morse was introduced. He explained that he sits on the Jury Committee of the American College of Trial Lawyers (ACTL) and that they have prepared a paper titled "Improving Jury Deliberations Through Jury Instructions Based on Cognitive Science." Mr. Morse encouraged the committee to read the paper, which was included with the materials for today's meeting, and to consider the changes it proposes. He summarized the main points of the paper: Juries sometimes reach the wrong decisions because they rely on gut feelings and emotions and decide quickly. Once they decide where they think the case should end up, they generally don't waiver from it and may not consider evidence that supports a different result. The paper discusses four flaws in the current jury system: (1) intuition trumps rational decision-making; (2) jurors are governed too much by confirmation bias; (3) glucose depletion affects their cognitive performance; and (4) dominant jurors tend to dominate, and submissive jurors are not heard. The paper proposes three new jury instructions: (A) accountability, (B) devil's advocate, and (C) deliberation guide. Judge Chon thought that the ACTL's work goes along with her subcommittee's work on an implicit bias instruction. She noted that she has been working with Kimberly Papillon on implicit bias. Ms. Sylvester suggested calling the jury foreperson the "facilitator," suggesting that he should not dominate the deliberations but should elicit participation from all the jurors. Judge Stone asked if any jurisdictions have adopted the proposed instructions. Mr. Morse thought that some had. Judge Chon and Mr. Morse thought that Judge Landau of the Third District Justice Court had used instruction C. Judge Stone thought that instructions A and B could be given as opening instructions, and instruction C could be given at the end of the case. Mr. Simmons pointed out that instructions A and B in the exhibits were the same. Others pointed out that what should be instruction A in the exhibits is found on p. 15 of the report. Judge Stone noted that, if the committee were to adopt the instructions, district and justice court judges would need to be educated on them. Ms. Sylvester suggested that there could be a presentation at the spring judicial training for district and justice court judges and suggested that Mr. Morse contact Tom Langhorne, the courts' Education Director. Judges Stone and Kelly thought that Judge Kelly's subcommittee on uniformity could

try to incorporate the suggested instructions into the revised general instructions the subcommittee is working on and come back to the committee with a recommendation. The other members of the subcommittee (Ms. McAllister and Ms. Shurman) were willing to take on the task. Mr. Summerill expressed concerns. He questioned the merits of instructions telling the jurors how to go about their deliberations and questioned the accuracy of some of the research underlying the proposal. He thought the best way to vet the instructions would be through the adversarial process. He questioned whether a general instruction on implicit bias would do any good. He also thought that some of the instructions favored one party over another. Several committee members questioned the use of the term "accountability." They thought it might put undue pressure on jurors and could make them think that their service could expose them to liability.

Dr. Di Paolo joined the meeting.

Other committee members thought that some jurors may object to being asked to play "devil's advocate." Ms. McAllister noted that asking jurors to, in effect, marshal the evidence in support of and in opposition to their opinions could run counter to the instruction that the greater weight of the evidence is not determined by counting the number of witnesses on each side. Ms. Shapiro noted that there is no real way to enforce the instructions and see that the jurors follow them. Judge Stone noted that the proposed instructions impose an added structure on deliberations but also noted that the current instructions invite nonparticipation on the part of jurors. Mr. Mortensen suggested leaving it to the attorneys to suggest how the jury go about its deliberations. Mr. Morse noted that such suggestions mean more when they come from the judge. Dr. Di Paolo noted that there is value in "scenarios" or "scaffolds" that create a structure for how information is to be received, and that creating a structure at the beginning and reinforcing it at the end of trial may be beneficial. Judge Stone noted that this is new territory for the committee and is more legislative in nature than the committee's other work, which was to update the old MUJI instructions and restate them in plain English. Judge Stone noted that he can tell the jury what the law is, but he can't tell the jury that the law requires them to deliberate in any particular way because it doesn't. He noted that historically the right to trial by jury was a right to trial by the intuition of one's peers, not a right to a trial by 12 people who all think like lawyers. Others agreed that words like "requires" and "duty" overstate the law with respect to deliberations. Mr. Ferre suggested telling jurors that they "should be prepared to explain" their reasoning rather than "have to explain." Judge Stone wondered if the Supreme Court should be involved in any changes. Ms. Sylvester thought that the Judicial Council might want to consider the matter and noted that there will be an opportunity for attorneys to comment on the proposed jury instructions. Judge Stone noted that he now gives the jury all of the instructions up front, including the verdict form, and noted that Utah Rule of Civil Procedure 51 seems to encourage the practice. The committee deferred further

discussion until Judge Kelly's subcommittee can review the proposed instructions and come back with a recommendation.

Mr. Hancock joined the meeting, and Judge Chon and Mr. Morse were excused.

3. *Trespass and Nuisance Instructions.* The committee continued its review of the Trespass and Nuisance Instructions. Ms. Sylvester distributed with the agenda a memorandum giving the responses of Mr. Hancock and Ryan Beckstrom to the committee's questions at the last meeting. Their conclusions were that (a) the same reasonableness standard should apply to claims for both statutory nuisance (CV1208) and common-law nuisance (CV1209); (b) there are differences between the two types of claims, and the differences are spelled out in the instructions (CV1208 and CV1209); (c) it may make sense to include a committee note that in most cases the differences between the instructions may be immaterial; and (d) because some form of the word "reasonable" (or "unreasonable") appears in four different instructions (CV1208, CV1209, CV1210, and CV1211), there should be a stand-alone instruction on reasonableness.

a. *CV1208, Statutory Nuisance Claim.* The committee moved the last two paragraphs to new CV1213, "Reasonableness," and added to the committee note the following statement: "Although the statutes do not mention reasonableness, the committee added a reasonableness requirement to conform to case law. See CV1213 for a discussion of reasonableness."

Mr. Summerill and Ms. McAllister were excused.

On motion of Mr. Simmons, seconded by Ms. Shurman, the committee approved CV1208 as revised.

b. *CV1209, Common Law Private Nuisance Claim.* The committee changed "an actual property interest" in paragraph 1 to "a legal interest" and put paragraph 1 in brackets, since in many cases whether the plaintiff owned or possessed a legal interest in the property will be decided as a matter of law before trial. The committee also deleted the quotation marks around "otherwise actionable" in paragraph 3. The committee also numbered the alternatives in the last paragraph, describing when an unintentional use is "otherwise actionable." The committee added two paragraphs to the committee note, the first to explain that the first element may be omitted if there is no factual dispute over whether the plaintiff had a legal interest in the real property, and the second to explain that the differences between common-law and statutory private nuisance claims will only be material in a limited number of cases, so the attorneys and judges may want to use only the instruction most applicable to the circumstances of

their case. On motion of Ms. Shapiro, seconded by Dr. Di Paolo, the committee approved the instruction as revised.

c. *CV1213, Reasonableness*. The committee created a new instruction, made up of the deleted paragraphs of CV1208 revised to read as follows:

> [Name of defendant]'s [conduct, action, or thing] may be "unreasonable" under circumstances where the harm caused by [name of defendant]'s [conduct, action, or thing] outweighs whatever benefit it may have to society, or the [conduct, action, or thing] is not suitable to the location.
>
> To determine if [name of defendant]'s [conduct, action, or thing] is "reasonable" or "unreasonable," you should consider things such as the specific location where the nuisance is alleged to have occurred, when [name of defendant]'s [conduct, action, or thing] began, the nature and value of [name of defendant]'s [conduct, action, or thing], the character of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]'s life, health, and property.

Mr. Mortensen questioned the meaning of "when [defendant's conduct] began." Does it mean how long ago it began or what time of day it began or something else? Dr. Di Paolo recommended replacing the bracketed phrases with actual examples and then seeing how the instruction reads. The committee also moved most of the former committee note to CV1209 to CV1213. The committee deferred further discussion of CV1213 until the next meeting.

4. *Next meeting*. The next meeting is Tuesday, October 15, 2019, at 4:00 p.m. (Monday, October 14, being a holiday).

The meeting concluded at 6:00 p.m.

Tab 2

Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back/Notes
Trespass and Nuisance	Yes	Hancock, Cameron; Beckstrom, Ryan	November-18	October-19	
Uniformity	Yes	Judge Keith Kelly (chair), Alyson McAllister, Lauren Shurman	February-19	November-19	
Caselaw updates	n/a	n/a	October-19	November-19	
Implicit Bias	TBD	Judge Su Chon (chair)	TBD	TBD	
Products Liability	Yes	Tracy Fowler, Nelson Abbott, and Todd Wahlquist	November-19	January-19	Time to update due to significant changes in case law.
Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	TBD	TBD	
Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	TBD	TBD	
Unjust Enrichment	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Abuse of Process	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	TBD	TBD	
Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	TBD	TBD	Much of this is codified in statute. There may not be enough instructions to dedicate an entire instruction area.
Civil Rights: Set 2	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	TBD	TBD	
Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	TBD	TBD	

Tab 3

Draft: September 9, 2019

MUJI 2nd Trespass and Nuisance Jury Instructions

CV1201 TRESPASS TO REAL PROPERTY. Approved January 15, 2019.

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 [name of plaintiff]'s claim for trespass against the property involved in this case, you must find 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.

References:

Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc., 2006 UT App 387, ¶ 4, 145 P.3d 1177

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

John Price Associates v. Utah State Conference, 615 P.2d 1210 (Utah 1980)

Wood v. Myrup, 681 P.2d 1255 (Utah 1984)

CV1202 TRESPASS TO PERSONAL PROPERTY. Approved January 15, 2019.

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 [name of plaintiff]'s claim for trespass against the property involved in this case, you must find that:

1. [name of plaintiff] had [ownership/lawful possession] of the property at the time of the alleged trespass;

2. [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property, by [specify briefly the acts alleged to constitute wrongful interference with [name of plaintiff]'s personal property];

3. [name of defendant] intended to perform the act that amounted to the unlawful interference with the personal property of [name of plaintiff]; and

4. [name of defendant] had no right to do the act that constituted the interference with the personal property of [name of plaintiff].

References:

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

Peterson v. Petterson, 117 P. 70, 71 (Utah 1911)

CV1203 CONSENT. Approved January 15, 2019.

[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 if [he/she/it] can establish that [name of plaintiff] consented to the entry or encroachment upon the property, but only to the extent that the entire entry or encroachment was authorized.

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

Committee note: The MUJI 1 instructions enumerated express and implied consent separately. But the Utah case law speaks only of consent, which may be express or implied.

References:

Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)

Restatement (Second) of Torts § 252 (1965)

CV1204 IMPLIED CONSENT - CUSTOM AND USAGE. Approved January 15, 2019.

[name of defendant] asserts that [name of defendant] had the implied consent of [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.

Consent is an absolute defense to an action for trespass. Consent for [use of/entry upon] real property need not be expressly given but may be implied from the circumstances. The implied consent may be derived from custom, usage, or conduct. Therefore, [name of defendant] is not liable for trespass if [name of defendant] can show that:

1. [name of defendant] was a member of a category of persons for whom [use of/entry upon] the property would be considered customary or common;
2. [name of defendant]'s [use of/entry upon] [name of plaintiff]'s property was within the fair and reasonable bounds of the implied consent to [use/enter upon] the property; and
3. [name of plaintiff] did not indicate, either verbally or by posted signs on the property, that [name of plaintiff] did not consent to the entry.

References:
Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33
Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)
Restatement (Second) of Torts § 252 (1965)

CV1205 DAMAGES - NOMINAL DAMAGES. Approved January 15, 2019.

If you found that [name of defendant] trespassed [name of plaintiff]'s [real/personal] property, you may award economic, non-economic, or nominal damages to [name of plaintiff].

Even if you find that no actual damage was suffered by [name of plaintiff] as a result of [name of defendant]'s trespass, you may still award [name of plaintiff] a trivial amount, called "nominal damages," to compensate [name of plaintiff] for the invasion of [name of plaintiff]'s property rights. "Nominal damages" has been defined as a trivial sum such as one dollar.

References:
Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)
Henderson v. For-Shor Co., 757 P.2d 465 (Utah App. 1988)

Committee note:
For a definition of economic and non-economic instructions, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a trespass, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in trespass may include the addition of discomfort and annoyance to CV2004's list of considerations. *See Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998).

CV1206 NUISANCE - INTRODUCTORY INSTRUCTION. Approved February 11, 2019.

One person can interfere with the use or enjoyment of another person's property even without entering that other person's property. In some instances, the legal term for this is "nuisance."

In this case, [name of plaintiff] claims that [name of defendant], through [describe the conduct, action, or thing], has created a nuisance that has interfered with [name of plaintiff]'s use or enjoyment of [his/her/its] property.

[Name of plaintiff] claims that [name of plaintiff] has suffered harm as a result of this nuisance, and seeks to recover damages from [name of defendant] for that harm.

References:
Utah Code § 76-10-801
Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985)
Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)
Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990)

CV1207 NUISANCE PER SE. Approved February 11, 2019.

The court has determined that, under the law, [name of defendant]'s conduct, [describe the conduct, action, or thing], constitutes a nuisance.

References:
Utah Code § 78B-6-1101 (defining certain nuisances)
Erickson v. Sorensen, 877 P.2d 144, 149 (Utah App. 1994)
Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990)

Committee note:
This instruction will only be given when the court has already made a determination that the conduct constitutes nuisance per se. Utah Code §§ 78B-6-1101 and 78B-6-1107 list some things that constitute nuisance per se, but there may be others. A nuisance per se exists when the conduct creating the nuisance is specifically prohibited by statute.

CV1208 STATUTORY NUISANCE CLAIM. Approved September 9, 2019.

You must decide whether [name of plaintiff] has established a claim under the nuisance statutes.

To establish such a claim, [name of plaintiff] must show that [name of defendant]'s [describe the conduct, action, or thing]:

1) Was indecent, injurious to health, offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property;
2) [name of defendant]'s conduct was unreasonable or unlawful; and
3) [name of plaintiff]'s property was injuriously affected or plaintiff's personal enjoyment was lessened by [describe the conduct, action, or thing].

References:
Utah Code § 78B-6-1101 et al.
Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)
Dahl v. Utah Oil Ref. Co., 262 P. 269, 273 (Utah 1927)

Committee note:

Although the statutes do not mention reasonableness, the committee added a reasonableness requirement to conform to case law. See CV1213 for a discussion of reasonableness.

The statute provides specific instructions for when tobacco smoke, manufacturing and agricultural operations, and certain types of criminal activity may or may not be considered a nuisance. Those specific statutory causes of action and exceptions to nuisance liability are not included herein, but specially tailored instructions may be warranted in cases involving those statutory provisions.

The difference between the common law and statutory private nuisance claims will only be material in limited cases. Practitioners and judges may wish to present to the jury only the instruction most applicable to the circumstances of their case.

CV1209 COMMON LAW PRIVATE NUISANCE CLAIM. Approved September 9, 2019.

