

Judicial Council Standing Committee on
Model Utah Civil Jury Instructions

Agenda

January 8, 2024

4:00 to 6:00 p.m.

Via [Webex](#)

Welcome and Approval of November Minutes	Tab 1	Alyson
Recording Secretary Vacancy		Alyson
Public Comments re: CV132A Remote Testimony (none); CV2021 Present Cash Value	Tab 2	Alyson
CV920-CV925 draft prescriptive easement instructions	Tab 3	Robert Cummings
Progress on Instruction Topics	Tab 4	(Informational)

[Committee Web Page](#)

[Published Instructions](#)

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

Next meeting: February 12, 2024

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TAB 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
November 13, 2023
4:00 p.m.

Present: Judge Keith A. Kelly, Lauren A. Shurman, Alyson McAllister, John Macfarlane, Stewart Harman, Douglas G. Mortensen, Ricky Shelton, Michael D. Lichfield, Jace Willard, Adam Wentz

Excused: William Eggington, Judge Kent Holmberg, Mark Morris

1. *Welcome*

Lauren Shurman welcomed the Committee.

2. *Approval of Minutes*

October meeting minutes approved.

3. Preview of new MUJI Website

Jace Willard shares updates and changes to MUJI website. Website should go live later this week.

4. Linguistics and Law Subcommittee Update

Judge Kelly summarized most recent meeting with the Linguistics and Law subcommittee.

5. Future Committee Schedule

Alyson McAllister suggested adjourning early since the Prescriptive Easement subcommittee was unavailable for today's meeting. The plan is to finish discussing the prescriptive easement instructions during the December meeting, assuming there is a quorum.

The Committee thanked those members who will be leaving at end of the year, including Judge Kelly, Judge Holmberg, and Lauren Shurman.

The meeting concluded at approximately 4:30 PM.

TAB 2

CV2021 Present cash value.

If you decide that [name of plaintiff] is entitled to damages for future economic losses, then the amount of those damages must be reduced to present cash value. This is because any damages awarded would be paid now, even though the plaintiff would not suffer the economic losses until some time in the future. Money received today would be invested and earn a return or yield.

To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely invested, will provide [name of plaintiff] with the amount of money needed to compensate [name of plaintiff] for future economic losses. In making your determination, you should consider the earnings from a reasonably safe investment.

References

Florez v Schindler Elevator, 2010 UT App 254 (Absence of life expectancy evidence does not preclude award of future medical costs as damages.)
Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc., 2004 UT App 322, 110 P.3d 710, cert. denied (Utah 2005).
Bennett v. Denver & Rio Grande Western R. Co., 213 P.2d 325 (Utah 1950).

MUJI 1st Instruction

27.11.

Committee Notes

Utah law is silent on whether inflation should be taken into account in discounting an award for future damages to present value. The United States Supreme Court, however, has ruled that inflation should be taken into account when discounting to present value. See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

Utah law is silent on whether plaintiff or defendant bears the burden of proving present cash value. Other jurisdictions are split. Some courts treat reduction to present value as part of the plaintiff's case in chief. See, e.g., *Abdulghani v. Virgin Islands Seaplane Shuttle, Inc.*, 746 F. Supp. 583 (D. V.I. 1990); *Steppi v. Stromwasser*, 297 A.2d 26 (Del. Super. Ct. 1972). Other courts treat reduction to present value as a reduction of the plaintiff's damages akin to failure to mitigate, on which the defendant bears the burden of proof. See, e.g., *Energy Capital Corp. v. United States*, 47 Fed. Cl. 382 (Fed. Cl. 2000), *aff'd in part, rev'd in part on other grounds*, 302 F.3d 1314 (Fed. Cir. 2002); *CSX Transp., Inc. v. Casale*, 441 S.E.2d 212 (Va.1994). There is a good discussion of the issue in *Lewin Realty III, Inc. v. Brooks*, 771 A.2d 446 (Md. Ct. Spec. App. 2001), *aff'd*, 835 A.2d 616 (Md.

