

**AGENDA
ADVISORY COMMITTEE
ON MODEL CIVIL JURY INSTRUCTIONS**

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Council Room, Suite N31

April 11, 2005
4:00 to 6:00 p.m.

Welcome and approval of minutes	John Young
1.102. Role of the judge, jury and lawyers.	Frank Carney
1.401. Burden of proof.	Tim Shea
1.402. Preponderance of the evidence.	Tim Shea
2.102. "Negligence" defined.	Tim Shea
2.105. Standard of care of children.	Paul Belnap Jonathan Jemming
2.107. Abnormally dangerous activity.	Frank Carney
2.108. Amount of care required in controlling electricity.	Frank Carney
2.101. "Fault" defined. (2 alternatives)	Frank Carney Tim Shea
2.109 "Legal cause" defined. (2 alternatives)	Frank Carney Tim Shea
2.110. Allocation of fault.	Frank Carney
2.111. Comparative fault.	Frank Carney
2.112. Violation of a safety law.	Tim Shea

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00, Judicial Council Room

May 9, 2005
June 13, 2005
July 11, 2005
August 8, 2005

September 12, 2005
October 17, 2005 (3rd Monday)
November 14, 2005
December 12, 2005

Committee Web Page: <http://www.utcourts.gov/committees/muji/>

MINUTES

Advisory Committee on Model Civil Jury Instructions

February 14, 2005

4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons

Excused: Ralph L. Dewsnup, Colin P. King

1. *Minutes*. On motion of Mr. Carney, seconded by Judge Barrett, the committee approved the minutes of the January 10, 2005, meeting.

2. *Draft Instruction on the Role of Attorneys*. Mr. Carney presented a proposed instruction drafted by Rob Clark of the court's advisory committee on professionalism discussing attorneys' ethical duties. Several committee members thought the instruction would create in the minds of jurors an expectation that the attorneys would not act professionally. Dr. Di Paolo asked what jurors would be expected to do with the information and suggested that it left too many possibilities for jurors to come up with impermissible inferences. Judge Barrett recommended limiting the instruction to the second paragraph. Mr. Carney suggested adding the second paragraph to existing instruction 1.102 on the role of the judge, jury and lawyers.

Mr. Shea will add the second paragraph of the proposed instruction to the end of the fourth paragraph of instruction 01.102 so that the committee can see the proposed language in context.

3. *Draft Preliminary and General Instructions*. The committee continued its review of the draft preliminary and general instructions:

a. *01.401. Burden of Proof*. Mr. Humpherys asked how the instruction was to be used and whether it would have to be repeated with the instructions on each element of the parties' claims and defenses. Mr. Ferguson envisioned the instruction as a general instruction on the burden of proof to be given with a general statement of the nature of the case and the parties' claims. It was meant as a roadmap of the parties' claims and defenses and not a complete statement of every element. Mr. Young suggested that the purpose of the instruction be explained in a note. Mr. Fowler suggested that the instruction indicate that the court will instruct the jury more fully on the parties' claims and defenses at the end of the case. Mr. Simmons questioned whether the instruction accurately stated the law, since the preponderance of the evidence is to be determined by all of the evidence, regardless of who may have produced it. Mr. Shea suggested revising the first sentence to read: "When I use the term 'burden of proof,' it means that the party must persuade you by a preponderance of the evidence."

b. *01.402. Preponderance of the Evidence.* The committee discussed the third paragraph of the proposed instruction. Dr. Di Paolo suggested that the second sentence read, "It is how convincing the evidence is and not just how much evidence there is." The committee suggested that this sentence replace both the second and third sentences of the third paragraph. Mr. Ferguson noted that the quantity of evidence may matter; the more evidence there is on a certain point, the more convincing the evidence on that point may be. Mr. Simmons suggested adding the following language from MUJI 2.18: "The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the convincing character of the testimony." Dr. Di Paolo suggested reversing the order of the last two sentences of the third paragraph.

Mr. Shea will redraft instruction 01.402 in accordance with the committee's suggestions.

c. *01.403. Clear and Convincing Evidence.* Mr. Simmons asked how "no serious or substantial doubt" differed from "beyond a reasonable doubt" and suggested that "highly probable" may be more accurate than "no serious or substantial doubt." Mr. Fowler suggested that the comparison to the criminal standard contained in instruction 01.402 may have to be repeated in instruction 01.403 if "clear and convincing" were the only standard of proof in a case. The committee could not think of a situation where that might be the case. The committee approved the instruction as drafted.

d. *02.105. Standard of Care of Children.* Mr. Jemming explained that Utah does not follow the tri-partite approach of presuming children in certain age categories capable or incapable of negligence. It is not clear, however, whether children below a certain age (such as age 7) are incapable of negligence as a matter of law. The proposed instruction adopts the standard of care under the Restatement, which is that of children of a similar age. The proposed note explains that there is an exception for children engaged in adult activities.

