Agenda
Advisory Committee on Model Civil Jury Instructions

April 14, 2014
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	Alison Adams-Perlac
Alternative treatment methods.	Tab 2	Committee Medical Malpractice Attorneys
Punitive Damages Instructions	Tab 3	Rich Humpherys

Committee Web Page

Published Instructions

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

May 12, 2014
June 9, 2014
September 8, 2014
October 14, 2014 (Tuesday)
November 10, 2014
December 8, 2014

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
March 10, 2014
4:00 p.m.

Present: John L. Young (chair), Alison Adams-Perlac, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, Peter W. Summerill. Also present: Jack Ray

Excused: Tracy H. Fowler, John R. Lund, Ryan M. Springer, Honorable Andrew H. Stone

1. *CV301B. "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.* Mr. Carney reviewed the prior discussions and history of CV301B and CV324. Mr. Ferguson reported that his subcommittee (Mr. Ferguson, Ms. Blanch, and Ms. Adams-Perlac; Mr. Springer was not there) decided to move CV326 into CV301B and added the following language: "The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute." Mr. Carney noted that a party cannot argue "alternative treatment methods" under CV324 just because the experts may disagree on what the standard of care is. Mr. Ferguson noted that the subcommittee did not use CV136 ("conflicting testimony of experts") as a reference. It also did not use CV129 ("statement of opinions"), which allows the jury to ignore expert opinions, because jurors cannot ignore all expert testimony on the standard of care in a medical malpractice or other professional liability case. Mr. Summerill noted that the phrase "skill ordinarily used by other qualified [providers/doctors]" in the first paragraph was problematic. Mr. Ray added that the legal standard is an objective, reasonableness standard and that the level of skill "ordinarily used" by other providers may not meet this objective standard. He proposed the following language, based on *Schaerrer v. Stewart's Plaza Pharmacy, Inc.*, 2003 UT 43, ¶ 35, 79 P.3d 922: "the reasonable degree of skill, care, and knowledge that would be exercised by a reasonably prudent [provider] in the same situation." Mr. Carney agreed with Mr. Ray and raised another issue, namely, whether the locality rule was still alive. The court held that it did not apply to "specialists" in *Jenkins v. Parrish*, 627 P.2d 533 (Utah 1981), but alluded to the rule in a later case. The committee agreed that it is seldom argued any more.

Ms. Blanch and Dr. Di Paolo joined the meeting.

Mr. Carney asked whether the instructions should refer to "medical negligence" or "medical malpractice." Messrs. Ray and Summerill noted that they have had potential clients say, in explaining their claim, that they did not know if the defendant's conduct was malpractice or just negligence, as if they were different. Dr. Di Paolo said that "malpractice" sounds much worse than "negligence." Mr. Young suggested adding a committee note recommending that the court clarify that medical negligence and medical malpractice are the same thing. Mr. Ray thought that "medical negligence" is

appropriate, since the standard is a negligence standard. Mr. Ferguson noted that we don't say that a negligent driver is guilty of vehicular malpractice. Mr. Humpherys asked whether "malpractice" should be purged from all the jury instructions. Mr. Summerill noted that CV302 refers to "nursing negligence," whereas CV301B refers to "medical malpractice." Mr. Carney noted that CV302 on the nursing standard of care should be revised to track any changes to CV301. Judge Harris thought that the instruction should tell the jury that the terms mean the same thing. Mr. Humpherys was concerned that using "malpractice" at all will taint "medical negligence." Mr. Carney noted that the verdict form just refers to "fault." Dr. Di Paolo suggested using both terms ("malpractice" and "negligence") every time one is used. Mr. Young suggested a separate introductory instruction to dispose of the issue at the beginning. Dr. Di Paolo suggested asking on the verdict form, "Did [name of defendant] violate the standard of care?" It was noted that "fault" encompasses both breach of the standard of care and causation, yet the verdict form asks both whether the defendant was at fault and whether the defendant's fault was a cause of the plaintiff's harm. Mr. Simmons suggested revising CV301B to read:

> **CV301B Elements of a medical negligence claim**
>
> To establish [his] [her] claim, [name of plaintiff] has the burden of proving two things:
>
> 1. That [name of defendant] breached the standard of care, and
>
> 2. That the breach was a cause of [name of plaintiff]'s harm.