A private nuisance is any activity that substantially and unreasonably interferes with the use and enjoyment by another of that person's property, other than by entering upon it.

[Name of plaintiff] claims that [name of defendant] has interfered with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property by [specify nature of alleged nuisance].

To establish [name of pPlaintiff]'s claim for private nuisance, you must find that:

1. [[name of plaintiff] owned or possessed a legal interest in the real property that is the subject of this action];
2. [name of Ddefendant] caused or was responsible for a substantial interference with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property; and
3. [[name of plaintiff]][name of defendant]'s use of the property was either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable.

A "substantial interference" with [name of plaintiff]'s use and enjoyment of the land is typically one that results in substantial annoyance, discomfort, or harm. The degree of interference, which is measured by what would be offensive to a reasonable person, or to a person one who has ordinary health and ordinary and reasonable sensitivities.

An unintentional use that is "otherwise actionable" is generally one that is 1) negligent or reckless, or 2) that results in abnormally dangerous conditions or activities in an inappropriate place.

References:

Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1
Sanford v. Univ. of Utah, 488 P.2d 741 (Utah 1971)
Johnson v. Mount Ogden Enterprises, Inc., 460 P.2d 333 (Utah 1969)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)
Canon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)
Dahl v. Utah Oil Ref. Col, 71 Utah 1, 262 P. 269, 273 (1927)

Committee note:

The first element of this instruction may be omitted if there is no factual dispute over whether the plaintiff has a legal interest in the real property.

Negligence is defined in CV202A and it may be appropriate to also give that instruction to the jury. See CV1213 for a discussion of reasonableness.

The difference between the common law and statutory private nuisance claims will only be material in limited cases. Practitioners and judges may wish to present to the jury only the instruction most applicable to the circumstances of their case.

CV1210 STATUTORY PUBLIC NUISANCE CLAIM

To establish [name of plaintiff]'s claim that defendant created a public nuisance, you must find:

1. The alleged nuisance consists of unlawfully doing any act or omitting to perform any duty;
2. [name of defendant]'s conduct was unreasonable;
3. The act or omission either
    a. Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;
    b. Offends public decency;
    c. Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway; or
    d. In any way renders three or more persons insecure in life or the use of property.
4. Plaintiff has suffered damages different from those of society at large.

An act which affects three or more persons in any of the ways specified in this instruction is still a nuisance regardless of the extent of annoyance and regardless of whether the damage inflicted on individuals is unequal.

References:

Utah Code § 76-10-803 (2009)
Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1
Solar Salt Co. v. Southern Pac. Transp. Co., 555 P.2d (Utah 1976)
Monroe City v. Arnold, 452 P.2d 321 (Utah 1969)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)
Erickson v. Sorensen, 877 P.2d 144, 148 (Utah App. 1994)

Committee note

This instruction cites the elements for a statutory public nuisance claim. There may also be a common law claim. *See Riggins v. Dist. Court of Salt Lake Cty.*, 51 P.2d 645, 662 (1935).

CV1211DAMAGES FOR NUISANCE. Approved May 13, 2019.

If you determine that [name of defendant] is liable to [name of plaintiff] for nuisance, you must award some amount of damages. To determine the proper 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 presented at trial, you may award damages that range from "nominal damages" up to an amount necessary to fully compensate name of plaintiff] for [name of plaintiff]'s economic and/or non-economic harm..

"Nominal damages" is an amount such as one dollar.

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

References:
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)

Committee note:
For a definition of economic and non-economic damages, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a nuisance, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in a nuisance case may include the addition of discomfort and annoyance to CV2004's list of considerations. See *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998) and CV1212. A possessor of land may be allowed to recover "incidental damages for harms to his person or chattels" in an action for nuisance. See *Turnbaugh for Benefit of Heirs of Turnbaugh v. Anderson*, 793 P.2d 939, 942–43 (Utah Ct. App. 1990). The committee concluded that "incidental damages" are included in either economic or non-economic damages. In public nuisance claims, the first element of interference in the use and enjoyment of land may not apply; there may be other factors to consider.

CV1212 NON-ECONOMIC DAMAGES FOR NUISANCE. Approved May 13, 2019.

In addition to any economic damages incurred by [name of plaintiff], you may also award damages for personal inconvenience, annoyance, and discomfort caused by the existence of a nuisance.

References:
Wade v. Fuller, 365 P.2d 802, 805 (Utah 1961)
Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245–49 (Utah 1998)

Committee note
This instruction reflects the language of the case law on nuisance. Parties may also consider adapting CV2004.

CV1213 REASONABLENESS.

[Name of defendant]'s [conduct, action, or thing] may be "unreasonable" under circumstances where the harm caused by [name of defendant]'s [conduct, action, or thing] outweighs whatever benefit it may have to society, or the [conduct, action, or thing] is not suitable to the location.

To determine if [name of defendant]'s [conduct, action, or thing] is "reasonable" or "unreasonable," you should consider things such as the specific location where the nuisance is alleged to have occurred, when [name of defendant]'s [conduct, action, or thing] began, the nature and value of [name of defendant]'s [conduct, action, or thing], the character of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]'s life, health, and property.

Comment [NS1]: We should fill in actual things here and see if this sentence still makes sense.

References:
Utah Code § 78B-6-1101 et al.
Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)
Dahl v. Utah Oil Ref. Col, 71 Utah 1, 262 P. 269, 273 (1927)
Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1
Walker Drug Co. v. La Sal Oil Col, 972 P.2d 1238, 1245 (Utah 1998)

Committee note:
Utah courts appear to be conflicted on the applicable considerations of "unreasonableness," with some addressing it from the standpoint of the actor:

> [W]hat is a reasonable use of one's property must necessarily depend upon the circumstances of each case, for a use for a particular purpose and in a particular way, in one locality, that would be lawful and reasonable might be unlawful and a nuisance in another. The test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case.

Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954) (cleaned up) (emphasis in original). While others address it from the standpoint of the injured party:

> Unlike most other torts, [private nuisance law] is not centrally concerned with the nature of the conduct causing the damage, but with the nature and relative importance of the interests interfered with or invaded. The doctrine of nuisance has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of action or omission which has lead to the invasion…. Distinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct.

Whaley v. Park City Mun. Corp., 2008 UT App 234, ¶22, 190 P.3d 1. This conflict seems understandable because "no hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another." *Dahl v. Utah Oil Ref. Co.*, 71 Utah

1, 262 P.269, 273 (1927). This a fact-specific inquiry that "requires the finder of tact to evaluate, among other things, the severity of the harm vis-a-vis its social value or utility." *Walker Drug Co. v. La Sal Oil Col*, 972 P.2d 1238, 1245 (Utah 1998).

Tab 4

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

ACTL Cognitive science instruction

3 messages

Judge Andrew Stone Mon, Sep 30, 2019 at 8:50 AM
To: Judge Keith Kelly , Nancy Sylvester <nancyjs@utcourts.gov> Cc: "Andrew M. Morse" <amm@scmlaw.com>

I used the following instruction in a jury trial last week, adapted from the three suggested instructions from ACTL. The jury did tell me they applied it in their deliberations. Both counsel liked it.

Jury Instruction No. ____

Listening to evidence and deliberation.

Because you will be deliberating as a group, I suggest a few simple practices to follow during trial and deliberation to help ensure that the process runs well.

When you go to deliberate you will be asked to decide the case. You should not only expect to vote "yes" or "no" on certain verdict questions; you should plan to explain to your fellow jurors what evidence you believe supports your decision to vote a certain way.

Second, after you explain to your fellow jurors why you believe the evidence supports your decision to vote a certain way, I suggest you also state a fact or facts that you believe would support a decision reaching a different result. The reason I ask you to do this—to focus both on evidence that supports and does not support a certain result—is because it will help each of you keep an open mind throughout the trial. If you stop considering evidence that goes against your thinking you may reach the wrong result.

Third, when a group deliberates fairly and respectfully it is most likely to come to a fair and just result. As your fellow jurors speak about the evidence they found important, PLEASE LISTEN. In order for this process to work best I want each of you to have the benefit of your fellow jurors' insights and ideas. Those insights and ideas may impact your thinking—or they may not—but unless you listen and allow them to speak you will not have the chance to have your own thinking challenged and improved.

As in any group some of you will be more comfortable than others in sharing your thoughts. But just as others will lose out if they do not listen, the group will also lose out if they do not have the benefit of everyone's input. So, I suggest the foreperson should speak last and allow everyone else to have their say before providing his or her input. And, I would suggest that those most hesitant to speak out go first so their ideas are sure to be heard.

--
Andrew Stone
Third District Judge

Andrew M. Morse <amm@scmlaw.com> Mon, Sep 30, 2019 at 9:12 AM
To: Judge Andrew Stone, Judge Keith Kelly, Nancy Sylvester <nancyjs@utcourts.gov>

Judge Stone,

Thanks very much. This instruction is a nice blend of the major points of the three instructions. I am going to share your note and the instruction with the Jury Committee of the American College of Trial Lawyers. Thanks again. AMM

SNOW CHRISTENSEN & MARTINEAU

Andrew M. Morse | Lawyer
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[Quoted text hidden]

Nancy Sylvester <nancyjs@utcourts.gov> Mon, Sep 30, 2019 at 10:05 AM
To: "Andrew M. Morse" <amm@scmlaw.com>
Cc: Judge Andrew Stone, Judge Keith Kelly

I agree, Judge Stone. This is a great instruction.
[Quoted text hidden]

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Subcommittee Response on ACTL Suggested Jurror Accountability Instructions

Judge Keith Kelly > Thu, Oct 10, 2019 at 8:26 AM
To: Nancy Sylvester, Judge Andrew Stone

Andy & Nancy:

Our subcommittee has considered the ACTL proposed juror accountability instructions and has created the attached redlines to address some of our concerns.

Alyson has created a redline that combines ACTL proposed instructions A & B and removes some of the most concerning language.

Lauren has created a reline that attempts to combine ACTL proposed instruction C with MUJI CV137.

We submit these to the committee for discussion.

In addition, Alyson has created a memo raising her concerns about any adoption of the ACTL proposed accountability instructions, along with attaching an article.

These documents are attached to this email. Could you please forward them to the committee for consideration this Tuesday?

Thanks, Keith

--
Judge Keith A. Kelly
Utah 3rd District Court

4 attachments

Alyson McAllister memo on concerns about accountability instructions.docx
15K

MUJI - Redline to Deliberation Instruction(103789027.1).docx
23K

Lord, Ross & Lepper, Biased Assimilation & Attitude Polarization.pdf
920K

Model Accountability and Devils Advocate Instructions.revised.docx
19K

Model Accountability Instruction:

~~People Of The Jury~~

~~This is the first step of a process that ultimately will lead to some of you going into the jury room at the conclusion of the trial.~~ When you go into ~~that~~ the jury deliberation room you will be asked to decide the case. ~~But you not~~Not only will you have to vote "yes" or "no" on certain verdict questions; ~~in order to do your duty as a juror~~ you ~~will have~~should plan to explain to your fellow jurors what evidence you believe supports your decision to vote a certain way.

~~I tell you this now because research has shown that jurors who understand they will be accountable to their fellow jurors for their vote pay more attention to the evidence and are more engaged in jury deliberation. Our system wants you to pay attention and to engage fully in jury deliberation because jurors who do these things help make sure the trial reaches a just result. Thus, good jurors pay attention and participate with their fellow jurors during deliberation.~~

Model Devil's Advocate Instruction:

~~People Of The Jury~~

~~I have just explained to you that jurors in the jury deliberation room will be accountable for their vote. That is, you will be required to talk about the reasons for your vote. Now I will add another element. Research shows that people tend to look for facts to support their beliefs and to disregard facts that do not fit their beliefs. The problem with this tendency in a jury trial is you may miss important facts and reach the wrong result.~~

~~Therefore, a~~After you explain to your fellow jurors why you believe the evidence supports your decision to vote a certain way, ~~you then will also be asked to be your own "Devil's Advocate." This means you will~~I suggest you consider ~~also~~ state~~ing~~ a fact or facts that you believe would support a decision reaching a different result. The reason ~~we~~ I ask you to do this—to focus both on evidence that supports and does not support a certain result— is because it will help each of you keep an open mind throughout the trial. If you stop considering evidence that goes against your thinking you may reach the wrong result.

Comment [AM1]: I would not use the word "accountability" in the title or body of these instructions, as I think it sends the wrong message and creates confusion.

Comment [AM2]: I find this whole paragraph problematic for a number of reasons. My biggest concern is that the research that was presented to us was very one sided, and there is also a body of research that does not support the conclusions drawn by the ACTL. I have attached one such article to my email with these instructions.

Comment [AM3]: I would not use the phrase "devil's advocate" in the title or instruction because of the negative connotations associated with that term.

Comment [AM4]: Again, I think citing to research is misleading, as there is research that contradicts these findings too.

Comment [AM5]: I'm still not entirely comfortable with suggesting this to the jury, for the reasons stated in my email, but if we decide to include it then these are the modifications I would suggest.

EXHIBIT C

Deliberation Guide Instruction

When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. After you select the foreperson you must discuss with one another—that is deliberate—with a view to reaching an agreement.

~~You may be wondering why we ask a group of lay people to decide cases instead of just having an experienced person, such as a judge, hear the evidence and issue a ruling. The reason is we believe that there is great value in group decision-making.~~

~~For example, when a group hears and sees evidence, we have found that all the evidence is heard and seen by some if not all of the individual jurors. In other words, each of you acts as a backstop for each other, picking up on evidence that one or more of your fellow jurors may have missed. That helps make for a fair trial for everyone.~~

~~In addition, we have found that when~~ When you ~~a group~~ deliberate~~s~~ fairly and respectfully, the~~n such a~~ group is most likely to come to a fair and just result. ~~Again, that is why the parties are here and why this process works.~~

Accordingly, ~~because you will be deliberating as a group,~~ here are a few simple practices to follow during deliberation to help ensure that the process runs well. ~~I will have a copy of these practices for the jury foreperson's reference during deliberation, but I want every juror to understand how the process should work so you can help the foreperson do a good job.~~

First, before you vote on any verdict question, you should discuss the pros and cons of the evidence. Discussing before voting will make the process work better. It is not helpful to say that your mind is already made up or that you are determined to vote a certain way. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.

Second, ~~as I explained before, each of you will be expected~~it may be helpful ~~not only~~ to discuss not only what evidence you think supports your decision on each verdict question, but also what evidence you believe would best support a different decision. ~~To make this work, before you begin discussions you should jot down in your notebook~~Consider one or more of the reasons for and against your initial answer to the verdict question.

Third, as your fellow jurors speak about the evidence they found important, PLEASE LISTEN. In order for this process to work best I want each of you to have the benefit of your fellow jurors' insights and ideas. Those insights and ideas may impact your thinking—or they may not—but unless you listen and allow them to speak you will not have the chance to have your own thinking challenged and improved. Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.