Mr. Belnap was excused.

e. *02.103. Standard of Care of the Physically Disabled.* Mr. Jemming thought that the first sentence of the proposed instruction was misleading, that the standard is not a diminished standard but simply reasonable care under the circumstances, with the actor's disability being one of the circumstances the jury may consider. Dr. Di Paolo noted that having a separate instruction on the standard of care for the physically disabled suggests that the standard is a lesser standard. Mr. Humpherys asked what qualifies as a disability. The committee agreed that mental disabilities are treated differently from physical disabilities and may not excuse a negligent actor even if his negligence was the result of a mental problem. Mr. Carney read a comment from the

Restatement that confirmed the points the committee had made. Mr. Shea noted that the disability must be relevant to the conduct in question. Mr. Young asked whether the jury must make a preliminary finding of disability. He also suggested that the committee note say that there are no Utah cases on point. Ms. Blanch suggested omitting the instruction altogether and allowing the parties to argue whether or not a disabled person was negligent from the general negligence instruction.

Mr. Shea will redraft the instruction as part of the general negligence instruction, using a physical disability as an example of one of the circumstances the jury may consider in determining whether the actor was negligent.

f. *Abnormally Dangerous Activities.* Mr. Carney presented a revised proposed instruction on abnormally dangerous activities. He noted that, under Utah law, there is strict liability for abnormally dangerous activities. Mr. Humpherys asked whether the court or the jury was to apply the factors listed in the instruction to determine whether an activity is abnormally dangerous. Mr. Simmons thought the question was one of law for the court to decide; otherwise, different people could be held to different standards for the same activity, depending on the decision of the particular juries that heard the evidence. Mr. Carney noted that a comment to section 520 of the Restatement (Second) of Torts says that it is a question of law. The committee suggested putting the factors (a through f) in a comment for the court to consider. Dr. Di Paolo noted that “strict liability” needs to be explained to the jury.

Mr. Carney will revise the instruction.

4. *Next Meeting.* The next meeting will be Monday, March 14, 2005, at 4:00 p.m.

The meeting concluded at 5:30 p.m.

01.102. Role of the judge, jury and lawyers.

I, you, and the lawyers are all officers of the court and play important roles in the trial.

It's my role to decide all legal questions, supervise the trial and instruct you on the law that you must apply.

It's your role to follow that law and to decide what the facts are. The facts generally relate to who, what, when, where, how or how much and must be supported by the evidence.

It's the lawyers' role to present evidence, generally by calling and questioning witnesses and presenting exhibits. Each lawyer will also try to persuade you to decide the case in favor of his or her client. Lawyers have ethical duties that apply to their conduct. You may observe that professionalism and civility enhance the lawyer's effectiveness, and that lack of professionalism and lack of civility have the opposite effect.

Neither the lawyers nor I actually decide the case. That is your role. You should decide the case based upon the evidence presented in court and the instructions that I give you.

MUJI 1st Reference.

01.05; 02.02; 02.05; 02.06.

References.

Advisory Committee Notes.

Staff Notes.

Status: Reviewed.

01.401. Burden of proof.

When I instruct you that a party must prove something or that a party has the burden of proof, it means that the party must persuade you by [a preponderance of the evidence] [clear and convincing evidence] of the following:

[List the elements of the claim or defense.]

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

MUJI 1st Reference.

02.16.

References.

Advisory Committee Notes.

The judge may give the instructions on the burden of proof and standards of proof at the start of the trial to introduce the jurors to the concepts by which they will evaluate the evidence. At the beginning of the trial, however, the description of the claims and defenses must necessarily be general because the evidence has not yet been introduced.

Staff Notes.

Status: Reviewed.

01.402. Preponderance of the evidence.

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

You may have heard that in a criminal case proof must be beyond a reasonable doubt, but I must emphasize to you that 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.

Another way of saying this is proof by the greater weight of the evidence. 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 testimony. In weighing the evidence, you should consider all the evidence that applies to a fact, no matter which party presented the evidence. 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 the evidence regarding a fact is evenly balanced, then you must find that the fact has not been proved. On the other hand, if you decide that a fact is more likely true than not, then you must find that the fact has been proved.

