

Judicial Council Standing Committee on
Model Utah Civil Jury Instructions

Agenda

July 10, 2023
4:00 to 6:00 p.m.

[Via Webex](#)

Welcome and Approval of May Minutes	Tab 1	Alyson/Lauren
Welcome new Committee members (Michael Lichfield and John Macfarlane), eff. 4/24/23, and reappointed member (Ricky Shelton), eff. 12/16/22		Alyson
CV632 Minimum Injury Requirements amend. (vote)	Tab 2	Alyson
CV632A, CV632B, CV632C, and CV632D definitions (vote)	Tab 3	Alyson
CV930 Easement by Necessity Intro. and CV931 Easement by Necessity Elements (vote)	Tab 4	Alyson
CV940 Easement by Implication Intro. and CV941 Easement by Implication Elements (vote)	Tab 5	Alyson
“Reasonableness” in corpus linguistics (work-in-progress presentation)		Bill Eggington
Progress on Instruction Topics	Tab 6	(Informational)

[Committee Web Page](#)

[Published Instructions](#)

Meeting Schedule: Monthly on the 2nd Monday at 4 pm

Next meeting: August 14, 2023

TAB 1

MINUTES

Advisory Committee on Model Civil Jury Instructions

May 8, 2023

4:00 p.m.

Present: Judge Kent Holmberg, Judge Keith A. Kelly, Lauren A. Shurman, Alyson McAllister, Douglas G. Mortensen, Adam D. Wentz, Jace Willard (staff).

Also present: Adam Pace, Robert Fuller, Samantha Slark

Excused: Ricky Shelton, William Eggington, Mark Morris

1. *Welcome.*

Lauren Shurman welcomed the Committee.

2. *Approval of Minutes.*

April meeting minutes approved.

3. *CV632 Threshold/Minimum Injury Requirements*

- Discussed necessity of the committee note as drafted and determined to delete it.
- Discussed whether the title for the instruction should be “Threshold” or “Minimum Injury Requirements.” The Committee determined that “Minimum Injury Requirements” is clearer.
- Without a quorum at the time this instruction was discussed, the Committee did not vote on these changes and agreed to do so at the next meeting.

4. *CV632A “Minimum Injury Requirements” - Definitions*

- The Committee determined that it would be more consistent with the rest of the MUJI instructions to separate the various defined terms within the “Minimum Injury Requirements” instruction into their own, separate instructions. The four terms in this instruction were separated into CV632A – D as follows:
 - 632A – “Permanent Disability” Defined.
 - 632B – “Permanent Impairment” Defined.
 - 632C – “Permanent Disfigurement” Defined.
 - 632D – “Objective Findings” Defined.
- The Committee made small edits to the various definitions consistent with *Pinney v. Carrera*, 2019 UT App 12, 438 P.3d 902, and *Pinney v. Carrera*, 2020 UT 43, 469 P.3d 970, 978.
- Without a quorum at the time this instruction was discussed, Ms. McAllister suggested a clean copy of the suggested changes be circulated to the remainder of the Committee for review and later approval.

- Jace Willard will look at the referenced cases to ensure the correct paragraphs are cited.

5. *Avoiding Bias Instruction*

- Judge Kelly received feedback from the Board of District Court Judges and updated the draft instruction to include those proposed edits. The Committee discussed the proposals in turn.
- Judge Kent Holmberg joined the meeting during discussion of this instruction, creating a quorum.
- The Committee approved the edits and recommended the instruction be published for comment.
- The Committee unanimously voted to ratify the suggested changes and publish the revised instruction for public comment.

6. *CV920 Easement Defined.*

- The Committee debated whether it was necessary to include a comment to the instruction regarding whether there is a right to a jury trial in a prescriptive easement case. The Committee decided to table the issue until the next meeting.