Then a separate instruction (CV301C) could define "standard of care":

> **CV301C "Standard of care" defined.**
>
> A [health care provider/doctor] is required to use that degree of learning, care, and skill used by reasonably prudent [providers/doctors] in good standing practicing in the same [specialty/field] under the same or similar circumstances. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as either medical negligence or medical malpractice. The terms mean the same thing.
>
> To establish a breach of the standard of care, [name of plaintiff] has the burden of proving–
>
> 1. What the standard of care is, and
>
> 2. That [name of defendant] failed to follow the standard of care.

> The standard of care is established through expert witnesses and other evidence. You may not use a standard based on your own experience or any other standard of your own. It is your duty to decide, based on the evidence, what the standard of care is. The expert witnesses may disagree as to what the standard of care is and what it requires. If so, it will be your responsibility to determine the credibility of the experts and to resolve the dispute.

Judge Harris noted that *Schaerrer* says that a health-care professional is required to "possess and exercise" the requisite care and asked if the instruction loses anything by saying simply "use." The committee thought not. They thought that as long as a defendant used the requisite care in the particular case, he would not liable even though he otherwise may not possess all the care exercised by reasonably prudent providers. Mr. Simmons asked what other "evidence" could establish the standard of care besides expert testimony, since even learned treatises or medical journals must come in through an expert. Mr. Ferguson pointed out that the standard can also be established by judicial notice or stipulation. The committee also noted that res ipsa loquitur can apply in a medical malpractice case. Mr. Summerill suggested adding to the committee note that a plaintiff does not have to establish the standard of care in a res ipsa loquitur case. Mr. Ray noted that the part of CV301B that listed the plaintiff's allegations raises questions, such as, must the plaintiff prove that the defendant failed to follow the standard of care in all respects listed? Must the jury agree on the same items? What if, for example, three jurors think the defendant breached the standard of care with respect to issue (1), two thought he did with respect to issue (2), and three thought he did with respect to issue (3)? All eight jurors agree that the defendant breached the standard of care, but there is no majority that agrees on any specific breach. The committee decided to delete the paragraph, since it raises more questions than it answers. The last paragraph of old CV301B was moved to the beginning of CV309, "Cause" defined, and the phrase "in any of these respects" was deleted from it. The committee approved CV301B, CV301C, and CV309 as revised.

2. *CV324. Use of alternative treatment methods.* Mr. Carney raised two questions regarding an alternative treatment instruction: (1) is it ever appropriate? and (2) if so, what form should it take? Mr. Ferguson's subcommittee proposed a revised CV324 that treated it as an affirmative defense. Mr. Ray thought the instruction created a legal doctrine that does not exist in Utah. He thought the committee was trying to salvage something that should not exist. Mr. Summerill thought it was argument and should not be presented as a court-sanctioned theory. Ms. Blanch thought it was not the committee's job to invalidate instructions that have not been invalidated by the Utah Supreme Court. Other committee members thought it was not the committee's job to perpetuate instructions that were not based on Utah law. Ms. Adams-Perlac said the committee's job is to get rid of bad instructions. Mr. Young noted that if there is no Utah law supporting an instruction, we should not be using it. Mr. Summerill noted that

