Agenda
Advisory Committee on
Model Civil Jury Instructions

March 10, 2008
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

Approval of minutes	Tab 1	John Young
Product Liability Instruction 1057	Tab 2	Peter Summerill
Medical Malpractice Instructions	Tab 3	Frank Carney

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

Published Instructions: http://www.utcourts.gov/resources/muji/

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00 p.m.

April 14, 2008	Commercial Contracts
May 12, 2008	Motor Vehicles
June 9, 2008	Premises Liability
August 11, 2008	Employment
September 8, 2008	Insurance Obligations
October 14, 2008	Construction Contracts
November 10, 2008	Intentional Torts / Fraud and Deceit
December 8, 2008	Eminent Domain
January 12, 2008	Probate
February 9, 2008	Professional Liability

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
February 12, 2008
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Jonathan G. Jemming, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, and David E. West. Also present: Kamie F. Brown

1. *Products Liability Instructions*. Pursuant to the procedure adopted at the last meeting, the products liability instructions that had not yet been approved by the committee were reviewed before the meeting by a subcommittee of three (Messrs. Summerill, Ferguson, and Johnson). The draft of the instructions distributed to the committee before the meeting also contained suggested additions and deletions by Mr. Shea, shown in blueline. The committee considered the revised instructions.

a. *CV 1021A. Negligence. Retailer's duty*. Mr. Shea added "dangerous and" before "defective" in the last line of the first paragraph. At Mr. Simmons's suggestion, the phrase was amended to "unreasonably dangerous and defective condition." Mr. Young suggested deleting "merely" from the second sentence, but Dr. Di Paolo thought the word aided understanding, and it was left in. Mr. Young questioned the use of the phrase "then [name of defendant] can be liable" in the second paragraph. The committee revised it to read, "then [name of defendant] may be at fault." The instruction was approved as modified.

b. *CV 1021B. Negligence. Retailer's duty*. At Ms. Brown's suggestion, the committee note to 1021B was moved to 1021A. The phrase "then [name of defendant] can be liable" in the second paragraph was changed to, "then [name of defendant] may be at fault." At Dr. Di Paolo's suggestion, "its dangerous condition" in the third line of the second paragraph was changed to "the danger." The instruction was approved as modified.

c. *CV 1022. Breach of warranty. "Warranty" defined*. The instruction was approved as written.

d. *CV 1023. Breach of express warranty. Creation of an express warranty*. The instruction was approved (with Mr. Shea's edits).

e. *CV 1024. Breach of express warranty. What is not required to create an express warranty*. The instruction was approved (with Mr. Shea's edits).

f. *CV 1025. Breach of express warranty. Objective standard to create an express warranty*. The instruction was approved as written.

g. *CV 1026. Breach of express warranty. Essential elements of claim. (Contract.)* At Mr. West's suggestion, the word "essential" was deleted from the title of this instruction and CV 1027, 1028, 1029, 1031, and 1032. In the last paragraph, the phrase "may be liable" was changed to "may be at fault." Subparagraph (5) was returned to its original form. As modified, the instruction was approved.

h. *CV 1027. Breach of express warranty. Essential elements of claim. (Tort.)* The same changes that were made to CV 1026 were also made to CV 1027. As modified, the instruction was approved.

i. *CV 1028. Breach of implied warranty. Essential elements of implied warranty of merchantability claim. (Contract.)* Subparagraphs (2)(a) and (5) were returned to their original form. Mr. Young thought subparagraph (2)(b) was awkward, but the committee did not come up with better language. At Mr. West's suggestion, "or" was added after subparagraphs (2)(a) and (b). Dr. Di Paolo thought "merchantable" would not be understandable to an average juror. She suggested revising the second sentence to read, "To establish that the product was unmerchantable, [name of plaintiff] must prove all of the following." Mr. Shea and Mr. Simmons recommended leaving the sentence the way it was, and, after some discussion, the committee agreed. Mr. Carney thought there needed to be something in the instructions telling courts and attorneys that the instructions need to be tailored to the facts of the case. Mr. Shea noted that the introduction contained such a statement. The committee approved this instruction as modified, but Dr. Di Paolo still thought it was not understandable to a lay audience.

j. *CV 1029. Breach of implied warranty. Essential elements of implied warranty of merchantability claim. (Tort.)* The same changes that were made to CV 1028 were also made to CV 1029. As modified, the instruction was approved.