MUJI 1st Reference.

02.18.

References.

Morris v. Farmers Home Mut. Ins. Co., 500 P.2d 505 (Utah 1972).
Alvarado v. Tucker, 268 P.2d 986 (Utah 1954).

Advisory Committee Notes.

Staff Notes.

From MUJI 1st 2.18: "The preponderance of the evidence is not determined by the number of witnesses, nor the amount of the testimony, but by the convincing character of the testimony."

Status: Reviewed.

02.102. "Negligence" defined.

We all have a duty to use reasonable care to avoid injuring others. Negligence means that a person did not use reasonable care. Reasonable care is simply what a reasonably careful person would do in a similar situation. A person may be negligent in acting or in failing to act.

The amount of care that is reasonable depends upon the situation. Ordinary circumstances do not require extraordinary caution. But some situations require more care because a reasonably careful person would understand that more danger is involved.

You must decide whether [names of persons on the verdict form] were negligent by comparing their conduct with that of an reasonably careful person in a similar situation.

To be added if the physical condition of one or more of the actors is relevant to determining negligence:

A person with a physical disability is held to this same standard of care. However, you may consider [name of person]'s disability among all of the other circumstances when deciding whether his conduct was reasonable. In other words, a physically disabled person must use the care that a reasonable person with a similar disability would use in a similar situation.

MUJI 1st Reference.

03.02; 03.05; 03.06.

References.

Mitchell v. Pearson Enters., 697 P.2d 240 (Utah 1985).
Meese v. BYU, 639 P.2d 720 (Utah 1981).

Advisory Committee Notes.

The standard of care for the physically disabled should be distinguished from the standard for the mentally disabled. Under REST 2d Torts § 283C "[i]f the actor is ill or otherwise physically disabled, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under the disability." This is not necessarily a diminished standard, but is subjective in that a party's circumstances, i.e. their physical disability, must be considered in determining whether the actor breached the standard of care.

However, a different approach exists for the mentally disabled. Under REST 2d Torts § 283B "[u]nless the actor is a child, his insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of

a reasonable man under like circumstances." Cited in *Birkner v. Salt Lake County, et al.*, 771 P.2d 1053 (Utah 1989). While *Birkner* also appears to create a distinction in cases involving either "primary" or comparatively negligent mentally impaired actors, the distinction is factually specific and appears limited to the narrow context of conduct between a therapist and a patient with limited mental impairment. *Id.* at 1060.

Staff Notes.

Status: Approved, except for final paragraph and Notes.

02.105. Standard of care of children.

You must decide whether a child aged _____ was negligent. A child is not judged by the adult standard. Rather, a child is negligent if he does not use the amount of care that is ordinarily used by children of similar age, intelligence, knowledge or experience in similar circumstances.

MUJI 1st Reference.

None.

References.

Donohue v. Rolando, 16 Utah 2d 294, 296-297, 400 P.2d 12,14 (1965).
Restatement (Second) of Torts § 283A (1965).
Restatement (Third) of Torts § 8 (1999).

Advisory Committee Notes.

This instruction should not be given if the child is engaged in an 'adult' activity. See *Summerill v. Shipley*, 890 P.2d 1042, 1044 (Utah Ct. App. 1995).

It is unclear whether this instruction should be given if the child is less than seven years old. In *S.H. By and Through Robinson v. Bistrski*, the Utah Supreme Court states that children under the age of seven are legally incapable of negligence. 923 P.2d 1376, 1382 (Utah 1996)(citing *Nelson v. Arrowhead Freight Lines Ltd.*, 104 P.2d 225, 228 (Utah 1940)). However, given the backdrop of additional Utah case-law that is left un-addressed by *Bistrski*, combined with its factually specific nature, it is unclear whether a presumption that children under seven years old are wholly incapable of negligence exists in Utah.

Staff Notes.

Status: Reviewed.

02.107. Abnormally dangerous activity.

One who carries on an abnormally dangerous activity is strictly liable for harm resulting from that activity. I have determined that [name of defendant]'s activity was abnormally dangerous. Therefore, you should award all damages that were legally caused by the activity, whether or not [name of defendant] exercised reasonable care.

MUJI 1st Reference.

03.08.

References.

Walker Drug Co., Inc. v. La Sal Oil Co., 902 P.2d 1229, 1233 (Utah 1995)
Branch v. Western Petroleum, 657 P.2d 267, 273 (Utah 1982)
Robison v. Robison, 394 P.2d 87, 877 (Utah 1964)
Restatement (Second) of Torts §520 (1976); Restatement (Third) of Torts §20
(Tentative Draft No. 1)

Advisory Committee Notes.