Fourth, as in any group, some of you will be more comfortable than others in sharing your thoughts. But just as others will lose out if they do not listen, the group will also lose out if they do not have the benefit of everyone's input. So, I will ask the foreperson to speak last and allow everyone else to have their say before providing ~~your~~ input. ~~And, I would suggest that those most hesitant to speak out go first so their ideas are sure to be heard.~~ The foreperson's

opinions should be given the same weight as the opinions of the other jurors.

10/3/19

Judge Kelly and Lauren:

I apologize for the delay in getting my proposal to you. In working on this assignment, I have developed a number of concerns about the proposals contained in the "White Paper."

First, it appears to be quite one-sided. It was drafted by defense lawyers (of all the individuals named on the paper it appears there were only three plaintiffs' attorneys).

Second, any use of these instructions presumes the validity of the White Paper and accuracy of the very limited research cited in support. There is also some research on the confirmation bias, for example, that shows that when people are forced to consider opposing viewpoints, it just enforces the bias they had to begin with. (See Lord, Ross & Lepper, Biased Assimilation and Attitude Polarization, 37 J. of Personality & Social Psychology 2098-2109 (1979) (attached).) This makes me skeptical about the efficacy of using these instructions at all.

Third, these instructions, as proposed, appear to alter the level of proof.

Finally, the instructions seem to legislate a certain way for the jury conference to proceed. In the absence of case authority or precedent requiring these instructions, I'm concerned that the committee would be departing from its permissible work. These instructions would be adopted without any vetting through the adversarial process and presented to the Bar as legitimate.

Despite these concerns, I have attached a draft combining the first two instructions (with a few more tweaks considering the email from Judge Stone) so that we have something to discuss should we choose to go forward with recommending use of these instructions to the committee as a whole.

Thanks, Alyson

MEMORANDUM

TO: Model Utah Jury Instructions Committee
From: Peter Summerill and Paul Simmons
Date: September 27, 2019

Re: A Very Brief Response to ACTL White Paper Regarding Confirmation Bias and Instructions on Bias Generally.

The Utah Model Jury Instruction Committee is currently considering adoption of several instructions to "cure" bias. The matter was brought to the Committee through presentation of a February 2019 American College of Trial Lawyers White Paper entitled *Improving Jury Deliberations Through Jury Instructions Based On Cognitive Science*. The paper begins with and relies primarily upon the book *Thinking, Fast and Slow* by Daniel Kahneman.[1] Before embarking upon adoption of jury instructions based upon the White Paper, or jury instructions to address biases generally, the Committee should consider the following.

1. WHETHER THE COMMITTEE SHOULD DRAFT INSTRUCTIONS TO ADDRESS BIASES.

From its inception, the charge to the Utah Jury Instruction committee was "to develop plain language jury instructions that juries can easily understand and to update the model instructions to reflect changes in the substantive law."[2] The purpose of the Committee has since been codified. "The committees on Model Utah Jury Instructions will develop jury instructions

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[1] Kahneman, Daniel *Thinking, Fast and Slow*, (iBooks 2011).

[2] See, April 15, 2003 Meeting Minutes

that are accurate statements of Utah law using simple structure and, where possible, words of ordinary meaning."[3]

Primarily at issue in the ACTL White Paper is an instruction meant to control confirmation bias. Kahneman identifies many biases throughout his book that can come into play during decision making. The White Paper suggests addressing confirmation bias.[4] The White Paper elevates a single bias (confirmation bias) in need of instruction to the exclusion of all other potential biases, including many identified by Kahneman.

One bias identified by Kahneman, and not addressed by the White Paper, involves juror decision-making when calculating appropriate damage amounts. Kahneman documents that individuals under-value damages in products liability cases until they are exposed to damages sustained in commercial cases.[5] Kahneman's take-away is that individuals assessing damages should consider other cases and instances of damage in order to better form an accurate assessment. "[C]omparative judgment, which necessarily involves System 2, is more likely to be stable than single evaluations."[6]

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[3] Utah Code Judicial Admin. Rule 3-418. Model Utah Jury Instructions.

[4] The paper also addresses the need of keeping jurors nourished for better decision-making and proposes an instruction to avoid tyranny of the foreperson.

[5] Kahneman, Chp. 33 Reversals, Unjust Reversals, p. 769 (iBooks 2011).

[6] Id.

Kahneman continues: "We would expect that any institution that wishes to elicit thoughtful judgments would seek to provide the judges with a broad context for the assessments of individual cases."[7] Yet, there is no instruction urged by the White Paper that jurors ought to consider comparative amounts from outside the case to evaluate and assess damages. This Committee should take note that the ACTL White Paper Committee consists of 31 individuals, only three of whom represent plaintiffs.

There are over 195 separately identified biases throughout research literature that are suggested as potentially impacting decision-making.[8] From a pragmatic standpoint, this Committee is ill-equipped to evaluate which biases ought to be addressed by instruction. Further, addressing a bias through a jury instruction adopted by this Committee carries legislative weight. Practitioners will point to the adoption as authority in support of the instruction even though no testing has been done to determine whether the instruction might mitigate, increase or have no effect on juror decision making in light of the alleged bias. The Committee cannot reasonably be expected to single out those biases which ought to have jury instructions to the exclusion of others as there is no mechanism by which to evaluate the validity of each asserted bias. Indeed, if the bias were argued admissible as expert opinion, it is highly unlikely that anyone on this Committee would find it passes muster under a Rule 702 evaluation.

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[7] Id.

[8] https://en.wikipedia.org/wiki/List_of_cognitive_biases

The 2014 National Association for State Courts study, *Can Explicit Instructions Reduce Expressions of Implicit Bias?*[9] begins on a cautionary note regarding anti-bias instructions. "Depending on how these instructions are crafted, they may produce unintended, undesirable effects (e.g., by increasing expressions of bias against socially disadvantaged group members among certain types of individuals, or by making jurors feel more confident about their decision(s) without actually reducing expressions of bias in judgment)."[10] The authors warned that "**[t]o prevent the distribution and implementation of jury instructions that may do more harm than good, any instruction of this kind must be carefully evaluated.**"[11] In crafting their implicit bias instruction the researchers, experts with advanced degrees in the fields of experimental psychology and public policy, vetted and crafted each sentence to reduce bias and avoid exacerbating or creating a backlash.[12] At the conclusion of a 900+ participant study the authors were unable to say whether the instruction had any effect at all in reducing bias among the decision-maker participants. If experienced researchers carefully crafting an instruction to eliminate bias cannot detect any discernible effect from the instruction, this Committee should not promulgate instructions without understanding what effect the instruction would have on jurors.

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[9] Complete article attached hereto for review.

[10] *Id*. at *3.

[11] *Id.* (emphasis added).

[12] *See id., Appendix C - Implicit Bias Instruction*.

2. Eye Witness and Racial Bias Instructions Were Mandated By Appellate Courts After Years of Research and Vetting Through Trial and Appellate Court Review.

The White Paper holds out instructions on eye witness identification and racial bias as examples to be followed in the adoption of the proposed instructions concerning confirmation bias. Importantly, instructions on those topics were not adopted by a jury instruction committee prior to the principles underlying them being extensively tested at both the trial and appellate court levels. In the eye witness example, the instructions appear to be a codification of expert testimony that was no longer sufficiently controversial to merit a battle of the experts before jurors. The proposed instructions here come nowhere near the same level of review and scrutiny.

Cognitive strain actually increases the use of System 2 and decreases reliance on System 1. "Cognitive strain, whatever its source, mobilizes System 2, which is more likely to reject the intuitive answer suggested by System 1."[13] Yet, the research projects relied upon by the White Paper failed to account for the cognitive strain imposed by the deliberative process of jurors, choosing instead to poll individual jurors how they felt about the evidence being presented. No jury deliberations were performed and the authors admit their results "may lack external validity in that they were arrived at without jury deliberation."[14] Without being subjected to the stress of group deliberation, no one should be surprised that the research participants defaulted to

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[13] Kahneman, Chp. 5, Cognitive Ease, Strain and Effort.

[14] Kurt A. Carlson & J. Edward Russo, *Biased Interpretation of Evidence by Mock Jurors*, 7 J. of Experimental Psych.: Applied 91, 94 (2001).

whatever System 1 bias they were relying upon. Although the White Paper repeatedly claims to be based in "science" or "neuroscience" there should be no confusion that what the paper is relying upon are theories of decision-making that based on murky data and which do not reflect the real world conditions imposed upon juror decision-making.

3. ANTI-BIAS INSTRUCTIONS MUST REFLECT UTAH LAW AND AVOID AUTHORITARIAN LANGUAGE WHICH COULD BACKFIRE.

Anti-bias instructions can induce a backlash among jurors if improper language is used. In order to avoid a backlash, instructions "should reduce external pressure to comply (by avoiding authoritarian language) and promote intrinsic motivation to counteract biases."[15] The instruction as drafted includes significant authoritarian language, admonishing jurors that they will be "accountable" and "[o]ur system wants you to pay attention."[16] Further, as noted, the Committee's charge is to draft plain language instructions that reflect substantive law. If there is to be a charge given that increases the likelihood that jurors will feel more accountable, it should employ language that at least does not have the potential to backfire *and* have some basis in law.

First-year law students are taught, at the very outset of their tort law class, to "consider the major purposes of tort law: (1) to provide a peaceful means for adjusting the rights of parties who might otherwise 'take the law into their own hands'; (2) to deter wrongful conduct; (3) to encourage socially responsible behavior; (4) to restore injured parties to their original condition,

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[15] *Can Explicit Instructions Reduce Expressions of Implicit Bias?,* Appendix C, n. 10.

[16] *Improving Jury Deliberations Through Jury Instructions Based on Cognitive Science*, p. 15.

insofar as the law can do this, by compensating for their injury; and (5) to vindicate individual rights of redress."[17] "The chief advantage of this standard of the reasonable man is that it enables the triers of fact ... to look to a community standard rather than an individual one, and at the same time to express their judgment of what the standard is in terms of the conduct of a human being."[18]

Utah courts have repeatedly endorsed these foundational principles. Utah courts recognize deterrence as a primary motivation for tort liability. "Tort liability has a powerful deterrent effect on future conduct and would do much to protect other children from being harmed under similar circumstances. Tort liability might also provide necessary funds to rehabilitate the victim of such an assault."[19] Under the analysis section titled "Tort Liability & Deterrence" the Utah Supreme Court acknowledged that, in addition to compensation, tort law is intended to "deter uneconomical accidents."[20] The Utah Supreme Court granted the right to recover for future medical surveillance damages primarily on the basis of deterrence. Permitting recovery of medical surveillance damages "furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of

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[17] Prosser, Wade and Schwartz *Torts: Cases and Materials*, 1-2, 12th ed. 2010.

[18] Restatement (Second) of Torts §295A cmt. b. (1965).

[19] *S.H. By & Through R.H. v. State*, 865 P.2d 1363, 1365 (Utah 1993).

[20] *Condemarin v University Hospital*, at 364.

exposure."[21] In order to re-orient juror thinking and attitudes toward civil cases, a jury instruction may be given that reflects the actual law and motivation behind jury trials.

> Members of the Jury:
> In addition to the traditional role of juries deciding the guilt or innocence of those charged with crimes, our justice system gives citizens the ability to seek redress for their rights. A jury trial is a civilized means that people use to resolve disputes among themselves. By having juries available to resolve disputes, people are less likely to resort to self-help or seek retribution against the party that allegedly caused harm. The case you will be hearing is such a case. The purpose of public civil jury trials also allows the decisions of the jury to become known, so that others can adjust their conduct knowing the boundaries of what is permissible and impermissible conduct.
>
> Thus, when weighing the evidence in this case, you act as the conscience of the community. Consider the facts and the case objectively, reflecting the conscience of the community. Your decision in this case will, then, be a reflection of the community values.

Notably, this instruction lets jurors know that they are accountable for their decision without using authoritarian language and at the same time encouraging their participation in the decision-making process. The instruction encourages jurors to take on a perspective which is not their own, without needlessly telling them to second-guess their thoughts and feelings about the case. "Perspective-taking may help to reduce the accessibility and expression of stereotypes."[22] Last, the instruction arises from fundamental and well-established law. Adopting the instruction would be consistent with substantive Utah law and, at the same time, help to alleviate or mitigate any personal bias by encouraging an objective perspective.

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[21] *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 976 (Utah 1993).

[22] *Can Explicit Instructions Reduce Expressions of Implicit Bias?*, p. 28 n. 16.

CONCLUSION

Kahneman states "A happy mood loosens the control of System 2 over performance: when in a good mood, people become … less vigilant and more prone to logical errors."[23] Of course, instructing jurors to be in a bad mood so that they can think more clearly would never work. But, perhaps the Committee should reconsider giving them snacks and set the Thermostat in the deliberation room at 80º. Alternatively, jurors may be so disgruntled at having been forced to serve that their System 2 remains engaged throughout trial, thus overriding any System 1 deficiencies such as confirmation bias and negating the need for any instructions. A jury instruction committee lacks both the authority and expertise necessary to evaluate the merits of instructions aimed at altering the psychological postures of jurors; there is no basis in Utah law to support the giving of such instructions; and, this Committee should not legislate a solution to a problem which has not even been demonstrated to exist.

If the Committee is inclined to instruct jurors in order to provide them with an appropriate mindset, that should be done pursuant to established legal authority supporting the instruction. Any other course takes the Committee well outside the charge given by the Utah Supreme Court to provide plain language instructions for Utah law.

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[23] Kahneman, Chp. 5 Cognitive Ease, Ease, Mood and Intuition p. 130.

Journal of Personality and Social Psychology
1979, Vol. 37, No. 11, 2098-2109

Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence

Charles G. Lord, Lee Ross, and Mark R. Lepper
Stanford University

People who hold strong opinions on complex social issues are likely to examine relevant empirical evidence in a biased manner. They are apt to accept "confirming" evidence at face value while subjecting "disconfirming" evidence to critical evaluation, and as a result to draw undue support for their initial positions from mixed or random empirical findings. Thus, the result of exposing contending factions in a social dispute to an identical body of relevant empirical evidence may be not a narrowing of disagreement but rather an increase in polarization. To test these assumptions and predictions, subjects supporting and opposing capital punishment were exposed to two purported studies, one seemingly confirming and one seemingly disconfirming their existing beliefs about the deterrent efficacy of the death penalty. As predicted, both proponents and opponents of capital punishment rated those results and procedures that confirmed their own beliefs to be the more convincing and probative ones, and they reported corresponding shifts in their beliefs as the various results and procedures were presented. The net effect of such evaluations and opinion shifts was the postulated increase in attitude polarization.