CV301A says that the committee considered instructions on certain claims (such as loss of chance) but did not include them because there is no clear appellate authority on whether those claims exist in Utah. Mr. Carney thought that part of the committee's job is to help judges and attorneys and provide guidance where Utah law may not be clear. Mr. Simmons said he had an analytical problem with CV324 as revised. He thought that it invited inconsistent verdicts, because, before the jury could reach the question of alternative treatment methods as an affirmative defense, it first had to find that the defendant breached the standard of care, for example, by his choice of treatment methods or his application of the method under the circumstances of the case. If it decided that the defendant breached the standard of care but then decided that the defendant was not liable because he used a method that was "approved by a respectable portion of the medical community," that would mean that a negligent defendant could escape liability. The instruction in effect gives the defendant a "Get Out of Jail Free" card. Dr. Di Paolo thought that the concept was already covered in the standard-of-care instructions and thought that a committee note could be added to CV301B or 301C to explain the absence of the instruction. Mr. Carney noted that no one from the medical malpractice defense bar was at the meeting and said he was not comfortable proceeding in their absence. Ms. Adams-Perlac said that she had not sent them a notice of the meeting. Mr. Carney notified them the day of the meeting, but that may not have been sufficient time. Mr. Young suggested tabling the discussion. Mr. Humpherys thought that any decision should be based on a sound foundation, whether anyone was present to represent a particular side or not, and asked if anyone was advocating that there is Utah law to support CV324. He also suggested asking the defense bar to draft a comment on their position if the committee decides to eliminate CV324. Judge Harris suggested leaving CV324 in but using the strike-out feature on it. Further discussion was deferred until the next meeting.

3. *Committee Membership*. David E. West has resigned from the committee.

4. *Next Meeting*. The next meeting will be Monday, April 14, 2014, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Tab 2

Use of alternative treatment methods

(1) 324. Use of alternative treatment methods.

When there is more than one method of [diagnosis/treatment] that is approved by a respectable portion of the medical community, and no particular method is used exclusively by all providers, it is not medical malpractice for a provider to select one of the approved methods, even if it later turns out to be a wrong selection, or one not favored by some other providers. The provider has the burden to prove that the method used is approved by a respectable portion of the medical community.

References

Cf. Butler v. Naylor, 1999 UT 85, 987 P.2d 41 (even if the evidence did not support giving this instruction, it was harmless error to do so, because the jury could have found for the defendant on other grounds).

Turner v. University of Utah Hospitals and Clinics, 2011 UT App 431, rev'd 2013 UT 52.

MUJI 1st Instruction

6.29

Committee Notes

This instruction is currently under further review in light of Turner v. University of Utah Hospitals and Clinics, 2013 UT 52.

This instruction is slightly modified from MUJI 1st 6.29. The committee agreed on deleting the "best judgment" language from the instruction, as that inappropriately suggested a subjective standard of care might be followed; that is, what defendant "thinks best," whether it is within the standard of care or not.

This instruction should only be used when a proper foundation is laid for it, namely, that the "alternative method" is shown by defendant to be used by something more than a small minority of doctors, but not necessarily the majority. In other words, the defendant must show that the challenged treatment enjoys such substantial support within the medical community that it truly is "generally" recognized. See Peters v. Vander Kooi, 494 N.W.2d 708 (Iowa 1993); Bickham v. Grant, 861 So.2d 299 (Miss. 2003); Velazquez v. Portadin, 751 A.2d 102 (N.J. 2000); Yates v. University of W. Va. Bd. of Trustees, 549 S.E.2d 681(W. Va. 2001); R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instruction 3-38, cmt. 3 (LexisNexis, 6th ed. 2007).

The drafting subcommittee was not unanimous in its approval of this instruction, so counsel and the trial court should review it with caution. Some thought that it is inappropriate to instruct a jury that a doctor is "not negligent" if he uses an approved

method, but that this is simply one factor to consider in determining whether the provider met the standard of care.

Some members of the committee expressed concerns regarding this instruction, and these concerns are summarized as:

First, no Utah authority recognizes the appropriateness of this instruction, and Butler v. Naylor did not question the propriety of giving the "alternative methods" instruction. Rather, appellant only challenged the instruction on the basis that the “evidence failed to establish that the surgical procedure used [was] recognized by a respectable portion of the medical community.” Butler v. Naylor, 1999 UT 85 at & 19, 987 P.2d 41. Butler avoided any detailed examination of the instruction “because [the instruction] presents only one of several theories upon which the jury could have relied in finding for [Defendant].” Id. at & 20. Accordingly, the court offered no direct endorsement or rejection of the instruction as an accurate statement of the law. At best, Butler is ambiguous about whether the instruction reflects the state of the law in Utah.