Staff Notes.

Status: Reviewed.

02.108. Amount of care required in controlling electricity.

Power companies and others who control power lines and power stations must use extra care to prevent people and their equipment from coming in contact with high-voltage electricity. The greater the danger, the greater the care that must be used.

MUJI 1st Reference.

03.09.

References.

Lish v. Utah Power & Light Co., 493 P.2d 611 (Utah 1972).

Brigham v. Moon Lake Elec. Ass'n, 470 P.2d 393 (Utah 1970).

See also, Burningham v. Utah Power & Light, 76 F. Supp. 2d 1243 (D. Utah 1999)
(no duty owed to trespasser on power pole.)

Advisory Committee Notes.

Staff Notes.

Status: Reviewed.

02.101. “Fault” defined.

You must decide whether [names of persons on the verdict form] were at fault. As used in these instructions and in the verdict form, the word “fault” has special meaning. Someone is at fault if:

- (1) that person’s conduct gave rise to a claim for [insert applicable causes of action];
- and
- (2) that person’s conduct was the legal cause of [name of plaintiff]’s harm.

I will now explain what these terms mean.

MUJI 1st Reference.

03.01.

References.

Utah Code Sections 78-27-37(2); 78-27-38; 78-27-40.
Haase v. Ashley Valley Medical Center, 2003 UT 360.
Bishop v. GenTec, 2002 UT 36.
Biswell v. Duncan, 742 P.2d 80, (Utah Ct. App. 1987).

Advisory Committee Notes.

“Fault” under the Comparative Negligence Act includes negligence in all its degrees, comparative negligence, assumption of risk, strict liability, breach of express or implied warranty of a product, products liability, and misuse, modification, or abuse of a product.

This instruction should be followed by those defining the specific duty (for example, negligence) and the instruction on legal cause.

Staff Notes.

See proposed instruction 2.101a, which in essence is the same as this instruction, only omitting the first sentence of paragraph 2 as obsolete under the Comparative Negligence Act.

Renumber so that this instruction immediately precedes the instruction on legal cause.

Status: Reviewed.

02.101a "Fault" defined.

When I say that you must decide whether a person was at fault, I mean that you must decide whether that person's [failure to] act was the legal cause of [name of plaintiff]'s injury.

MUJI 1st Reference.

03.01.

References.

Utah Code Sections 78-27-37(2); 78-27-38; 78-27-40.
Haase v. Ashley Valley Medical Center, 2003 UT 360.
Bishop v. GenTec, 2002 UT 36.
Biswell v. Duncan, 742 P.2d 80, (Utah Ct. App. 1987).

Advisory Committee Notes.

Under Utah Code Section 78-27-37(2) "fault" means:

- (1) any actionable breach of a legal duty proximately causing or contributing to the injury;
- (2) any act proximately causing or contributing to the injury; and
- (3) any omission proximately causing or contributing to the injury.

The first of these is merely a restatement of four of the elements of most civil liability claims: duty; breach; causation; damages. The second two include any act or omission that is the proximate cause of the injury, whether actionable or not. That is, whether the act or omission is a breach of duty or not. Any act or omission that is a breach of duty giving rise to a cause of action will also qualify as fault under the broader terms of items (2) or (3), rendering the actionable-breach-of-duty clause mere surplusage.

All three items require proximate cause - that is, what these instructions label "legal cause." Legal cause includes actual cause, which in turn requires an act or omission. Therefore, under the Comparative Negligence Act, "fault" means "legal cause."

This instruction should be followed by those defining the specific duty (for example, negligence) and the instruction on legal cause.

Staff Notes.

Renumber so that this instruction immediately precedes the instruction on legal cause.

Status: Not Reviewed.

02.109 “Legal cause” defined.

If you decide that the conduct of a person named on the verdict form was [insert applicable cause of action], you must then decide whether that conduct was a legal cause of [name of plaintiff]’s harm. For the conduct to be a legal cause of harm, you must decide that all of the following are true:

- (1) there was a cause and effect relationship between the conduct and the harm;
- (2) the conduct played a substantial role in causing the harm; and
- (3) a reasonable person could foresee that harm could result from the conduct.

There may be more than one legal cause of the same harm.

MUJI 1st Reference.

03.13; 03.14; 03.15.

References.

Advisory Committee Notes.