> The human understanding when it has once adopted an opinion draws all things else to support and agree with it. And though there be a greater number and weight of instances to be found on the other side, yet these it either neglects and despises, or else by some distinction sets aside and rejects, in order that by this great and pernicious predetermination the authority of its former conclusion may remain inviolate. (Bacon, 1620/1960)

Often, more often than we care to admit, our attitudes on important social issues reflect only our preconceptions, vague impressions, and untested assumptions. We respond to social policies concerning compensatory education, water fluoridation, or energy conservation in terms of the symbols or metaphors they evoke (Abelson, 1976; Kinder & Kiewiet, Note 1) or in conformity with views expressed by opinion leaders we like or respect (Katz, 1957). When "evidence" is brought to bear it is apt to be incomplete, biased, and of marginal probative value—typically, no more than a couple of vivid, concrete, but dubiously representative instances or cases (cf. Abelson, 1972; Nisbett & Ross, in press). It is unsurprising, therefore, that important social issues and policies generally prompt sharp disagreements, even among highly concerned and intelligent citizens, and that such disagreements often survive strenous attempts at resolution through discussion and persuasion.

An interesting question, and one that prompts the present research, involves the consequences of introducing the opposing factions to relevant and objective data. This question seems particularly pertinent for contemporary social scientists, who have frequently called for "more empirically based" social decision making (e.g., Campbell, 1969). Very likely, data providing consistent and

This research was supported in part by Research Grants MH-26736 from the National Institute of Mental Health and BNS-78-01211 from the National Science Foundation to Mark R. Lepper and Lee Ross. The authors would like to express their appreciation to Daryl Bem, Richard Nisbett, Robert Zajonc, and Mark Zanna for their thoughtful comments and suggestions on earlier drafts of this article, and to Lisa Burns for acting as the experimenter.

Requests for reprints should be sent to any of the authors, Department of Psychology, Stanford University, Stanford, California 94305.

unequivocal support for one or another position on a given issue can influence decision makers and, with sufficiently energetic dissemination, public opinion at large. But what effects can be expected for more mixed or inconclusive evidence of the sort that is bound to arise for most complex social issues, especially where full-fledged experiments yielding decisive and easy-to-generalize results are a rarity? Logically, one might expect mixed evidence to produce some moderation in the views expressed by opposing factions. At worst, one might expect such inconclusive evidence to be ignored.

The present study examines a rather different thesis—one born in an analysis of the layperson's general shortcomings as an intuitive scientist (cf. Nisbett & Ross, in press; Ross, 1977) and his more specific shortcomings in adjusting unwarranted beliefs in the light of empirical challenges (cf. Ross, Lepper, & Hubbard, 1975). Our thesis is that belief polarization will *increase*, rather than decrease or remain unchanged, when mixed or inconclusive findings are assimilated by proponents of opposite viewpoints. This "polarization hypothesis" can be derived from the simple assumption that data relevant to a belief are not processed impartially. Instead, judgments about the validity, reliability, relevance, and sometimes even the meaning of proffered evidence are biased by the apparent consistency of that evidence with the perceiver's theories and expectations. Thus individuals will dismiss and discount empirical evidence that contradicts their initial views but will derive support from evidence, of no greater probativeness, that seems consistent with their views. Through such biased assimilation even a random set of outcomes or events can appear to lend support for an entrenched position, and both sides in a given debate can have their positions bolstered by the same set of data.

As the introductory quotation suggests, the notions of biased assimilation and resulting belief perseverance have a long history. Beyond philosophical speculations and a wealth of anecdotal evidence, considerable research attests to the capacity of preconceptions and initial theories to bias the consideration of subsequent evidence, including work on classic Einstellung effects (Luchins, 1942, 1957), social influence processes (Asch, 1946), impression formation (e.g., Jones & Goethals, 1971), recognition of degraded stimuli (Bruner & Potter, 1964), resistance to change of social attitudes and stereotypes (Abelson, 1959; Allport, 1954), self-fulfilling prophecies (Merton, 1948; Rosenhan, 1973; Snyder, Tanke, & Berscheid, 1977), and the persistence of "illusory correlations" (Chapman & Chapman, 1967, 1969). In a particularly relevant recent demonstration, Mahoney (1977) has shown that trained social scientists are not immune to theory-based evaluations. In this study, professional reviewers' judgments about experimental procedures and resultant publication recommendations varied dramatically with the degree to which the findings of a study under review agreed or disagreed with the reviewers' own theoretical predilections.

Thus, there is considerable evidence that people tend to interpret subsequent evidence so as to maintain their initial beliefs. The biased assimilation processes underlying this effect may include a propensity to remember the strengths of confirming evidence but the weaknesses of disconfirming evidence, to judge confirming evidence as relevant and reliable but disconfirming evidence as irrelevant and unreliable, and to accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically. With confirming evidence, we suspect that both lay and professional scientists rapidly reduce the complexity of the information and remember only a few well-chosen supportive impressions. With disconfirming evidence, they continue to reflect upon any information that suggests less damaging "alternative interpretations." Indeed, they may even come to regard the ambiguities and conceptual flaws in the data *opposing* their hypotheses as somehow suggestive of the fundamental *correctness* of those hypotheses. Thus, completely inconsistent or even *random* data—when "processed" in a suitably biased fashion—can maintain or even reinforce one's preconceptions.

The present study was designed to examine both the biased assimilation processes that

may occur when subjects with strong initial attitudes are confronted with empirical data concerning a controversial social issue and the consequent polarization of attitudes hypothesized to result when subjects with differing initial attitudes are exposed to a common set of "mixed" experimental results. The social controversy chosen for our investigation was the issue of capital punishment and its effectiveness as a deterrent to murder. This choice was made primarily because the issue is the subject of strongly held views that frequently do become the target of public education and media persuasion attempts, and has been the focus of considerable social science research in the last twenty years. Indeed, as our basic hypothesis suggests, contending factions in this debate often cite and derive encouragement from the same body of inconclusive correlational research (Furman v. Georgia, 1972; Sarat & Vidmar, 1976; Sellin, 1967).

In the present experiment, we presented both proponents and opponents of capital punishment first with the results and then with procedural details, critiques, and rebuttals for two studies dealing with the deterrent efficacy of the death penalty—one study confirming their initial beliefs and one study disconfirming their initial beliefs. We anticipated biased assimilation at every stage of this procedure. First, we expected subjects to rate the quality and probative value of studies confirming their beliefs on deterrent efficacy more highly than studies challenging their beliefs. Second, we anticipated corresponding effects on subjects' attitudes and beliefs such that studies confirming subjects' views would exert a greater impact than studies disconfirming those views. Finally, as a function of these assimilative biases, we hypothesized that the net result of exposure to the conflicting results of these two studies would be an increased polarization of subjects' beliefs on deterrent efficacy and attitudes towards capital punishment.

Method

Subjects

A total of 151 undergraduates completed an in-class questionnaire that included three items on capital punishment. Two to four weeks later, 48 of these students were recruited to participate in a related experiment as partial fulfillment of a course requirement. Twenty-four were "proponents" who favored capital punishment, believed it to have a deterrent effect, and thought most of the relevant research supported their own beliefs. Twenty-four were "opponents" who opposed capital punishment, doubted its deterrent effect, and thought that the relevant research supported *their* views.

Procedure

Upon entering the experiment, mixed groups of proponents and opponents were seated at a large table. The experimenter, blind to subjects' attitudes, told them that they would each be asked to read 2 of 20 randomly selected studies on the deterrent efficacy of the death penalty and asked them to use their own "evaluative powers" in thinking about what the author(s) of the study did, what the critics had to say, and whether the research provided support for one side or the other of this issue.

The experimenter next showed subjects a set of 10 index cards, each containing a brief statement of the results of a single study. Each subject was asked to choose one card and read it silently. In reality, all 10 cards in any one session were identical, providing either prodeterrent information, for example:

> Kroner and Phillips (1977) compared murder rates for the year before and the year after adoption of capital punishment in 14 states. In 11 of the 14 states, murder rates were *lower after* adoption of the death penalty. This research supports the deterrent effect of the death penalty.

or antideterrent information, for example:

> Palmer and Crandall (1977) compared murder rates in 10 pairs of neighboring states with different capital punishment laws. In 8 of the 10 pairs, murder rates were *higher* in the state *with* capital punishment. This research opposes the deterrent effect of the death penalty.

To control for order effects, half of the proponents and half of the opponents saw a "prodeterrence" result first, and half saw an "antideterrence" result first. The studies cited, although invented specifically for the present study, were characteristic of research found in the current literature cited in judicial decisions.

After reading one of these "result cards," subjects answered two sets of questions, on 16-point scales, about changes in their attitudes toward capital punishment (from -8 = more opposed, to 8 = more in favor) and their beliefs about the deterrent efficacy of the death penalty (from -8 = *less* belief that capital punishment has a deterrent effect, to 8 = *more* belief in the deterrent effect). One set of questions examined change occasioned by the single piece of information they had just finished reading; a second set of questions assessed the cumulative change

produced by all of the materials read since the start of the experiment.[1]

Next the experimenter distributed detailed research descriptions bearing code letters corresponding to those on the result cards. The descriptions gave details of the researchers' procedure, reiterated the results, mentioned several prominent criticisms of the study "in the literature," listed the authors' rebuttals to some of the criticisms and depicted the data both in table form and graphically. After reading this more detailed description and critique of the first study, subjects were asked to judge how well or poorly the study had been conducted (from $-8 =$ very poorly done, to $8 =$ very well done), and how convincing the study seemed as evidence on the deterrent efficacy of capital punishment (from $-8 =$ completely unconvincing, to $8 =$ completely convincing).[2] Following this evaluation, subjects were asked to write why they thought the study they had just read did or did not support the argument that capital punishment is a deterrent to murder, and then to answer a second set of attitude and belief change questions on the effects of the description alone and the effects of all experimental materials (i.e., the results and subsequent description and critique) up to that point in time.

Following completion of these questions, the entire procedure was repeated, with a second fictitious study reporting results opposite to those of the first. Again, subjects initially received only a brief description of the results of this second study but were then provided with a detailed presentation of the procedure, results, and critiques. As before, subjects were asked to evaluate both the impact of each single piece of evidence and the impact of all experimental materials up to that point in the experiment on their attitudes toward capital punishment and their beliefs concerning its deterrent efficacy.

To control for possible differences in the inherent plausibility of the two studies, two sets of materials were employed that interchanged the ostensible results of the two invented experiments. The overall design was thus completely counterbalanced with respect to subjects' initial attitudes, order of confirming vs. disconfirming evidence, and the association of the "before–after" vs. "adjacent states" designs with positive or negative results.[3] At the end of the procedure, subjects were carefully debriefed concerning the fictitious nature of the studies and were asked not to reveal this deception to others. In addition to insuring that subjects understood the fictional nature of the experimental materials, this debriefing included discussion of the processes underlying the assimilation of evidence to previous theories and reassurance that a skeptical reaction to poorly designed research is often a praiseworthy cognitive response.

Results

Evaluations of the Two Studies

Our first hypothesis was that subjects holding different initial positions would differentially evaluate the quality and "convincingness" of the same empirical studies and findings. The relevant evaluations, presented in Table 1, revealed strong support for the hypothesized bias in favor of the study that confirmed subjects' initial attitudes.

A two-way analysis of variance (Initial Attitude × Order of Presentation) on the differences between ratings of convincingness of the prodeterrence and antideterrence studies yielded only a main effect of initial attitude, $F(1, 44) = 32.07$, $p < .001$. Proponents

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[1] Since most of our subjects had reported initial positions at, or very close to, the ends of the attitude and belief scales used for selection purposes, our initial plan to assess attitude polarization—in terms of difference scores assessing changes in subjects' attitudes and beliefs on these same scales from these initial measures to the completion of the experiment—proved impossible. As a substitute, we employed three sorts of measures to assess attitude change. First, we asked subjects, after each new piece of information, to indicate any changes in their attitudes and beliefs occasioned by that single piece of information. Second, we asked subjects, at these same points, to report on "cumulative" changes in their attitudes and beliefs since the start of the experiment. Third, subjects were asked to keep "running records" of their attitudes and beliefs on enlarged versions of the scales initially used for selection purposes. Although all of these measures individually raise some problems, the congruence of data across these different measurement devices gives us some confidence concerning the results reported. Indeed, because the results obtained on the "running record" measure so completely parallel the findings obtained on the cumulative change question depicted in Figures 1 and 2, in terms of both the array of means and the obtained significance levels, the data from this measure will not be reported separately.

[2] Subjects were also asked, at this point, whether they thought the researchers had favored or opposed the death penalty and whether they thought an unbiased consideration should lead one to treat the study as evidence for or against capital punishment. Analyses on the first question showed only that subjects believed the researchers' attitudes to coincide with their stated results. Analyses on the second question proved wholly redundant with those presented for the "convincingness" and "well done" questions.

[3] Preliminary analyses were conducted to see if the particular association of positive versus negative results with either the before–after or adjacent–states designs would affect the results obtained. There were no significant effects or interactions involving this variation in stimulus materials; hence, the data were collapsed across this factor.

Table 1
Evaluations of Prodeterrence and Antideterrence Studies by Proponents and Opponents of Capital Punishment

Study	Proponents	Opponents
Mean ratings of how well the two studies had been conducted		
Prodeterrence	1.5	−2.1
Antideterrence	−1.6	− .3
Difference	3.1	−1.8
Mean ratings of how convincing the two studies were as evidence on the deterrent efficacy of capital punishment		
Prodeterrence	1.4	−2.1
Antideterrence	−1.8	.1
Difference	3.2	−2.2

Note. Positive numbers indicate a positive evaluation of the study's convincingness or procedure. Negative numbers indicate a negative evaluation of the study's convincingness or procedure.

regarded the prodeterrence study as significantly more convincing than the antideterrence study, $t(23) = 5.18$, $p < .001$,[4] regardless of whether it was the "before–after" design that suggested the efficacy of capital punishment and the "adjacent states" design that refuted it, or vice versa. Opponents, by contrast, regarded the prodeterrence study as significantly less convincing than the antideterrence study, $t(23) = -3.02$, $p < .01$, again irrespective of which research design was purported to have produced which type of results. The same was true of the difference between ratings of how well done the two studies had been, $F(1, 44) = 33.52$, $p < .001$.[5] As above, proponents found the prodeterrence study to have been better conducted than the antideterrence study, $t(23) = 5.37$, $p < .001$, whereas opponents found the prodeterrence study to have been less well conducted, $t(23) = -2.80$, $p < .05$. As one might expect, the correlation between the "convincingness" and "well done" questions was substantial, $r = .67$, $p < .001$.

These differing opinions of the quality of the two studies were also reflected in subjects' written comments. At the risk of opening ourselves to a charge of "biased assimilation," we present a set of subjects' comments—selected for dramatic effect but not unrepresentative in content—in Table 2. As these comments make clear, the same study can elicit entirely opposite evaluations from people who hold different initial beliefs about a complex social issue. This evidence of bias in subjects' evaluations of the quality and convincingness of the two studies is consistent with the biased assimilation hypothesis and sets the stage for testing our further predictions concerning attitude and belief polarization.