k. *CV 1030. Breach of implied warranty. Creation of an implied warranty of fitness for a particular purpose.* Mr. Shea questioned whether the terms "buyer" and "seller" should be changed to "plaintiff" and "defendant" throughout. The committee thought "buyer" and "seller" were more appropriate for this instruction. Mr. West asked whether "if" should be moved to the end of the second line, but the committee thought it would change the meaning to do so. Mr. Young questioned the use of the word "contracting" at the end of the first paragraph and suggested replacing it with "sale." Mr. Johnson thought there was a distinction between a contract and a sale and thought that "contracting" (the statutory language) was more accurate. Dr. Di Paolo suggested that the

distinction could be covered in a committee note, which could say that the statute says "at the time of contracting," that in most cases this will also be the time of sale, but in cases where the distinction is important, "contracting" can be substituted for "sale." Over Mr. Johnson's objection, the committee voted to change "contracting" to "sale," a term the committee thought would be more easily understood. As modified, the instruction was approved.

l. *CV 1031. Breach of implied warranty. Essential elements of claim for breach of an implied warranty of fitness for a particular purpose. (Contract.)* Mr. Young thought the phrase "bought it for" in subparagraph (3) was awkward, but Dr. Di Paolo and other committee members thought it was clear. Mr. Shea struck "suitable or" in the second line and changed "caused" to "was a cause of" in subparagraph (5). Dr. Di Paolo thought "suitable or fit" was okay, but did not feel strongly about deleting "suitable or." The instruction was approved with Mr. Shea's edits.

m. *CV 1032. Breach of implied warranty. Essential elements of claim for breach of an implied warranty of fitness for a particular purpose. (Tort.)* Mr. Shea made the same changes to this instruction as he made to CV 1031. The instruction was approved with Mr. Shea's edits.

n. *CV 1033. Breach of implied warranty. Warranty implied by course of dealing or usage of trade. (Contract.)* The committee changed the phrase "between the parties" in the third paragraph to read "between the plaintiff and defendant." As modified, the instruction was approved.

o. *CV 1034. Breach of warranty. Allergic reaction or hypersensitivity.* Mr. Simmons suggested striking the second sentence ("There is no breach of warranty when a [product] is harmless to a normal person"), because, standing alone, it was not an accurate statement of the law and the law was adequately stated in the rest of the instruction. Dr. Di Paolo suggested moving the sentence to the end of the instruction and inserting "Otherwise," at the beginning of the sentence. The committee deleted the sentence. Mr. Simmons also thought that the instruction should say that a defendant can be liable if he knows of the plaintiff's hypersensitivity or allergy and knows that his product is dangerous to someone with such a hypersensitivity or allergy. The other committee members thought that that conclusion followed from the second paragraph and went without saying. The second paragraph was revised to read: "If you find that [name of plaintiff]'s injuries in this case resulted from an allergy or physical hypersensitivity that most people do not have and that [name of defendant] did not know about, then there is no breach of warranty." The instruction was approved as modified.

p. *CV 1035. Breach of warranty. Improper use.* Mr. Young suggested starting the second sentence with, "If you find that [name of plaintiff] improperly used the product, which was a cause of his harm, . . ." The committee decided to leave the instruction as it was and approved the instruction with Mr. Shea's suggested changes.

q. *CV 1036. Breach of warranty. Effect of buyer's examination.* Mr. Shea noted that the committee note should have been a staff note and reflected his confusion with the instruction as written. Other committee members thought that the instruction as written more accurately stated the law than Mr. Shea's proposed alternative instruction and thought it would be understandable to a lay juror. At Mr. Simmons's suggestion, "[he]" in the third line was replaced with "[name of plaintiff]." Messrs. Shea and Jemming suggested deleting the first sentence of the second paragraph, but Messrs. Fowler and Simmons thought it was important to keep it in. The instruction was approved as modified.

r. *CV 1037. Breach of warranty. Exclusion or modification of express warranties by agreement.* Mr. Shea suggested changing "buyer" and "seller" to "plaintiff" and "defendant," but the committee thought that the instruction was accurate and understandable as written. At Mr. Shea's suggestion, "shall" or "can be" was replaced with "are" or "is," and "has been made" was changed to "can be made." As modified, the instruction was approved.

s. *CV 1038. Breach of warranty. Validity of disclaimer.* The instruction was approved as written, with Mr. Shea's edits.

t. *CV 1039. Breach of warranty. Notice of breach.* Mr. Simmons questioned whether the word "(Contract)" should be added at the end of the title, as with other instructions, such as 1031, 1033, 1041, and 1042. He said he knew of no requirement for notice of breach in an action not governed by the UCC. Mr. Fowler and Ms. Brown noted that the UCC can apply to tort actions as well as contract actions. The committee thought that, if there is a breach of warranty claim that is not governed by the UCC, the instruction would not apply and would not be given. The committee approved the instruction as edited by Mr. Shea.

u. *CV 1040. Breach of warranty. Definition of "goods."* Mr. West questioned whether this was a proper subject for a jury instruction, since whether or not a particular product is considered a "good" within the meaning of the UCC will generally be a question of law, for the court to decide. Ms. Brown noted that MUJI 1st contained a similar instruction. The committee note says that this instruction and the following instructions (1041-43) should only be used when

there is a disputed issue of fact as to whether the statutory requirement has been met. The committee approved the instruction as written.