7. *CV941 Easement by Implication. Elements.*

- Subcommittee member Adam Pace questioned whether a separate instruction defining the term “continuous” in element four is necessary as its meaning is not clear or consistent in the case law.
- Mr. Fuller expressed concern that providing a separate instruction for the term “continuous” could cause more problems than solutions since different precedent suggests different standards for the term. He further notes that this language comes directly from a 2019 Court of Appeals case—*Bridge BLOQ NAC LLC v. Sorf*.
- The Committee decided to leave element four as drafted and include as a reference *Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, 447 P.3d 1278, 1282*.
- The Committee agreed to add to the Committee Notes that “the meaning of the term ‘continuous’ may depend on the factual circumstances of the case. The Committee therefore determined not to draft a separate definitional instruction. The parties may need to modify the fourth element depending on the factual circumstances of the case to elaborate on the meaning of the term ‘continuous.’”

8. *CV922 Prescriptive Easement. Elements of a Claim and CV924 Prescriptive Easement. “Adverse” Defined.*

- The Committee considered revisions to the second paragraph of draft CV924 and the possible need for revisions to draft CV922 pursuant to feedback received from Chris Hogle.
- The Subcommittee agreed to review Mr. Hogle's comments for these instructions and the need to add other instructions and return at a later date to finalize the instructions.
- The easement by necessity and implication instructions require no further changes and are ready for a vote at the next meeting.

9. *Adjournment.*

The meeting concluded at 6:09 PM.

TAB 2

CV632 ~~Threshold-Minimum Injury Requirements.~~

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

~~In order to A person may~~ recover non-economic damages resulting from an automobile accident [name of Plaintiff] must prove only if [he/she] has suffered one of the following:

[(1) death.] or

[(2) dismemberment.] or

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

[(~~24~~) permanent disfigurement.] or

[(5) a bone fracture.] or

[(~~36~~) reasonable and necessary medical expenses in excess of \$3,000.]

References

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

Pinney v. Carrera, 2020 UT 43, 469 P.3d 970.

~~Committee Notes~~

~~Neither Both the statute nor and case law has have provided clear boundaries examples and on the definitions of for disability and impairment. For example, a herniated disc and permanent scar tissue restricting range of motion have both been held to constitute permanent injury.~~

Here is the case law and statutory law that I used to update the instruction:

First, it relied on one of our earlier cases to conclude that a disability or impairment is “permanent” “whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.”¹⁴ Then it interpreted the term “disability” to mean “the inability to work” and the term “impairment” to mean “the loss of bodily function.”¹⁵ Finally, the court interpreted the phrase “objective finding.”¹⁶ The court of appeals interpreted the phrase “objective findings” in two steps. First, it cited Black’s Law Dictionary, which defines “objective” as “[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual’s perceptions, feelings, or intentions.”¹⁷ And second, it cited one of its previous cases, in which it held that a plaintiff had failed to provide “objective findings” of a permanent injury where the plaintiff did not support his claim “with something more than his say so.”¹⁸ After considering these sources, the court concluded that, to be considered “objective,” “a finding need only be demonstrated through evidence other than the plaintiff’s own subjective testimony.”¹⁹

Pinney v. Carrera, 2020 UT 43, ¶¶ 19-20, 469 P.3d 970, 977

¶24 The statute imposes a burden on the plaintiff to prove that one of the circumstances enumerated in the statute exists.²

Pinney v. Carrera, 2020 UT 43, ¶ 24, 469 P.3d 970, 978

a permanent herniated disc in her back. And he specifically testified that the herniated disc constituted “a permanent injury.” He also testified that scar tissue, stemming from injuries sustained in the crash, inhibited Ms. Pinney's range of motion, and that treatment failed to restore her range of motion back to “100 percent.” He further testified that “the scar tissue is permanent.”

Pinney v. Carrera, 2020 UT 43, ¶ 28, 469 P.3d 970, 979

(1)(a) A person who has or is required to have direct benefit coverage under a policy which includes personal injury protection may not maintain a cause of action for general damages arising out of personal injuries alleged to have been caused by an automobile accident, except where the person has sustained one or more of the following:

- (i) death;
- (ii) dismemberment;
- (iii) permanent disability or permanent impairment based upon objective findings;
- (iv) permanent disfigurement;
- (v) a bone fracture; or
- (vi) medical expenses to a person in excess of \$3,000.

Utah Code Ann. § 31A-22-309 (West)

TAB 3

CV632A “Permanent Disability” Defined.

A “permanent disability” is an inability to work that is reasonably certain to continue throughout the life of the person suffering from it.