Overall Attitude Polarization

Given such biased evaluations, our primary hypothesis was that exposure to the "mixed"[6] data set comprised by the two studies would result in a further polarization of subjects' attitudes and beliefs rather than the convergence that an impartial consideration of these inconclusive data might warrant. To test this hypothesis requires a consideration

[4] All p values reported in this article are based on two-tailed tests of significance.

[5] In order to examine possible main effects of either study direction or initial attitude on subjects' ratings of how convincing and how well done the studies were—findings that would not be portrayed in the difference score analysis reported—a three-way analysis of variance (Initial Attitude × Order of Presentation × Direction of Study) was also performed. There were no main effects of study direction on either measure. A main effect of initial attitude—indicating that opponents evaluated the total set of evidence more negatively than did proponents—proved significant for the "well done" question, $F(1, 44) = 4.69$, $p < .05$, but not for the "convincing" question, $F(1, 44) = 1.53$, *ns*.

[6] The term *mixed,* we should emphasize, refers to the fact that one study yielded evidence confirming the deterrent efficacy of the death penalty, whereas the other study yielded evidence disconfirming such efficacy (with appropriate counterbalancing of purported procedures and purported results). Subjects, regardless of initial position, clearly recognized this discrepancy between results, as will be apparent in our analyses of their responses to the simple statements of the study's main findings. We do not mean to imply that the subjects "phenomenologically" judged the two studies to be of equal probative value; indeed, as indicated in the preceding discussion, identical procedures were clearly judged to differ in their probativeness depending on the congruity between the study's outcomes and the subject's initial beliefs.

Table 2
Selected Comments on Prodeterrence and Antideterrence Studies by Proponents and Opponents of Capital Punishment

Subject	Comments on	
	Prodeterrence study	Antideterrence study
	Set 1 materials	
S8 Proponent	"It does support capital punishment in that it presents facts showing that there is a deterrent effect and seems to have gathered data properly."	"The evidence given is relatively meaningless without data about how the overall crime rate went up in those years."
S24 Proponent	"The experiment was well thought out, the data collected was valid, and they were able to come up with responses to all criticisms."	"There were too many flaws in the picking of the states and too many variables involved in the experiment as a whole to change my opinion."
S35 Opponent	"The study was taken only 1 year before and 1 year after capital punishment was reinstated. To be a more effective study they should have taken data from at least 10 years before and as many years as possible after."	"The states were chosen at random, so the results show the average effect capital punishment has across the nation. The fact that 8 out of 10 states show a rise in murders stands as good evidence."
S36 Opponent	"I don't feel such a straightforward conclusion can be made from the data collected."	"There aren't as many uncontrolled variables in this experiment as in the other one, so I'm still willing to believe the conclusion made."
	Set 2 materials	
S14 Proponent	"It shows a good direct comparison between contrasting death penalty effectiveness. Using neighboring states helps to make the experiment more accurate by using similar locations."	"I don't think they have complete enough collection of data. Also, as suggested, the murder rates should be expressed as percentages, not as straight figures."
S15 Proponent	"It seems that the researchers studied a carefully selected group of states and that they were careful in interpreting their results."	"The research didn't cover a long enough period of time to prove that capital punishment is not a deterrent to murder."
S25 Opponent	"The data presented are a randomly drawn set of 10. This fact seems to be the study's biggest problem. Also many other factors are not accounted for which are very important to the nature of the results."	"The murder rates climbed in all but two of the states after new laws were passed and no strong evidence to contradict the researchers has been presented."
S38 Opponent	"There might be very different circumstances between the sets of two states, even though they were sharing a border."	"These tests were comparing the same state to itself, so I feel it could be a fairly good measure."

of subjects' final attitudes, after exposure to both studies and related critiques and rebuttals, relative to the start of the experiment.

The relevant data provide strong support for the polarization hypothesis. Asked for their final attitudes relative to the experi-

Table 3
Mean Attitude and Belief Changes for a Single Piece of Information

Issue and study	Initial attitudes: Proponents	Initial attitudes: Opponents
Results only		
Capital punishment		
Prodeterrence	1.3	0.4
Antideterrence	−0.7	−0.9
Combined	0.6	−0.5
Deterrent efficacy		
Prodeterrence	1.9	0.7
Antideterrence	−0.9	−1.6
Combined	1.0	−0.9
Details, data, critiques, rebuttals		
Capital punishment		
Prodeterrence	0.8	−0.9
Antideterrence	0.7	−0.8
Combined	1.5	−1.7
Deterrent efficacy		
Prodeterrence	0.7	−1.0
Antideterrence	0.7	−0.8
Combined	1.4	−1.8

Note. Positive numbers indicate a more positive attitude or belief about capital punishment and its deterrent effect. Negative numbers indicate a more negative attitude or belief about capital punishment and its deterrent effect.

ment's start, proponents reported that they were *more* in favor of capital punishment, $t(23) = 5.07$, $p < .001$, whereas opponents reported that they were *less* in favor of capital punishment, $t(23) = -3.34$, $p < .01$. In a two-way analysis of variance (Initial Attitude × Order of Presentation), the effect of initial attitude was highly significant, $F(1, 44) = 30.06$, $p < .001$, and neither the order effect nor the interaction approached significance. Similar results characterized subjects' beliefs about deterrent efficacy. Proponents reported greater belief in the deterrent effect of capital punishment, $t(23) = 4.26$, $p < .001$, whereas opponents reported less belief in this deterrent effect, $t(23) = -3.79$, $p < .001$. Final attitudes toward capital punishment and beliefs concerning deterrent efficacy were highly correlated, $r = .88$, $p < .001$.

Such results provide strong support for the main experimental hypothesis that inconclusive or mixed data will lead to increased polarization rather than to uncertainty and moderation. Moreover, the degree of polarization shown by individual subjects was predicted by differences in subjects' willingness to be less critical of procedures yielding supportive evidence than of procedures yielding nonsupportive evidence. Significant correlations were found between overall attitude change regarding capital punishment and differences in ratings of both how convincing, $r = .56$, $p < .001$, and how well done, $r = .56$, $p < .001$, the studies were. Overall changes in beliefs in deterrent efficacy produced comparable correlations of .53 and .57, both ps $< .001$.

Components of Attitude Polarization

In view of this strong evidence of overall attitude polarization, it is worth examining the course of attitude polarization as subjects' opinions were successively assessed after exposure to the first study, the details and critiques of the first study, the results of the second study, and the details and critiques of the second study. At each stage, it will be recalled, subjects were asked about the impact of the single piece of information they had just considered and the cumulative impact of all information presented to that point. Let us first examine the reported effects of single segments of evidence and then the effects of accumulated evidence over time.

Effect of Exposure to the Results of Each Study

Considering the result cards as single pieces of evidence, both proponents and opponents reported shifting their attitudes in the direction of the stated results for both the prodeterrence, $t(47) = 4.67$, $p < .001$, and antideterrence, $t(47) = -5.15$, $p < .001$, studies. As shown in the top half of Table 3, however, subjects' responses to the two studies also varied with initial attitude. Proponents tended to be influenced more by the prodeterrence study and opponents more by the antideterrence study. Thus a two-way analysis of variance (Initial Attitude × Order of Pre-

sentation) on combined change from the two result cards considered individually yielded only a main effect of initial attitude for both attitudes toward the death penalty, $F(1, 44) = 6.35$, $p < .02$,[7] and beliefs about its deterrent effect, $F(1, 44) = 10.37$, $p < .01$. Interestingly, the analysis of beliefs regarding deterrent efficacy also showed an unanticipated interaction effect, $F(1, 44) = 7.48$, $p < .01$, with proponents showing a differential response to results alone regardless of order of presentation but opponents showing a differential response to results alone only when the confirming study was presented first.

Effect of Exposure to Procedures and Data, Critiques and Rebuttals

When provided with a more detailed description of the procedures and data, together with relevant critiques and authors' rebuttals, subjects seemed to ignore the stated results of the study. As shown in the bottom half of Table 3, both proponents and opponents interpreted the additional information, relative to the results alone, as strongly supporting their own initial attitudes. Detailed descriptions of either the prodeterrence or the antideterrence study, with accompanying critiques, caused proponents to favor capital punishment more and believe in its deterrent efficacy more, but caused opponents to oppose capital punishment more and believe in its deterrent efficacy less. A two-way analysis of variance (Initial Attitude × Order of Presentation) on attitude change for the two descriptions combined yielded only a significant main effect of initial attitude for both the capital punishment issue, $F(1, 44) = 28.10$, $p < .001$, and the deterrent efficacy question, $F(1, 44) = 26.93$, $p < .001$.

Changes in Attitudes Across Time

Subjects' reported changes in attitudes and beliefs, relative to the start of the experiment, following exposure to each of the four separate pieces of information are depicted in Figure 1 for attitudes concerning capital punishment and in Figure 2 for beliefs concerning deterrent efficacy. These data, portrayed separately for subjects who received first either the prodeterrence study or the antideterrence study, provide a more detailed view of the attitude polarization process. They allow, as well, an examination of the hypothesized "rebound effect," that the provision of any plausible reason for discounting data that contradict one's preconceptions will eliminate the effects that mere knowledge of those data may have produced.

The existence of such a "rebound effect" is obvious from examination of these figures. Whether they encountered the disconfirming result first or second, both proponents and opponents seemed to be swayed momentarily by this evidence, only to revert to their former attitudes and beliefs (and in 23% of the individual cases, to even more extreme positions) after inspecting the procedural details and data, and the critiques and rebuttals found in the literature. Across all subjects, this rebound in opinions proved significant for both the capital punishment, $t(47) = 4.43$, $p < .001$, and deterrent efficacy, $t(47) = 4.58$, $p < .001$, issues. By contrast, no compensating rebound effects resulted from reading the descriptions and critiques of studies supporting subjects' initial attitudes, for either capital punishment, $t(47) = .60$, *ns*, or deterrent efficacy, $t(47) = .23$, *ns*.

Discussion

The results of the present experiment provide strong and consistent support for the attitude polarization hypothesis and for the biased assimilation mechanisms postulated to underlie such polarization. The net effect of exposing proponents and opponents of capital punishment to identical evidence—studies ostensibly offering equivalent levels of support and disconfirmation—was to increase further the gap between their views. The mechanisms responsible for this polarization of subjects' attitudes and beliefs were clearly

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[7] In order to rule out the possibility that direction of study interacted with initial attitude, a three-way analysis of variance (Initial Attitude × Order of Presentation × Direction of Study) was also performed on these data. The relevant interaction term did not approach significance, $F(1, 44) = 1.62$, *ns*.

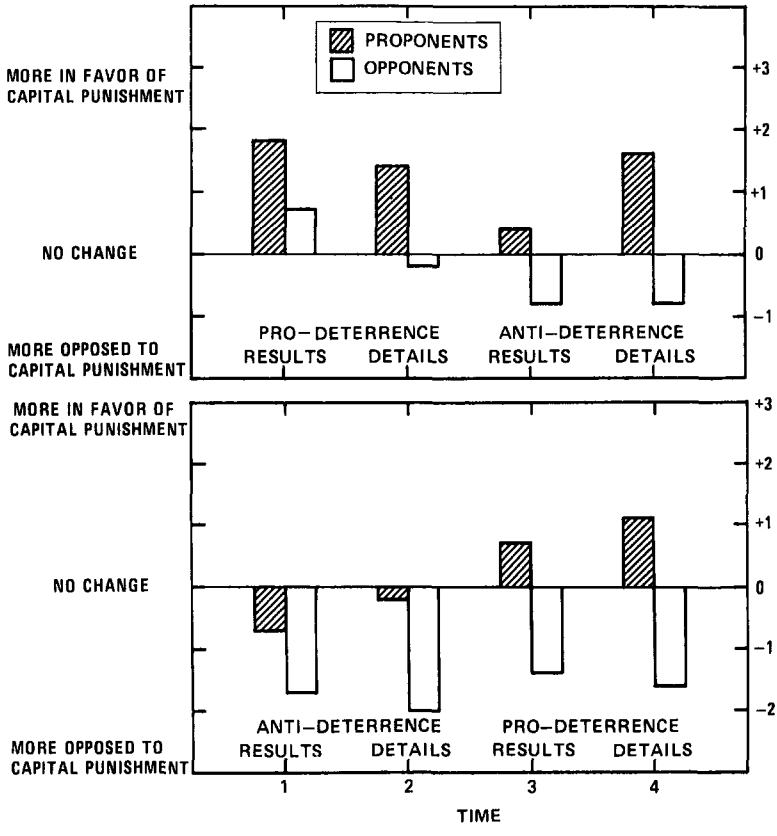

Figure 1. Top panel: Attitude changes on capital punishment relative to start of experiment as reported across time by subjects who received prodeterrence study first. Bottom panel: Attitude changes on capital punishment relative to start of experiment as reported across time by subjects who received antideterrence study first.

suggested by correlational analyses. Subjects' decisions about whether to accept a study's findings at face value or to search for flaws and entertain alternative interpretations seemed to depend far less on the particular procedure employed than on whether the study's results coincided with their existing beliefs.

The Normative Issue

It is worth commenting explicitly about the normative status of our subjects' apparent biases. First, there can be no real quarrel with a willingness to infer that studies supporting one's theory-based expectations are more probative than, or methodologically superior to, studies that contradict one's expectations. When an "objective truth" is known or strongly assumed, then studies whose outcomes reflect that truth may reasonably be given greater credence than studies whose outcomes fail to reflect that truth. Hence the physicist would be "biased," but appropriately so, if a new procedure for evaluating the speed of light were accepted if it gave the "right answer" but rejected if it gave the "wrong answer." The same bias leads most of us to be skeptical about reports of miraculous virgin births or herbal cures for cancer, and despite the risk that such theory-based and experience-based skepticism may render us unable to recognize a miraculous event when it occurs, overall we are surely well served by our bias. Our subjects' willingness to impugn or defend findings as a function of their conformity to expectations can, in part, be similarly defended. Only the strength of

their initial convictions in the face of the existing inconclusive social data and arguments can be regarded as "suspect."

Our subjects' main inferential shortcoming, in other words, did not lie in their inclination to process evidence in a biased manner. Willingness to interpret new evidence in the light of past knowledge and experience is essential for any organism to make sense of, and respond adaptively to, its environment. Rather, their sin lay in their readiness to use evidence already processed in a biased manner to bolster the very theory or belief that initially "justified" the processing bias. In so doing, subjects exposed themselves to the familiar risk of making their hypotheses unfalsifiable—a serious risk in a domain where it is clear that at least one party in a dispute holds a false hypothesis—and allowing themselves to be encouraged by patterns of data that they ought to have found troubling. Through such processes laypeople and professional scientists alike find it all too easy to cling to impressions, beliefs, and theories that have ceased to be compatible with the latest and best evidence available (Mahoney, 1976, 1977).