2003), holding the burden to be on the defendant. It cites *Miller v. Union P.R. Co.*, 900F.2d 223, 226 (10th Cir.1990), as support.

There are several Utah cases holding that the burden is on the defendant to show that a damage award should be reduced, but they deal with failure to mitigate, not reduction to present value. See *Covey v. Covey*, 2003 UT App 380, 29, 80 P.3d 553; *John Call Eng'g, Inc. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah Ct. App. 1990).

[The Utah Court of Appeals has noted in dicta that, while having an expert testify as to the present value calculation of future economic damages is usually preferred, such expert testimony is not required. *Brinkerhoff v. Fleming*, 2023 UT App 92, ¶ 19 n.4.](#)

Expert testimony on annuities as relevant to present value of future damages is permitted. *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322, 110 P.3d 710, cert. denied (Utah 2005). Annuity tables and their related data also are permitted without expert testimony. See *Schlatter v. McCarthy*, 113 Utah 543, 196 P.2d 968 (1948). ~~But Utah law is silent on whether expert testimony, government tables or other evidence is necessary before a jury is charged to calculate present cash value. Other jurisdictions require evidence before the jury can be instructed to calculate present cash value. See *Schiernbeck v. Haight* 7 Cal.App.4th 869, 877, 9 Cal.Rptr.2d 716 (1992), citing *Wilson v. Gilbert*, 25 Cal.App.3d 607, 614, 102 Cal.Rptr. 31 (1972).~~

Public Comment on CV2021 Present Cash Value

The following public comment was edited somewhat, converting the proposed instruction change into a redline format to show how the present instruction would be modified by the proposal:

FROM: Daniel Day

Fri, Nov 10, 2023 at 11:57 AM

Good morning.

I am puzzled by the jury instruction on present cash value. It instructs the jury to “consider the earnings from a reasonably safe investment.” In preparing this instruction, the drafters have misunderstood the concept of the present value of future economic losses. The discount rate should be comparable to the risk associated with the particular future economic loss in question, which in most cases will have no relationship to a “reasonably safe investment.” Let’s take “earnings” for example. Earnings could be future lost wages or future business revenues for example. Compare the risks associated with future earnings with a reasonably safe investment such as an S&P index fund. The risk of an individual’s future wages or a business’s future earnings is very different from a reasonably safe investment. Having some experience in discounting future economic losses, I am of the opinion that the risks of a single individual’s future wages or a single business’s future revenue, for example, is substantially more risky than an S&P index fund or other reasonably safe investment. Individuals lose their jobs and sometimes suffer months of unemployment; they get sick and so forth. Businesses suffer setbacks and so forth beyond mere market risks. Accordingly, if the jury is being asked to discount a future earnings stream, for example, the discount rate should correspond to the riskiness of the specific income stream in question--not a reasonably safe investment. The discount rate for a single individual’s future wages, for example, should be considerably larger than a reasonably safe investment. As drafted, the jury instruction is fundamentally flawed. I would suggest the committee consult with a finance expert to draft language that will instruct the jury to discount the future economic losses based on the riskiness of the future economic losses in question. Also, there are many different types of future economic losses other than “earnings.” The instruction should not limit the future economic losses to “earnings.” I would suggest something like the following:

If you decide that [name of plaintiff] is entitled to damages for future economic losses, then the amount of those damages must be ~~reduced~~ discounted to present value. This is because any damages awarded would be paid now, even though the plaintiff would not suffer the economic losses until some time in the future. ~~Money received today would be invested and earn a return or yield.~~

~~To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely invested, will provide [name of plaintiff] with the amount of money needed to compensate [name of plaintiff] for future economic losses. In making your determination, you should consider the earnings from a reasonably safe investment.~~