References

Pinney v. Carrera, 2019 UT App 12, ¶¶ 23-25, 438 P.3d 902, aff'd, *Pinney v Carrera*, 2020 UT 43, 469 P.3d 970.

CV632B “Permanent Impairment” Defined.

A “permanent impairment” is the loss of a bodily function that is reasonably certain to continue throughout the life of the person suffering from it.

References

Pinney v. Carrera, 2019 UT App 12, ¶¶ 23-25, 438 P.3d 902, aff'd, *Pinney v Carrera*, 2020 UT 43, 469 P.3d 970.

CV632C “Permanent Disfigurement” Defined.

A “permanent disfigurement” is a disfigurement that is reasonably certain to continue throughout the life of the person suffering from it.

References

Pinney v. Carrera, 2019 UT App 12, ¶¶ 23-25, 438 P.3d 902, aff'd, *Pinney v Carrera*, 2020 UT 43, 469 P.3d 970.

Committee Notes

Unlike disability and impairment, what is meant by "disfigurement" under this statute does not appear to have been defined so this definition just focuses on the "permanent" aspect. (In fact, the Supreme court specifically declined to reach the issue of disfigurement in *Sheppard v. Geneva Rock*, 2021 UT 31, ¶ 45 n.8, 493 P.3d 632, because it resolved the case on other grounds.) Only provide the jury with these definitions if applicable to the threshold or thresholds the plaintiff claims to meet.

CV632D “Objective Findings” Defined.

To be considered objective, a finding that [plaintiff] is permanently disabled or permanently impaired must be based on something other than [plaintiff’s] own testimony, such as testimony of an expert or [plaintiff’s] treating physician.

References

Pinney v. Carrera, 2019 UT App 12, ¶¶ 26-27, 438 P.3d 902, aff'd, *Pinney v. Carrera*, 2020 UT 43, ¶¶ 21-29, 469 P.3d 970.

TAB 4

CV930 Easement by Necessity. Introduction.

An easement by necessity arises when there is a transfer of property from one owner to another that results in a tract of land becoming landlocked.

[Plaintiff] and [Defendant] are adjoining landowners. [Plaintiff] asserts that because [his/her/its] property is completely landlocked, [he/she/it] should be granted an "easement by necessity" across [Defendant's] property so that [Plaintiff] can get to or from [his/her/its] property from the [public highway]. [Defendant] asserts that [Plaintiff] has no right to enter or use [Defendant's] property to access [Plaintiff's] property.

References

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280 (Utah 1976).

Abraham & Assocs. Trust v. Park, 2012 UT App 173, ¶ 12, 282 P.3d 1027, 1030–31.

CV931 Easement by Necessity. Elements of a claim for access to landlocked property.

To succeed on this claim, [Plaintiff] must prove by clear and convincing evidence each of the following elements:

- (1) All of the property was once owned by a single person who then divided the land and transferred away one tract of land, creating a landlocked property; and
- (2) That the easement is reasonably necessary to the enjoyment of the landlocked property.

References

Morris v. Blunt, 49 Utah 243, 161 P. 1127, 1132 (1916).

Savage v. Nielsen, 114 Utah 22, 31–33, 197 P.2d 117, 121–22 (1948).

Tschaggeny v. Union Pac. Land Res. Corp., 555 P.2d 277, 280 (Utah 1976).

Potter v. Chadaz, 1999 UT App 95, ¶ 18, 977 P.2d 533, 538.

David A. Thomas & James H. Backman on Utah Real Property Law, Easement by Necessity, § 12.02(b)(2)(ii), at 341 (ed. 2021).

Committee Notes

This instruction applies to cases based solely upon a claim of a way of necessity. Other easement claims will require proof of additional elements. *Tschaggeny v. Union Pac. Land Res. Corp.*, 555 P.2d 277, 280 (Utah 1976).

TAB 5

CV940 Easement by Implication. Introduction.

An easement by implication is an easement that can arise when a landowner divides property into two or more pieces (i.e., Parcel A and Parcel B) and transfers Parcel B away. The transfer of Parcel B to the new owner may include by implication all those apparent or visible easements over Parcel A which were used by the original landowner for the benefit of Parcel B before it was transferred to the new owner.