Polarization: Real or Merely Reported?

Before further pursuing the broader implications of the present demonstration, it is necessary to consider an important question raised by our procedure: Did our subjects really show change (i.e., polarization) in their private beliefs about the desirability and deterrent efficacy of capital punishment? Certainly they told us, explicitly, that their

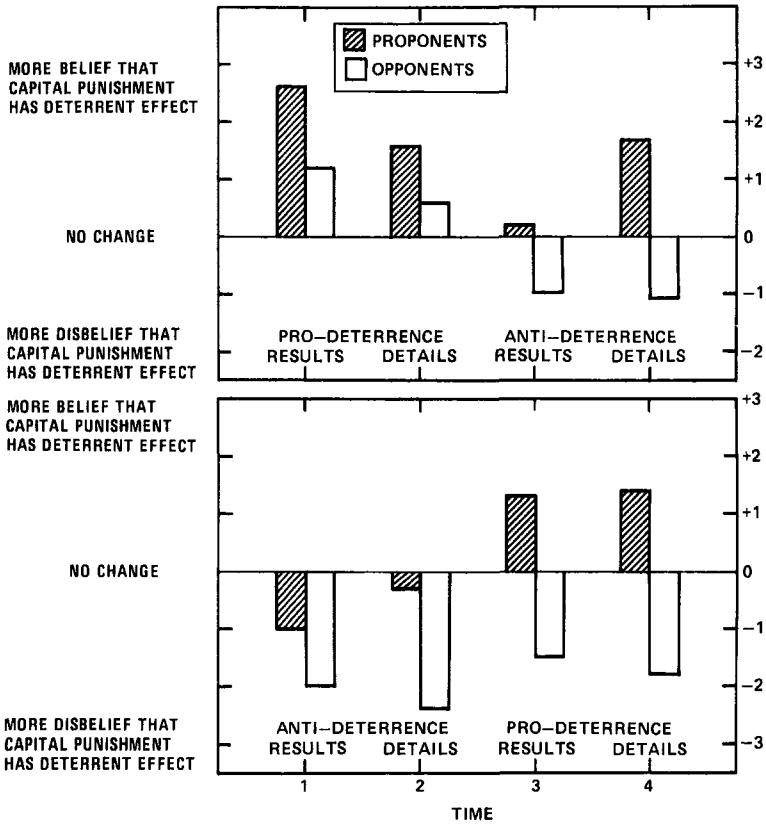

Figure 2. Top panel: Belief changes on capital punishment's deterrent efficacy relative to start of experiment as reported across time by subjects who received prodeterrence study first. Bottom panel: Belief changes on capital punishment's deterrent efficacy relative to start of experiment as reported across time by subjects who received antideterrence study first.

attitudes and beliefs did change after each new piece of evidence was presented, and from the beginning to the end of the experiment. Moreover, they did show a willingness to report a shift in their attitudes in the direction of findings that were contrary to their beliefs, at least until those findings were exposed to methodological scrutiny and possible alternative interpretations. Nevertheless, it could be argued that subjects were not reporting real shifts in attitudes but instead were merely reporting what they believed to be a rational or appropriate response to each increment in the available evidence. Although we believe that it remains an impressive demonstration of assimilation biases to show that contending factions both believe the same data to justify their position "objectively," the potential limitations of the present measures should be kept in mind in evaluating the relationship of this study to prior polarization research. As noted earlier (see Footnote 1) our intended strategy of assessing direct changes from our initial selection measures of attitudes and beliefs, rather than asking subjects to report such changes within the experiment, was neither feasible nor appropriate, given the necessity of selecting subjects with strong and consistent initial views on this issue. Potentially such methodological problems could be overcome in subsequent research through the use of less extreme samples or, perhaps more convincingly, by seeing whether biased assimilation of mixed evidence will make subjects more willing to *act* on their already extreme beliefs.

Belief Perseverance and Attribution Processes

The present results importantly extend the growing body of research on the perseverance of impressions and beliefs. Two of the present authors and their colleagues have now amassed a number of studies showing that, once formed, impressions about the self (Ross et al., 1975; Jennings, Lepper, & Ross, Note 2; Lepper, Ross, & Lau, Note 3), beliefs about other people (Ross et al., 1975), or theories about functional relationships between variables (Anderson, Lepper, & Ross, Note 4) can survive the total discrediting of the evidence that first gave rise to such beliefs. In essence, these prior studies demonstrate that beliefs can survive the complete subtraction of the critical formative evidence on which they were initially based. In a complementary fashion, the present study shows that strongly entrenched beliefs can also survive the addition of nonsupportive evidence.

These findings pose some fundamental questions for traditional attribution models. To the extent that beliefs and impressions can be shown to persevere in the face of subsequent challenging data, we need a "top down" rather than—or perhaps in conjunction with —a "bottom up" approach (cf. Bobrow & Norman, 1975) to the question of how individuals extract meaning from their social environment. Instead of viewing people as impartial, data-driven processors, the present research suggests our models must take into account the ways in which intuitive scientists assess the relevance, reliability, representativeness, and implications of any given sample of data or behavior within the framework of the hypotheses or implicit theories they bring to the situation (Lepper, 1977). In everyday life, as well as in the course of scientific controversies (cf. Kuhn, 1970), the mere availability of contradictory evidence rarely seems sufficient to cause us to abandon our prior beliefs or theories.

Social Science Research and Social Policy

We conclude this article, as we began it, by considering the important links between social policy, public attitudes and beliefs about such policy, and the role of the social scientist. If our study demonstrates anything, it surely demonstrates that social scientists can not expect rationality, enlightenment, and consensus about policy to emerge from their attempts to furnish "objective" data about burning social issues. If people of opposing views can each find support for those views in the same body of evidence, it is small wonder that social science research, dealing with complex and emotional social issues and forced to rely upon inconclusive designs, measures, and modes of analysis, will frequently fuel rather than calm the fires of debate.

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Received February 16, 1979 ■

Tab 5

Draft: June 10, 2019

MUJI 2D GENERAL INSTRUCTIONS

Table of Contents

MUJI 2d GENERAL INSTRUCTIONS

OPENING INSTRUCTIONS

CV101 GENERAL ADMONITIONS. Approved June 10, 2019.

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, although it may seem natural to want to investigate a case, you must not try to get information from any source other than what you see and hear in this courtroom. ~~It's natural to want to investigate a case, but y~~You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the I~~i~~nternet, reference books or dictionaries, newspapers, magazines, television, radio, computers, ~~Blackberries,~~ iPhones, Smartphones, ~~PDAs,~~ or any social media or electronic device.

You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, although it may seem natural, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. ~~This also is a natural thing to want to do, but y~~You may not communicate about the case by any means, including by ~~via~~ emails, text messages, tweets, blogs, chat rooms, comments, ~~or~~ other postings, ~~Facebook, MySpace, LinkedIn, or any other~~ or any social media.

You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

Also, do not talk with the lawyers, parties or witnesses about anything, not even to pass the time of day.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the

case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References

CACI 100

MUJI 1st Instruction

1.1; 2.4.

Committee Notes

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Amended Dates:

~~9/2011.~~

CV101A GENERAL ADMONITIONS. (SELF-REPRESENTED LITIGANT VERSION). Approved June 10, 2019.

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, although it may seem natural to want to investigate a case, you must not try to get information from any source other than what you see and hear in this courtroom. You may not use any printed or electronic sources to get information about this case or the issues involved. This includes the Internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, iPhones, Smartphones, or any social media or electronic device.

~~First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, Smartphones, PDAs, or any social media or electronic device.~~ You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, although it may seem natural, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. You may not communicate about the

case by any means, including by emails, text messages, tweets, blogs, chat rooms, comments, other postings, or any social media.

~~Second, you must not communicate with anyone about this case, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other social media.~~ You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors about the case until I send you to deliberate. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

[Name of plaintiff] [name of defendant] is representing him/herself.

[Name of defendant] [name of plaintiff] is represented by _____.

[Name of plaintiff], [name of defendant], attorneys for the [plaintiff][defense] and witnesses are not allowed to speak with you during the case. When you see [plaintiff's] [defendant's] attorneys at a recess or pass them in the halls and they do not speak to you, they are not being rude or unfriendly – they are simply following the law.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom. Courts used to sequester—or isolate—jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until I send you to deliberate.

References

MUJI CV 101.

Preliminary Jury Instructions for use with self-represented litigants, U.S. District Court, Eastern District of California.

Committee Notes

News articles have highlighted the problem of jurors conducting their own internet research or engaging in outside communications regarding the trial while it is ongoing. See, e.g., Mistrial by iPhone: Juries' Web Research Upends Trials, New York Times (3/18/2009). The court may therefore wish to emphasize the importance of the traditional admonitions in the context of electronic research or communications.

Amended Dates:

~~12/2013~~

CV101B FURTHER ADMONITION ABOUT ELECTRONIC DEVICES.

Removed 9/2011. Incorporated into CV 101.

CV102 ROLE OF JUDGE, JURY, AND LAWYERS.~~ROLE OF THE JUDGE, JURY AND LAWYERS.~~

Replaced with CR105 (modified)

All of us, judge, jury and lawyers, are officers of the court and have different roles during the trial:

As the judge I will supervise the trial, decide what evidence is admissible, and instruct you on the law.

As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.

The lawyers will present evidence and try to persuade you to decide the case in one way or the other.

Neither the lawyers nor I decide the case. That is your role. Do not be influenced by what you think our opinions might be. Make your decision based on the law given in my instructions and on the evidence presented in court.

References

Utah Code Ann. § 77-17-10(1).

Utah Code Ann. § 78A-2-201.

State v. Sisneros, 631 P.2d 856, 859 (Utah 1981).

State v. Gleason, 40 P.2d 222, 226 (Utah 1935).

75 Am. Jur.2d Trial §§ 714, 719, 817.

~~You and I and the lawyers play important but different roles in the trial.~~

~~I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.~~

~~You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.~~

~~The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client.~~

~~Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.~~

MUJI 1st Instruction

1.5; 2.2; 2.5; 2.6.

Amended Dates:

~~9/2011.~~

CV102A ROLE OF THE JUDGE, JURY, PARTIES, LAWYERS. (SELF-REPRESENTED LITIGANT VERSION)

All of us, judge, jury, lawyers, [name of plaintiff] [name of defendant] have different roles during the trial:

As the judge I will supervise the trial, decide what evidence is admissible, and instruct you on the law.

As the jury, you must follow the law as you weigh the evidence and decide the factual issues. Factual issues relate to what did, or did not, happen in this case.

The lawyers and [name of self-represented plaintiff] [name of self-represented defendant] will present evidence and try to persuade you to decide the case in one way or the other.

Neither the lawyers, parties, nor I decide the case. That is your role. Make your decision based on the law given in my instructions and on the evidence presented in court.

~~You and I and [name of plaintiff] [name of defendant] and the lawyers play important but different roles in the trial.~~

~~I supervise the trial and to decide all legal questions, such as deciding objections to evidence and deciding the meaning of the law. I will also explain the meaning of the law.~~

~~You must follow that law and decide what the facts are. The facts generally relate to who, what, when, where, why, how or how much. The facts must be supported by the evidence.~~

~~The lawyers present the evidence and try to persuade you to decide the case in favor of his or her client.~~

~~It is the self-represented [plaintiff] [defendant] and [plaintiff] [defense] counsel's duty to object when the other side offers testimony or other evidence that the self-represented [plaintiff] [defendant] or [plaintiff][defense] counsel believes is not admissible. You should not be unfair or prejudiced against the self-represented [plaintiff] [defendant], [plaintiff] [defense] counsel, or [plaintiff] [defendant] because the self-represented [plaintiff] [defendant] or [plaintiff] [defense] counsel has made objections. Television and the movies may not accurately reflect the way real trials should be conducted. Real trials should be conducted with professionalism, courtesy and civility.~~

References

MUJI CV 102.

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California.

Amended Dates:

12/2013

CV103 NATURE OF THE CASE.

In this case [Name of plaintiff] seeks [describe claim].

[Name of defendant] [denies liability, etc.].

[Name of defendant] has filed what is known as a [counterclaim/cross-claim/third-party complaint/etc.,] seeking [describe claim].

MUJI 1st Instruction

1.1.

Amended Dates:

9/2011.

CV104 ORDER OF TRIAL.

The trial will proceed as follows:

(1) The lawyers will make opening statements, outlining what the case is about and what they think the evidence will show.

(2) [Name of plaintiff] will offer evidence first, followed by [name of defendant]. I may allow the parties to later offer more evidence.

(3) Throughout the trial and after the evidence has been fully presented, I will instruct you on the law. You must follow the law as I explain it to you, even if you do not agree with it.

(4) The lawyers will then summarize and argue the case. They will share with you their views of the evidence, how it relates to the law and how they think you should decide the case.

(5) The final step is for you to go to the jury room and discuss the evidence and the instructions among yourselves until you reach a verdict.

MUJI 1st Instruction

1.2.

Amended Dates:

9/2011.

CV105 SEQUENCE OF INSTRUCTIONS NOT SIGNIFICANT.

The order in which I give the instructions has no significance. You must consider the instructions in their entirety, giving them all equal weight. I do not intend to emphasize any particular instruction, and neither should you.

MUJI 1st Instruction

2.1.

Amended Dates:

9/2011.

CV106 JURORS MUST FOLLOW THE INSTRUCTIONS.

Removed 9/2011. Incorporated into CV 102.

MUJI 1st Instruction

1.5.

CV107 JURORS MAY NOT DECIDE BASED ON SYMPATHY, PASSION AND PREJUDICE.

You must decide this case based on the facts and the law, without regard to sympathy, passion or prejudice. You must not decide for or against anyone because you feel sorry for or angry at anyone.

MUJI 1st Instruction

2.3.

Amended Dates:

9/2011

CV108 NOTE-TAKING.

Replaced with CR110

Feel free to take notes during the trial to help you remember the evidence, but do not let note-taking distract you. Your notes are not evidence and may be incomplete.

~~You may take notes during the trial and have those notes with you when you discuss the case. If you take notes, do not over do it, and do not let your note-taking distract you from following the evidence. Your notes are not evidence, and you should use them only as a tool to aid your personal memory. [I will secure your notes in the jury room during breaks and have them destroyed at the end of the trial.]~~

References

URCP 47(n).

MUJI 1st Instruction

1.6.

Committee Notes

The judge may instruct the jurors on what to do with their notes at the end of each day and at the end of the trial.

Amended Dates:

~~9/2011.~~

CV109 JUROR QUESTIONS. [Optional for judges who permit questions.] Approved 6/10/19.
Added from CR111 (modified)

During the trial you may submit questions to be asked of the witnesses, but you are not required to do so. You should write your questions down as they occur to you. Please do not ask your questions out loud. To make sure the questions are legally appropriate, we will use the following procedure: After the lawyers have finished questioning each witness, I will ask if you have any questions. You should hand your questions to the bailiff when I ask for them. I will review them with the lawyers to make sure they are allowed. I will tell you if your questions are allowed or not.