Second, the instruction is inconsistent with Utah law defining medical malpractice and standard of care. We tell jurors that a health care provider is required to use the same degree of learning, care, and skill ordinarily used by other qualified providers in good standing practicing in the same. This instruction, however, then tells the jurors that “it is not negligence” if more than one method exists, effectively eliminating any requirement that a physician exercise that degree of learning, care and skill ordinarily used

The bare existence of more than one method automatically excuses the physician because “it is not medical malpractice” to choose one method over another, thereby alleviating the physician of their duty to exercise any degree of learning, care or skill ordinarily used in the field. Under this instruction, the physician becomes “not negligent” simply by the existence of alternative methods without needing to exercise any judgment or care whatsoever in choosing the method.

This ignores whether one method may be safer, more effective, or carry less risk of complication. Instead, it simply says that if there is more than one method and the method is “accepted by a respectable portion of medical community,” it is not malpractice to choose one over the other. Clearly, this cannot be the law of medical negligence where every practitioner must exercise their skill, learning and professional care in treating patients.

Tab 3

Punitive Damages

(1) 2026. Purpose of punitive damages.

Punitive damages are intended to punish a wrongdoer for some extraordinary misconduct and to serve as a deterrent to others. They are not intended to compensate the plaintiff.

Authority: *State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408, 416 (2003) (punitive damages are intended to punish and deter, in contrast to compensatory damages, which "are intended to redress the concrete loss that Plaintiffs have suffered by reason of the defendant's wrongful conduct" (citation omitted)); *BMW of N. Am. Inc. v. Gore,* 517 U.S. 559, 568 (1996) (punitive damages are imposed to punish unlawful conduct and deter its repetition); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 19-20 (1991).

References

State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

BMW of N. Am. Inc. v. Gore, 517 U.S. 559, 568 (1996).

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19-20 (1991).

Committee Notes

(2) 2027. Requirements for punitive damages.

You may award punitive damages if the [name of plaintiff] has proved by clear and convincing evidence that the acts or omissions of [name of defendant] were the result of

[[willful and malicious] [intentionally fraudulent] conduct] [conduct that manifested a knowing and reckless indifference toward and a disregard of the rights of others]. Whether or not to award punitive damages is left entirely up to you.

Comment: *See* MUJI 2nd _____ regarding definition of clear and convincing.

References

Utah Code § 78B-8-201(1)(a).

Committee Notes

(3) 2028. Amount of punitive damages.

If you decide to award punitive damages, the amount must be reasonable and proportionate to the harm to [name of plaintiff] as a result of conduct by [name of defendant] that you find caused [name of plaintiff]'s injuries. The amount of punitive damages may not be arbitrarily selected but should be in an amount necessary to fulfill the two purposes of punitive damages—to punish past misconduct and to deter future misconduct.

Authority: *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003) ("[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to Plaintiffs and to the general damages recovered."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580-83 (1996) ("The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on Plaintiffs."); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.* 532 U.S. 424, 440-42 (2001) (punitive damage award must bear reasonable relation to the amount of "actual injury" from specific misconduct at issue).

References

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-83 (1996).

Cooper Indus., Inc. v. Leatherman Tool Group, Inc. 532 U.S. 424, 440-42 (2001).

Committee Notes

(4) 2029. Punitive damages.

In determining the amount of punitive damages, if any, that is necessary to achieve the proper level of punishment and deterrence, you may not award any punitive damages for the purpose of punishing [name of defendant] for its conduct in states other than [forum state] or for the purpose of changing [name of defendant]'s conduct outside of [forum state].

Authority: *State Farm Mut. Auto. Ins. Co. v. Campbell*, No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred;" "[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 570-75 & 585 (1996) ("While each State has ample power to protects its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the entire Nation.").

References

State Farm Mut. Auto. Ins. Co. v. Campbell, No. 01-1289, 2003 WL 1791206, at *9 (U.S. Apr. 7, 2003).

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 570-75 & 585 (1996).

Committee Notes