References

Tschaggeny v. Union Pac. Land Resources Corp., 555 P.2d 277, 280 (Utah 1976).

CV941 Easement by Implication. Elements.

To succeed on this claim, [Plaintiff] must prove by clear and convincing evidence each of the following elements:

- (1) All of the property was once owned by a single person who then divided the land and transferred away one tract of land;
- (2) At the time the property was divided, the use giving rise to the easement across the [retained/transferred] parcel for the benefit of the [transferred/retained] parcel was apparent, obvious, and visible;
- (3) The easement is reasonably necessary to the enjoyment of the [transferred/retained] property; and
- (4) The use giving rise to the easement was continuous rather than sporadic.

References

Bridge BLOQ NAC LLC v. Sorf, 2019 UT App 132, ¶ 24, 447 P.3d 1278, 1282.

Committee Notes

The Committee uses the terms “transferred” and “retained” in place of “dominant” and “servient.” In most cases, the easement would be across the retained parcel for the benefit of the transferred parcel, but it is conceivable that there are circumstances when the reverse could be true. Thus, those terms are placed in brackets. The meaning of the term “continuous” may depend on the factual circumstances of the case. The Committee therefore determined not to draft a separate definitional instruction. The parties may need to modify the fourth element depending on the factual circumstances of the case to elaborate on the meaning of the term “continuous.”

TAB 6

MUJI Civil Upcoming Queue:

Numbers	Subject	Members	Progress	Next Report Date
1000	Products Liability	Tracy Fowler, Paul Simmons, Nelson Abbott, Todd Wahlquist	Appeared on Agenda November 2021. Continuing to work and will report back.	2023
107A	Avoiding Bias	Judge Kelly, Judge Landau, Alyson McAllister, Doug Mortensen, Rachel Griffin, Ruth Shapiro, Marianna Di Paolo, Annie Fukushima	Approved in October 2022. Presented to Judicial Council November 2022. Discussed at December meeting. Went to Board of District Court Judges. Discussed at May meeting; approved for publication and public comment.	August 2023 (after public comment)
900	Easements and Boundary Lines	Adam Pace, Robert Cummings, Robert Fuller, Doug Farr	Finished Boundary by Acquiescence. Prescriptive Easement draft CV920-925 addressed at January, February, April, and May 2023 meetings. Easement by Necessity draft CV930-931 addressed at April 2023 meeting. Easement by Implication CV940-941 addressed at April and May 2023 meetings. Easement by necessity and implication are ready for a vote at the August meeting. Robert Fuller group to address Chris Hogle feedback re CV922 and 924 and other possible instructions at a future meeting (August).	August 2023
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	August 2023?
2400	Insurance	Andrew Wright, Richard Vazquez, Stewart Harman, Kigan Martinaeu	Appeared on Agenda March 2022. Currently 5 members – 3 defense, 2 plaintiffs. Will work on one more plaintiffs attorney.	?
	Unjust Enrichment	David Reymann	Stacy researching and following up on these instructions.	
1700	Abuse of Process	David Reymann	Instructions were shared in the past, were these completed? Marianna could only find notes as to intention to form this subcommittee.	
2700	Directors and Officers Liability	Adam Buck	Lauren has been working with Adam to fill this group and has reached out regarding a timeframe.	
2500	Wills / Probate	Matthew Barneck; Rustin Diehl	Matthew and Rustin have met to discuss direction and have started	

			reaching out to various recommendations – Elder law section, Probate Subcommittee, WINGS, recommended individuals.	
2300	Sales Contracts and Secured Transactions	Matthew Boley, Ade Maudsley	Matthew and Addie are willing to work on this topic and would like more feedback from the Committee.	
	Case law updates	TBD	Previous chairs or group leads may have feedback.	

Archived Topics:

Numbers	Subject	Completed
1500	Emotional Distress	December 2016
200 / 1800	Fault / Negligence	October 2017
1300	Civil Rights: Set 1 and 2	September 2017
1400	Economic Interference	December 2017
1900	Injurious Falsehood	February 2018
1200	Trespass and Nuisance	October 2019
100	Uniformity	February 2020
1600	Defamation Update	March 2022, December 2022
135	Pretrial Delay	December 2022, February 2023
107A	Avoiding Bias	May 2023