References
Utah R. Civ. P. 47(j).

CV110 RULES APPLICABLE TO RECESSES.

Removed 9/2011. Incorporated into CV 101.

MUJI 1st Instruction

1.8; 1.7

CV111A DEFINITION OF "PERSON."

"Person" means an individual, corporation, organization, or other legal entity.

Amended Dates:

9/2011.

CV111B ALL PERSONS EQUAL BEFORE THE LAW.

The fact that one party is a natural person and another party is a [corporation/partnership/other legal entity] should not play any part in your deliberations. You must decide this case as if it were between individuals.

MUJI 1st Instruction

2.8.

Amended Dates:

9/2011.

CV112 MULTIPLE PARTIES.

There are multiple parties in this case, and each party is entitled to have its claims or defenses considered on their own merits. You must evaluate the evidence fairly and separately as to each plaintiff and each defendant. Unless otherwise instructed, all instructions apply to all parties.

Amended Dates:

9/2011.

CV113 MULTIPLE PLAINTIFFS.

Although there are _____ plaintiffs, that does not mean that they are equally entitled to recover or that any of them is entitled to recover. [Name of defendant] is entitled to a fair consideration of [his] defense against each plaintiff, just as each plaintiff is entitled to a fair consideration of [his] claim against [name of defendant].

MUJI 1st Instruction

2.21.

Amended Dates:

9/2011.

CV114 MULTIPLE DEFENDANTS.

Although there are _____ defendants, that does not mean that they are equally liable or that any of them is liable. Each defendant is entitled to a fair consideration of [his] defense against each of [name of plaintiff]'s claims. If you conclude that one defendant is liable, that does not necessarily mean that one or more of the other defendants are liable.

MUJI 1st Instruction

2.22.

Amended Dates:

9/2011.

CV115 SETTLING PARTIES.

[Name of persons] have reached a settlement agreement.

There are many reasons why persons settle their dispute. A settlement does not mean that anyone has conceded anything. Although [name of settling person] is not a party, you must still decide whether any of the persons, including [name of settling person], were at fault.

You must not consider the settlement as a reflection of the strengths or weaknesses of any person's position. You may consider the settlement in deciding how believable a witness is.

References

Slusher v. Ospital, 777 P.2d 437 (Utah 1989).

Paulos v. Covenant Transp., Inc., 2004 UT App 35 (Utah App. 2004).

Child v. Gonda, 972 P.2d 425 (Utah App. 1998).

URE 408.

MUJI 1st Instruction

2.24.

Committee Notes

The judge and the parties must decide whether the fact of settlement and to what extent the terms of the settlement will be revealed to the jury in accordance with the principles set forth in *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989).

Substitute other legal concepts if "fault" is not relevant. For example, in commercial disputes.

Amended Dates:

9/2011.

CV116 DISCONTINUANCE AS TO SOME DEFENDANTS.

[Name of defendant] is no longer involved in this case because [explain reasons]. But you must still decide whether fault should be allocated to [name of defendant] as if [he] were still a party.

MUJI 1st Instruction

2.23.

Committee Notes

This instruction should be given at the time the party is dismissed. The court should explain the reasons why the defendants have been dismissed to the extent possible. If allocation of fault to the dismissed party is not appropriate under applicable law the final sentence should not be given.

CV117 PREPONDERANCE OF THE EVIDENCE.

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but this is not a criminal case. In a civil case such as this one, a different level of proof applies: proof by a preponderance of the evidence.

When I tell you that a party has the burden of proof or that a party must prove something by a "preponderance of the evidence," I mean that the party must persuade you, by the evidence, that the fact is more likely to be true than not true.

Another way of saying this is proof by the greater weight of the evidence, however slight. Weighing the evidence does not mean counting the number of witnesses nor the amount of testimony. Rather, it means evaluating the persuasive character of the evidence. In weighing the evidence, you should consider all of the evidence that applies to a fact, no matter which party presented it. The weight to be given to each piece of evidence is for you to decide.

After weighing all of the evidence, if you decide that a fact is more likely true than not, then you must find that the fact has been proved. On the other hand, if you decide that the evidence regarding a fact is evenly balanced, then you must find that the fact has not been proved, and the party has therefore failed to meet its burden of proof to establish that fact.

[Now] [At the close of the trial] I will instruct you in more detail about the specific elements that must be proved.

References

Johns v. Shulsen, 717 P.2d 1336 (Utah 1986).

Morris v. Farmers Home Mut. Ins. Co., 500 P.2d 505 (Utah 1972).

Alvarado v. Tucker, 268 P.2d 986 (Utah 1954).

Hansen v. Hansen, 958 P.2d 931 (Utah App. 1998)

MUJI 1st Instruction

2.16; 2.18.

Amended Dates:

9/2011

CV118 CLEAR AND CONVINCING EVIDENCE.

Some facts in this case must be proved by a higher level of proof called "clear and convincing evidence." When I tell you that a party must prove something by clear and convincing evidence, I mean that the party must persuade you, by the evidence, to the point that there remains no serious or substantial doubt as to the truth of the fact.

Proof by clear and convincing evidence requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

I will tell you specifically which of the facts must be proved by clear and convincing evidence.

References

Essential Botanical Farms, LC v. Kay, 2011 UT 71.

Jardine v. Archibald, 279 P.2d 454 (Utah 1955).

Greener v. Greener, 212 P.2d 194 (Utah 1949).

See also, *Kirchgestner v. Denver & R.G.W.R. Co.*, 233 P.2d 699 (Utah 1951).

MUJI 1st Instruction

2.19.

Committee Notes

In giving the instruction on clear and convincing evidence, the judge should specify which elements must be held to this higher standard. This might be done in an instruction and/or as part of the verdict form. If the judge gives the clear and convincing evidence instruction at the start of the trial and for some reason those issues do not go to the jury (settlement, directed verdict, etc.) the judge should instruct the jury that those matters are no longer part of the case.

Amended Dates:

9/2011.

CV119 EVIDENCE.

"Evidence" is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.

You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.

Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.

The lawyers might stipulate—or agree—to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say usually are not evidence.

You are to consider only the evidence in the case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.

MUJI 1st Instruction

1.3; 2.4.

Amended Dates:

9/2011.

CV119A EVIDENCE. (SELF-REPRESENTED LITIGANT VERSION)

"Evidence" is anything that tends to prove or disprove a disputed fact. It can be the testimony of a witness or documents or objects or photographs or certain qualified opinions or any combination of these things.

You must entirely disregard any evidence for which I sustain an objection and any evidence that I order to be struck.

Anything you may have seen or heard outside the courtroom is not evidence and you must entirely disregard it.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

(1) Arguments and statements by pro se [plaintiff] [defendant] and [plaintiff] [defense] counsel are not evidence. Pro se [plaintiff] [defendant] when acting as counsel and [plaintiff] [defense] counsel are not witnesses. What they have said in their opening statements, will say in their closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way they have stated them, your memory of them controls. However, pro se [plaintiff] [defendant]'s statements as a witness are evidence.

(2) Questions and objections by pro se [plaintiff] [defendant] and [plaintiff] [defense] counsel are not evidence.

The lawyers might stipulate -- or agree -- to a fact or I might take judicial notice of a fact. Otherwise, what I say and what the lawyers say usually is not evidence.

You are to consider only the evidence in this case, but you are not expected to abandon your common sense. You are permitted to interpret the evidence in light of your experience.

References

CV 119.

Preliminary jury instructions for use with pro se litigants, U.S. District Court, Eastern District of California.

Amended Dates:

November 2013.

CV120 DIRECT ~~AND~~ /CIRCUMSTANTIAL EVIDENCE.

Replaced with CR210 (modified)

Facts may be proved by direct or circumstantial evidence. The law does not treat one type of evidence as better than the other.

Direct evidence can prove a fact by itself. It usually comes from a witness who perceived firsthand the fact in question. For example, if a witness testified he looked outside and saw it was raining, that would be direct evidence that it had rained.

Circumstantial evidence is indirect evidence. It usually comes from a witness who perceived a set of related events, but not the fact in question. However, based on that testimony someone could conclude that the fact in question had occurred. For example, if a witness testified that she looked outside and saw that the ground was wet and people were closing their umbrellas, that would be circumstantial evidence that it had rained.

~~A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists of facts that allow someone to reasonably infer the truth of the facts to be proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie plate in his hand, that is circumstantial evidence of the fact.~~

MUJI 1st Instruction

2.17.

References

29 Am. Jur.2d Evidence § 4.
29 Am. Jur.2d Evidence § 1468.

Amended Dates:

~~9/2011.~~

CV121 ~~BELIEVABILITY OF WITNESSES.~~WITNESS CREDIBILITY.

CV121-123 replaced with CR207

In deciding this case you will need to decide how believable each witness was. Use your judgment and common sense. Let me suggest a few things to think about as you weigh each witness's testimony:

- How good was the witness's opportunity to see, hear, or otherwise observe what the witness testified about?
- Does the witness have something to gain or lose from this case?
- Does the witness have any connection to the people involved in this case?
- Does the witness have any reason to lie or slant the testimony?
- Was the witness's testimony consistent over time? If not, is there a good reason for the inconsistency? If the witness was inconsistent, was it about something important or unimportant?
- How believable was the witness's testimony in light of other evidence presented at trial?
- How believable was the witness's testimony in light of human experience?

- Was there anything about the way the witness testified that made the testimony more or less believable?

In deciding whether or not to believe a witness, you may also consider anything else you think is important.

You do not have to believe everything that a witness said. You may believe part and disbelieve the rest. On the other hand, if you are convinced that a witness lied, you may disbelieve anything the witness said. In other words, you may believe all, part, or none of a witness's testimony. You may believe many witnesses against one or one witness against many.

In deciding whether a witness testified truthfully, remember that no one's memory is perfect. Anyone can make an honest mistake. Honest people may remember the same event differently.

References

Utah Code Ann. § 78B-1-128.

United States v. McKissick, 204 F.3d 1282, 1289 (10th Cir. 2000).

Toma v. Utah Power & Light Co., 365 P.2d 788, 792-793 (Utah 1961).

Gittens v. Lundberg, 3 Utah 2d 392, 284 P.2d 1115 (1955).

State v. Shockley, 80 P. 865, 879 (1905).

75 Am. Jur.2d Trial § 819.

~~Testimony in this case will be given under oath. You must evaluate the believability of that testimony. You may believe all or any part of the testimony of a witness. You may also believe one witness against many witnesses or many against one, in accordance with your honest convictions. In evaluating the testimony of a witness, you may want to consider the following:~~

~~(1) Personal interest. Do you believe the accuracy of the testimony was affected one way or the other by any personal interest the witness has in the case?~~

~~(2) Bias. Do you believe the accuracy of the testimony was affected by any bias or prejudice?~~

~~(3) Demeanor. Is there anything about the witness's appearance, conduct or actions that causes you to give more or less weight to the testimony?~~

~~(4) Consistency. How does the testimony tend to support or not support other believable evidence that is offered in the case?~~

~~(5) Knowledge. Did the witness have a good opportunity to know what [he] is testifying about?~~

~~(6) Memory. Does the witness's memory appear to be reliable?~~

~~(7) Reasonableness. Is the testimony of the witness reasonable in light of human experience?~~

~~These considerations are not intended to limit how you evaluate testimony. You are the ultimate judges of how to evaluate believability.~~

MUJI 1st Instruction

2.9, 2.10, 2.11.

~~**CV122 INCONSISTENT STATEMENTS.**~~

~~You may believe that a witness, on another occasion, made a statement inconsistent with that witness's testimony given here. That doesn't mean that you are required to disregard the testimony. It is for you to decide whether to believe the witness.~~

~~**MUJI 1st Instruction**~~

~~2.10.~~

~~CV123 EFFECT OF WILLFULLY FALSE TESTIMONY.~~

~~If you believe any witness has intentionally testified falsely about any important matter, you may disregard the entire testimony of that witness, or you may disregard only the intentionally false testimony.~~

~~References~~

~~*Gittens v. Lundberg*, 3 Utah 2d 392, 284 P.2d 1115 (1955).~~

~~MUJI 1st Instruction~~

~~2.11.~~

CV124 STIPULATED FACTS.

A stipulation is an agreement. Unless I instruct you otherwise, when the lawyers on both sides stipulate or agree to a fact, you must accept the stipulation as evidence and regard that fact as proved.

The parties have stipulated to the following facts:

[Here read stipulated facts.]

Since the parties have agreed on these facts, you must accept them as true for purposes of this case.

MUJI 1st Instruction

1.3; 1.4

Committee Notes

This instruction should be given at the time a stipulated fact is entered into the record.

CV125 JUDICIAL NOTICE.

I have taken judicial notice of [state the fact] for purposes of this trial. This means that you must accept the fact as true.

MUJI 1st Instruction

1.3.

Committee Notes

This instruction should be given at the time the court takes judicial notice of a fact.

CV126 DEPOSITIONS.

A deposition is the sworn testimony of a witness that was given previously, outside of court, with the lawyer for each party present and entitled to ask questions. Testimony provided in a deposition is evidence and may be read to you in court or may be seen on a video monitor. You should consider deposition testimony the same way that you would consider the testimony of a witness testifying in court.

MUJI 1st Instruction

2.12.

Amended Dates:

9/2011.

CV127 LIMITED PURPOSE EVIDENCE.

Some evidence is received for a limited purpose only. When I instruct you that an item of evidence has been received for a limited purpose, you must consider it only for that limited purpose.

MUJI 1st Instruction

1.3.

Amended Dates:

9/2011.

CV128 OBJECTIONS AND RULINGS ON EVIDENCE AND PROCEDURE.

From time to time during the trial, I may have to make rulings on objections or motions made by the lawyers. Lawyers on each side of a case have a right to object when the other side offers evidence that the lawyer believes is not admissible. You should not think less of a lawyer or a party because the lawyer makes objections. You should not conclude from any ruling or comment that I make that I have any opinion about the merits of the case or that I favor one side or the other. And if a lawyer objects and I sustain the objection, you should disregard the question and any answer.

During the trial I may have to confer with the lawyers out of your hearing about questions of law or procedure. Sometimes you may be excused from the courtroom for that same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to decide. Please be patient even though the case may seem to go slowly.

MUJI 1st Instruction

2.5.

CV128A OBJECTIONS AND RULINGS ON EVIDENCE AND PROCEDURE: SELF-REPRESENTED PARTIES.

Comment [NS1]: Need to modify based on SRP.