The present value of a future economic benefit depends on how likely it is that the future economic benefit will actually be received. If the certainty of receiving the future economic benefit is 100%, then the present value of that future economic benefit would be the amount of that future economic benefit discounted only by the average rate of inflation. If the certainty of a future economic benefit is less than 100%, then the present value of that future economic benefit would be the amount of that future economic benefit discounted by the average rate of inflation plus some additional percentage rate to account for the uncertainty of the actual receipt of the future economic benefit. Accordingly, the present value of a specific future economic benefit is calculated by applying a discount rate based on how certain it was that plaintiff would have received the specific economic benefit in the future had defendant not caused the loss of that benefit. For example, if you believe plaintiff had a 100% certainty of actually receiving the future economic benefit, then to determine the amount of damages you will award to plaintiff, you should discount the amount of the future economic loss based on the average rate of inflation. If you believe plaintiff had less than a 100% certainty of actually receiving the future economic benefit, then to determine the amount of damages you will award to plaintiff, you must discount the amount of the future economic loss by a rate that reflects the riskiness of how uncertain it was that plaintiff would have received the specific economic benefit in the future.

I don't suppose it needs to be mentioned in the jury instruction, but the present value of future economic losses is a matter of expert opinion. In addition to requiring an expert's opinion about what the discount rate should be based on the riskiness of the future economic benefit, the calculation itself is way above the typical understanding of a layperson. Accordingly, the question of what the present value of a future economic loss is should not be presented to the jury for decision if expert evidence has not been admitted.

I hope this helps.

DANIEL L. DAY

TAB 3

CV920 “Easement” Defined.

An “easement” is a right to use or control land owned by another person for a specific limited purpose (such as to cross it for access [or insert other example]). An easement prohibits the landowner from interfering with the uses authorized by the easement.

[An express easement is an easement that the landowner grants to someone else in writing, such as in a contract or a deed.]

References

Black’s Law Dictionary (Abridged 7th ed.).

Committee Notes

The parties may include in the parenthetical a description of additional or other particular uses more specific to the facts of the case. Depending on the easement at issue, the easement may include an area above or below the surface of the land.

If there are additional types of easements, the jury may be instructed according to the particular easement. By including these instructions, the Committee does not intend to take a position on the question of whether a right to a jury trial exists for any particular easement claim.

CV921 Prescriptive Easement. Introduction.

A prescriptive easement is a legal right to continue to use property of another based on longstanding use.

References

Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998) (prescriptive easement).

CV922 Prescriptive Easement. Elements of a claim.

[Plaintiff] claims a prescriptive easement to continue to use [Defendant’s] property in the following manner: [describe the particular use]. To establish this prescriptive easement, [Plaintiff] must prove by clear and convincing evidence that for at least 20 years:

1. That [Plaintiff] has continuously used [Defendant’s] property for [describe the particular use];
2. That [Plaintiff’s] use of [Defendant’s] property in this manner was open and notorious; and
3. That [Plaintiff’s] use of [Defendant’s] property in this manner was adverse.

If you find that [Plaintiff] has proved each of these elements by clear and convincing evidence, then [Plaintiff] is entitled to a prescriptive easement to continue using [Defendant's] property for [describe the particular use].

References

M.N.V. Holdings LC v. 200 South LLC, 2021 UT App 76, ¶9, 494 P.3d 402.

Judd v. Bowen, 2017 UT App 56, ¶ 10, 397 P.3d 686, 692.

Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).

CV923 Prescriptive Easement. "Open and Notorious" Defined.

[Plaintiff's] use of [Defendant's] property was "open and notorious" if [Defendant] knew about the use, or if [Defendant] could have learned about the use through the exercise of reasonable diligence.

"Notorious" in this context does not mean a criminal act or some wrongdoing, but only that the use of the easement was carried out openly (that is, with notoriety) so that any person familiar with the property would be aware that the easement is being used.

References

Judd v. Bowen, 2017 UT App 56, ¶ 22, 397 P.3d 686, 694.

Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953).

Jensen v. Gerrard, 39 P.2d 1070, 1072 (1935).