The term “proximate” cause should be avoided. While its meaning is readily understandable to lawyers, the lay juror may be unavoidably confused by the similarity of “proximate” to “approximate.”

Staff Notes.

Status: Reviewed.

02.109a “Legal cause” defined.

Legal cause means that [name of person]'s [failure to] act:

- (1) caused the harm directly or set in motion events that caused the harm in a natural and continuous sequence;
- (2) played a substantial role in causing the harm; and
- (3) could be expected by a reasonable person to cause the harm.

There may be more than one legal cause of the same harm.

MUJI 1st Reference.

03.13; 03.14; 03.15.

References.

Advisory Committee Notes.

The term “proximate” cause should be avoided. While its meaning is readily understandable to lawyers, the lay juror may be unavoidably confused by the similarity of “proximate” to “approximate.”

Staff Notes.

Status: Not Reviewed.

02.110. Allocation of fault.

In this case you will be called upon to allocate fault among [names of persons on the verdict form]. This must be done on a percentage basis and the total amount of fault must add up to 100%. You will be given further instructions about fault and causation after you hear the evidence, but you should keep in mind that an important part of your deliberations will ultimately be to allocate the percentages of fault.

MUJI 1st Reference.

None.

References.

Advisory Committee Notes.

Staff Notes.

Should this be part of the "parties" instructions or part of the "fault" instructions?

Combine with "comparative fault."

Status: Reviewed.

02.111. Comparative fault.

You must decide and record on the verdict form a percentage of fault for the conduct of each party based on the gravity or seriousness of the conduct. The total fault must equal 100%.

For your information, [name of plaintiff]'s total recovery will be reduced by the percentage of fault that you attribute to [name of plaintiff]. If you decide that [name of plaintiff]'s fault is 50% or greater, [name of plaintiff] will recover nothing. When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage of fault. I will make that calculation later.

MUJI 1st Reference.

03.17; 03.18; 03.19.

References.

Utah Code Sections 78-27-37(2); 78-27-38; 78-27-40.
Haase v. Ashley Valley Medical Center, 2003 UT 360.
Bishop v. GenTec, 2002 UT 36.
Biswell v. Duncan, 742 P.2d 80, (Utah Ct. App. 1987).

Advisory Committee Notes.

The judge should ensure that the verdict form is clear that fault should only be assessed as to those parties for whom the jury finds both breach of duty and causation.

Staff Notes.

The definition of fault includes both breach of duty and legal cause. Is the percentage the jurors are to decide based on "seriousness of the conduct", level of breach or contribution to causation?

Combine with "allocation of fault."

Status: Reviewed.

02.112. Violation of a safety law.

Violation of a safety law is evidence of negligence unless the violation is excused. [name of plaintiff] claims that [name of defendant] violated a safety law that says:

[Summarize or quote the statute, ordinance or rule.]

If you decide that [name of defendant] violated this safety law, you must decide whether the violation is excused.

The defendant claims the violation is excused because:

1. Obeying the law would have created an even greater risk of harm.
2. He could not obey the law because he faced an emergency that he did not create.
3. He was unable to obey the law despite a reasonable effort to do so.
4. He was incapable of obeying the law.
5. He was incapable of understanding what the law required.

If you decide that [name of defendant] violated the safety law and that the violation was not excused, you may consider the violation as evidence of negligence. If you decide that [name of defendant] did not violate the safety law or that the violation should be excused, you must disregard the violation and decide whether [name of defendant] acted with reasonable care under the circumstances.

MUJI 1st Reference.

03.11.

References.

Child v. Gonda, 972 P.2d 425 (Utah 1998).
Gaw v. State ex rel. Dep't of Transp., 798 P.2d 1130 (Utah Ct. App. 1990).
Jorgensen v. Issa, 739 P.2d 80 (Utah Ct. App. 1987).
Hall v. Warren, 692 P.2d 737 (Utah 1984).
Intermountain Farmers Ass'n v. Fitzgerald, 574 P.2d 1162 (Utah 1978).
Thompson v. Ford Motor Co., 16 Utah 2d 30; 395 P.2d 62 (1964).

Advisory Committee Notes.

Before giving this instruction, the judge should decide whether the safety law applies. The safety law applies if:

- (1) the plaintiff belongs to a class of people that the law is intended to protect; and
- (2) the law is intended to protect against the type of harm that occurred as a result of the violation.

The judge should include the instruction on excused violations only if there is evidence to support an excuse and include only those grounds for which there is evidence.

Staff Notes.

Should this be grouped with the "evidence" instructions?

Status: Reviewed.