From time to time during the trial, I may have to make rulings on objections or motions made by the lawyers or the parties . Lawyers and parties on each side of a case have a right to object when the other side offers evidence that the lawyer believes is not admissible. You should not think less of a lawyer or a party because the lawyer makes objections. You should not conclude from any ruling or comment that I make that I have any opinion about the merits of the case or that I favor one side or the other. And if a lawyer objects and I sustain the objection, you should disregard the question and any answer.

During the trial I may have to confer with the lawyers out of your hearing about questions of law or procedure. Sometimes you may be excused from the courtroom for that same reason. I will try to limit these interruptions as much as possible, but you should remember the importance of the matter you are here to decide. Please be patient even though the case may seem to go slowly.

MUJI 1st Instruction

2.5.

CV129 STATEMENT OF OPINION.

Under limited circumstances, I will allow a witness to express an opinion. Consider opinion testimony as you would any other evidence, and give it the weight you think it deserves.

You may choose to rely on the opinion, but you are not required to do so.

If you find that a witness, in forming an opinion, has relied on a fact that has not been proved, or has been disproved, you may consider that in determining the value of the witness's opinion.

References

Lyon v Bryan, 2011 UT App 256 (jury entitled to disregard even unrebutted expert testimony).

MUJI 1st Instruction

2.13; 2.14.

Committee Notes

This instruction may be given if an expert or another witness is permitted to express an opinion on a matter that the jury is capable of deciding with or without expert testimony. This instruction should not be given if the jury is required to rely on expert testimony to establish the standard of care or some other fact. See, for example, Instruction CV 326. Expert testimony required..

If the jury is required to rely on expert testimony for some decisions and is allowed to decide other facts with or without expert testimony, the court's instructions should distinguish for the jury which matters the jury must decide based only on expert testimony and which matters they may decide by giving the expert testimony the weight they think it deserves.

Amended Dates:

September, 2011; November 13, 2012.

CV130A CHARTS AND SUMMARIES AS EVIDENCE.

Charts and summaries that are received as evidence will be with you in the jury room when you deliberate, and you should consider the information contained in them as you would any other evidence.

MUJI 1st Instruction

2.15.

Committee Notes

Use this instruction if the charts and summaries used at trial are introduced as evidence under URE 1006.

Amended Dates:

9/2011.

CV130B CHARTS AND SUMMARIES OF EVIDENCE.

Certain charts and summaries will be shown to you to help explain the evidence. However, these charts and summaries are not themselves evidence, and you will not have them in the jury room when you deliberate. You may consider them to the extent that they correctly reflect the evidence.

MUJI 1st Instruction

2.15.

Committee Notes

Use this instruction if the charts and summaries used at trial are used only as demonstrative aids.

Amended Dates:

9/2011.

CV131 SPOLIATION.

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].

References

Hills v. United Parcel Service, Inc., 2010 UT 39, 232 P.3d 1049.

Daynight, LLC v. Mobilight, Inc., 2011 UT App 28, 248 P.3d 1010.

Burns v. Cannondale Bicycle Co., 876 P.2d 415 (Utah Ct. App. 1994).

URCP 37(~~g~~e).

Committee Notes

Utah appellate courts have not recognized a cause of action for first-party spoliation (a claim against a party to the underlying action – or the party's attorney – who spoliates evidence necessary or relevant to the plaintiff's claims against that party), or a cause of action for third-party spoliation (a stranger to the underlying action or a party not alleged to have committed the underlying tort as to which the loss or destroyed evidence is related). *Hills v. United Parcel Serv., Inc.*, 2010 UT 39, 232 P.3d 1049; *Burns v. Cannondale Bicycle Co.*, 876 P.2d 415 (Utah Ct. App. 1994). Rule 37(~~g~~b), (e), however, expressly provides authority to trial courts to address spoliation of evidence by a litigant, including instructing the jury regarding an adverse inference. See, URCP 37(b)(7).~~2)(F).~~l

In *Daynight, LLC v. Mobilight, Inc.*, 2011 UT App. 28, 248 P.3d 1010, the Utah Court of Appeals observed that "spoliation under [Rule 37(~~e~~g)], meaning the destruction and permanent deprivation of evidence, is on a qualitatively different level than a simple discovery abuse under [Rule 37(b)~~(2)~~] which typically pertains only to a delay in the production of evidence. . . . [~~r~~R~~u~~ule 37(~~e~~g)] of the Utah Rules of Civil Procedure does not require a finding of 'willfulness, bad faith, fault or persistent dilatory tactics' or the violation of court orders before a court may sanction a party." Id. at ¶ 2.

The standard announced by the *Daynight* court differs from that employed by the United States Court of Appeals for the Tenth Circuit. Spoliation sanctions are proper in federal court when (1) a party has a duty to preserve evidence because it knew, or should have known the litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence. If the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case. Without a showing of bad faith, a district court may only impose lesser sanctions. *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1149 (10th Cir. 2009). In addition, it is appropriate for a federal trial court to consider "the degree of culpability of the party who lost or destroyed the evidence." *North v. Ford Motor Co.*, 505 F. Supp. 2d 1113, 1116 (D.Utah 2007).

The discussion by the Utah Court of Appeals in *Daynight* appears to indicate that even the negligent destruction of evidence will be sufficient to trigger a spoliation instruction without a finding of willfulness or bad faith.

Amended Dates:

9/2011.

~~CV135~~ CV132 OUT-OF-STATE OR OUT-OF-TOWN EXPERTS.

You may not discount the opinions of [name of expert] merely because of where [he] lives or practices.

References

Swan v. Lamb, 584 P.2d 814, 819 (Utah 1978).

MUJI 1st Instruction

6.30

Committee Notes

The committee was not unanimous in its approval of this instruction. Use it with caution.

~~CV136~~ CV133 CONFLICTING TESTIMONY OF EXPERTS.

In resolving any conflict that may exist in the testimony of [names of experts], you may compare and weigh the opinion of one against that of another. In doing this, you may consider the qualifications and credibility of each, as well as the reasons for each opinion and the facts on which the opinions are based.

MUJI 1st Instruction

6.31

~~**CV137 Selection of jury foreperson and deliberation.**~~

~~When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.~~

~~After you select the foreperson you must discuss with one another – that is deliberate – with a view to reaching an agreement. Your attitude and conduct during discussions are very important.~~

~~As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.~~

~~Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.~~

~~Amended Dates:~~

~~9/2011.~~

~~**CV138 Do not speculate or resort to chance.**~~

~~When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.~~

~~If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.~~

~~References~~

~~Day v. Panos, 676 P.2d 403 (Utah 1984).~~

~~**CV139 Agreement on special verdict.**~~

~~I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.~~

~~Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.~~

~~As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.~~

~~**Amended Dates:**~~

~~9/2011.~~

~~**CV140 Discussing the case after the trial.**~~

~~Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.~~

~~You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them – or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.~~

~~If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.~~

~~Again, thank you for your service.~~

~~CV141~~ CV134 NO RECORD OF TESTIMONY.

At the end of trial, you must make your decision based on what you recall of the testimony. You will not have a transcript or recording of the witnesses' testimony. I urge you to pay close attention to the testimony as it is given.

Amended Dates:

~~Added 9/2011.~~

CLOSING INSTRUCTIONS

CV-151. CLOSING ROADMAP.

[from CR201, CR202]

Members of the jury, you now have all the evidence. Three things remain to be done:

First, I will give you additional instructions that you will follow in deciding this case.

Second, the lawyers will give their closing arguments. The Plaintiff(s) will go first, then the Defendant(s). The Plaintiff(s) may give a rebuttal.

Finally, you will go to the jury room to ~~discuss the evidence and the instructions and~~ decide the case.

~~INSTRUCTION NO. CV 152~~

~~[from CR202]~~

In the jury room you will ~~You~~ have two main duties as jurors.

First, you will decide from the evidence ~~The first is to decide from the evidence~~ what the facts are. You may draw all reasonable inferences from that evidence. ~~Deciding what the facts are is your job, not mine.~~

Second, you will ~~The second duty is to~~ take the law I give you in the instructions, apply it to the facts, and reach a verdict.

CV-152~~3~~. CLOSING ARGUMENTS.

[from CR203]

When the lawyers give their closing arguments, keep in mind that they are advocating their views of the case. What they say during their closing arguments is not evidence. If the lawyers say anything about the evidence that conflicts with what you remember, you are to rely on your memory of the evidence. If they say anything about the law that conflicts with these instructions, you are to rely on these instructions.

CV-154~~3~~. LEGAL RULINGS.

[from CR204]

During the trial I have made certain rulings. I made those rulings based on the law, and not because I favor one side or the other.

However,

• if I sustained an objection,

• if I did not accept evidence offered by one side or the other, or

• if I ordered that certain testimony be stricken,

then you must not consider those things in reaching your verdict.

CV-~~155~~154. JUDICIAL NEUTRALITY.

[from CR205]

As the judge, I am neutral. If I have said or done anything that makes you think I favor one side or the other, that was not my intention. Do not interpret anything I have done as indicating that I have any particular view of the evidence or the decision you should reach.

~~CV137~~ CV155. FOREPERSON SELECTION AND DUTIES AND JURY DELIBERATIONS.~~SELECTION OF JURY FOREPERSON AND DELIBERATION~~.

CV 137 replaced with CR 216-217 (modified) and renumbered

Among the first things you should do when you go to the jury room to deliberate is to appoint someone to serve as the jury foreperson. The foreperson should not dominate the jury's discussion, but rather should facilitate the discussion of the evidence and make sure that all members of the jury get the chance to speak. The foreperson's opinions should be given the same weight as those of other members of the jury. Once the jury has reached a verdict, the foreperson is responsible for filling out and signing the verdict form(s) on behalf of the entire jury.

In the jury room, discuss the evidence and speak your minds with each other. Open discussion should help you reach an agreement on a verdict. Listen carefully and respectfully to each other's

views and keep an open mind about what others have to say. I recommend that you not commit yourselves to a particular verdict before discussing all the evidence.

Try to reach an agreement, but only if you can do so honestly and in good conscience. If there is a difference of opinion about the evidence or the verdict, do not hesitate to change your mind if you become convinced that your position is wrong. On the other hand, do not give up your honestly held views about the evidence simply to agree on a verdict, to give in to pressure from other jurors, or just to get the case over with. In the end, your vote must be your own.

In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment.

~~In reaching your verdict you may not use methods of chance, such as drawing straws or flipping a coin. Rather, the verdict must reflect your individual, careful, and conscientious judgment~~

~~When you go into the jury room, your first task is to select a foreperson. The foreperson will preside over your deliberations and sign the verdict form when it's completed. The foreperson should not dominate the discussions. The foreperson's opinions should be given the same weight as the opinions of the other jurors.~~

~~After you select the foreperson you must discuss with one another – that is deliberate – with a view to reaching an agreement. Your attitude and conduct during discussions are very important.~~

~~As you begin your discussions, it is not helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. Each of you must decide the case for yourself, but only after discussing the case with your fellow jurors.~~

~~Do not hesitate to change your opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.~~

~~CV138~~ CV156. DO NOT SPECULATE OR RESORT TO CHANCE.

When you deliberate, do not flip a coin, speculate or choose one juror's opinions at random. Evaluate the evidence and come to a decision that is supported by the evidence.

If you decide that a party is entitled to recover damages, you must then agree upon the amount of money to award that party. Each of you should state your own independent judgment on what the amount should be. You must thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence, and reach an agreement on the amount. You must not agree in advance to average the estimates.

References

Day v. Panos, 676 P.2d 403 (Utah 1984).

~~CV139~~ CV157. AGREEMENT ON SPECIAL VERDICT.

I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial.

Because this is not a criminal case, your verdict does not have to be unanimous. At least six jurors must agree on the answer to each question, but they do not have to be the same six jurors on each question.

As soon as six or more of you agree on the answer to all of the required questions, the foreperson should sign and date the verdict form and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.

~~CV140~~CV158. DISCUSSING THE CASE AFTER THE TRIAL.

Ladies and gentlemen of the jury, this trial is finished. Thank you for your service. The American system of justice relies on your time and your sound judgment, and you have been generous with both. You serve justice by your fair and impartial decision. I hope you found the experience rewarding.

You may now talk about this case with anyone you like. You might be contacted by the press or by the lawyers. You do not have to talk with them - or with anyone else, but you may. The choice is yours. I turn now to the lawyers to instruct them to honor your wishes if you say you do not want to talk about the case.

If you do talk about the case, please respect the privacy of the other jurors. The confidences they may have shared with you during deliberations are not yours to share with others.

Again, thank you for your service.

Tab 6

Date of Printing: August 12, 2019 09:02:18 AM CDT
Last Run: August 05, 2019 09:03:38 AM CDT

KEYCITE ALERT

§ 31A-22-309. Limitations, exclusions, and conditions to personal injury protection, UT ST § 31A-22-309

Results Narrowed by:

History References
Detail Level: Most Detail

Citing References
Detail Level: Most Detail

History

No references satisfied your KeyCite Alert History request.

Citing References

Citing References (1)

Title	Date	NOD Topics	Type
1. 59 Am. Jur. Trials 347, Litigating the No-Fault Serious-Injury Threshold Am. Jur. Trials "No-fault" automobile insurance systems are statutory schemes to provide automobile accident victims with compensation for certain expenses arising out of personal injuries... ... her life, that the herniated disc would not go away on its own, and that motorist would not be able to regain all bodily function. Utah Code Ann. § 31A-22-309(1)(a)(iii)Pinney v. Carrera, 2019 UT App 12, 438 P.3d 902 (Utah Ct. App. 2019) [Top ...	2019	—	Other Secondary Source

Motorist who suffered a herniated disc in her back following car accident met the tort threshold injury requirement of permanent impairment under no-fault statute, and, thus, could seek general damages for her personal injuries in action brought against other driver who allegedly failed to stop at a stop sign and struck injured motorist's car; treating chiropractor testified that based on the examinations, treatment, and MRI, that injured motorist had suffered a permanent impairment, and chiropractor further testified that motorist would be plagued by the injury for the rest of her life, that the herniated disc would not go away on its own, and that motorist would not be able to regain all bodily function. Utah Code Ann. § 31A-22-309(1)(a)(iii). *Pinney v. Carrera*, 2019 UT App 12, 438 P.3d 902 (Utah Ct. App. 2019).

59 Am. Jur. Trials 347 (Originally published in 1996)

CV632 Threshold.

[Name of defendant] claims that [name of plaintiff] has not met the threshold injury requirements and therefore cannot recover non-economic damages.

A person may recover non-economic damages resulting from an automobile accident only if [he] has:

[(1) permanent disability or permanent impairment based on objective findings.] or

[(2) permanent disfigurement.] or

[(3) reasonable and necessary medical expenses in excess of $3,000.]

References

Utah Code Section 31A-22-309(1)(a).

Committee Notes

Neither the statute nor case law has provided clear boundaries on the definitions of disability and impairment. It is also undecided whether the plaintiff or the defendant who asserts the defense carries the burden of proof or burden of moving forward.