<https://propertyrights.utah.gov/find-the-law/legal-topics/easements/>

CV924 Prescriptive Easement. "Adverse" Defined.

[Plaintiff's] use of [Defendant's] property was "adverse" if [Plaintiff] did not obtain permission for the use.

References

[*Zollinger v. Frank*, 175 P.2d 714, 716 \(Utah 1946\).](#)

[*Judd v. Bowen*, 2017 UT App 56, ¶ 25, 397 P.3d 686, 695.](#)

[*Jacob v. Bate*, 2015 UT App 206, ¶ 18, 358 P.3d 346, 353.](#)

CV925 Presumptions and Rebuttals. If you find [Plaintiff's] open and notorious use of [Defendant's] property continued for a period of twenty years, then you must presume that the use was adverse unless [Defendant] [rebutts this presumption, such as by proving that the use was permissive when the use first began or became permissive at some time during the twenty-year period.](#) ~~proves that [Defendant] [or a previous owner of [Defendant's] property] gave permission to [Plaintiff] for the use when it first began.~~

References

Harrison v. SPAH Family Ltd., 2020 UT 22, ¶¶31, 51, 466 P.3d 107, 118.

Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).

Zollinger v. Frank, 175 P.2d 714, 716 (Utah 1946).

Jacob v. Bate, 2015 UT App 206, ¶¶ 18-19, 358 P.3d 346, 353.

CV926 Prescriptive Easement. “Continuous” Defined.

[Plaintiff’s] use of [Defendant’s] property was continuous if [Plaintiff] used [Defendant’s] property as often as required by the nature of the use and [Plaintiff’s] needs, for an uninterrupted period of at least twenty years.

A prescriptive use is not continuous where, sometime during the twenty-year period:

- (1) [Plaintiff] stops using [Defendant’s] property;
- (2) [Defendant] [or a previous owner of [Defendant’s] property] prevents [Plaintiff] from using the property; or
- (3) [Plaintiff] accepts permission from [Defendant] [or a previous owner of [Defendant’s] property] to continue using the property.

References

SRB Inv. Co., Ltd v. Spencer, 2020 UT 23, 463 P.3d 654.

Harrison v. SPAH Family Ltd., 2020 UT 22, ¶¶ 31, 41-43, 466 P.3d 107, 116-17.

Valcarce v. Fitzgerald, 961 P.2d 305, 311 (Utah 1998).

Marchant v. Park City, 788 P.2d 520, 524 (Utah 1990).

Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953).

Zollinger v. Frank, 175 P.2d 714, 716 (Utah 1946).

Jensen v. Gerrard, 39 P.2d 1070, 1073 (Utah 1935).

M.N.V. Holdings LC v. 200 South LLC, 2021 UT App 76, ¶¶ 14-15, 494 P.3d 402, 407-08.

Judd v. Bowen, 2017 UT App 56, ¶ 16, 397 P.3d 686, 693.

Jacob v. Bate, 2015 UT App 206, ¶ 27, 358 P.3d 346, 355.

Committee Notes

For the definition of clear and convincing, *see* CV118.

TAB 4

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.	2024
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 were approved at the July meeting. Robert Fuller and Robert Cummings addressed Chris Hogle feedback re prescriptive easement CV922 and 924 at Sept. meeting. Robert Cummings will draft and circulate to his group new CV925 instruction to be presented at Nov. meeting.	Jan. 2024
1700	Assault / False Arrest	Mitch Rice, David Cutt, Andrew Wright, Alyson McAllister	Mitch is circulating instructions with the group and will report back.	Feb. 2024
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 was 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.	
	Linguistics and Law	Bill Eggington, Judge Kelly, John Macfarlane, Michael Lichfield, Robert Cummings, Clark Cunningham, Jesse Egbert, Scott Jarvis	Identifying instructions in need of plain-language adjustments	

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
632, 632A-632D	Minimum Injury Requirements Update and New	October 2023
132A	Remote Testimony	October 2023
2021	Present Cash Value Update	October 2023