v. *CV 1041. Breach of warranty. Definition of "sale." (Contract.)* The committee approved the instruction as written.

w. *CV 1042. Breach of warranty. Definition of "sample" or "model." (Contract.)* The committee approved the instruction as edited by Mr. Shea.

x. *CV 1043. Breach of warranty. Description of goods.* At Mr. Simmons's suggestion, the instruction was moved to follow instruction 1023 (breach of express warranty: creation of express warranty). The committee approved the language of the instruction as written.

y. *CV 1044. Sophisticated user.* The committee approved the instruction as edited by Mr. Shea.

z. *CV 1045. Conformity with government standards.* Mr. Simmons thought that the second sentence was an inaccurate statement of the law. In effect it said that if the plaintiff proved that the product was defective, the jury could still find that the product was not defective, based on the presumption of nondefectiveness. If the plaintiff proves that the product was defective, then the jury must find it is defective. Mr. Simmons and Mr. Summerill thought that the rebuttable presumption created by the statute meant that if the plaintiff came forward with evidence that the product was defective, the presumption disappeared, and the jury had to weigh the evidence on each side of the issue, unaided by the presumption. Mr. Fowler and Ms. Brown thought that the instruction was mandated by *Egbert v. Nissan,* 2007 UT 64, but Mr. Simmons noted that *Egbert* only held that the jury should be instructed on the presumption and that the presumption could be overcome by a preponderance of the evidence, not clear and convincing evidence. *Egbert* did not sanction any particular form of instruction. Mr. Ferguson asked whether the instructions should say "a preponderance of the evidence" or "the greater weight of the evidence." The committee noted that "preponderance of the evidence" has been used in other instructions and is defined in the general instructions. After further discussion, the instruction was revised to read:

> If the manufacturer of a [product] complies with federal or state laws, standards, or regulations for the industry regarding proper design, inspection, testing, manufacture, or warnings, it is presumed that the [product] is not defective. However, if you find that [name of plaintiff] has established by a preponderance of

> evidence that the [product] was defective even though the manufacturer followed government laws, standards, or regulations, then a presumption that the product is not defective no longer applies.

The committee approved the instruction as revised.

aa. *CV 1046. Product misuse.* The committee approved the instruction as edited by Mr. Shea.

bb. *CV 1047. Product alteration.* The committee approved the instruction as edited by Mr. Shea.

cc. *CV 1048A. Comparative fault.* The committee approved the instruction as edited by Mr. Shea. At Ms. Brown's suggestion, a reference to Utah Code Ann. §§ 78-27-37 through -41 was added under "References."

dd. *CV 1048B. Comparative fault.* The committee approved the instruction as edited by Mr. Shea. At Mr. Simmons's suggestion, *Mulherin v. Ingersoll-Rand Co.,* 628 P.2d 1301 (Utah 1981), was added to the references.

ee. *CV 1049. Unreasonable use. (Assumption of risk.)* Mr. Summerill suggested deleting "Assumption of risk" from the title. Other committee members thought that "assumption of risk" was still a viable defense; it is just not a complete defense but is to be considered as a form of comparative fault. CV 1048B refers to "assumption of risk" as a defense. Mr. Young suggested that CV 1049 be moved to precede the comparative fault instructions (CV 1048A & B). The committee approved the instruction as edited by Mr. Shea.

ff. *CV 1050. Industry standard.* Mr. Simmons noted that the instruction does not state a defense but only tells the jury what evidence it may consider in determining whether a product is defective. At Mr. Simmons's suggestion, it was moved to follow CV 1004. Dr. Di Paolo asked whether it meant that the jury could consider industry standards in the absence of evidence of such standards. To eliminate this ambiguity, the instruction was revised to read:

> In deciding whether the [product] is defective, you may consider the evidence presented concerning the design, testing, manufacture, and type of warning for similar products.

The committee approved the instruction as revised.

gg. *CV 1051. Product unavoidably unsafe.* The committee substituted "at fault" for "liable for any injuries the product caused" at the end of the first sentence and lowercased "rabies" in the last sentence. The committee approved the instruction as modified.

hh. *CV 1052. Learned intermediary.* Mr. Simmons thought that, because the instruction says that manufacturers of prescription drugs have a duty to warn only the prescribing physician, the instruction should also explain that, if the manufacturer fails to provide the physician with an adequate warning, the manufacturer can be liable to the plaintiff. The rest of the committee thought that conclusion would be self-evident when the instruction was read in context and did not have to be stated. The committee approved the instruction as edited by Mr. Shea.

ii. *CV 1053. Spoliation.* Mr. Young questioned whether spoliation should be the subject of a jury instruction. Mr. Carney noted that Utah Rule of Civil Procedure 37 has been amended to allow the jury to draw an adverse inference from spoliation. The committee agreed that there should be an instruction on spoliation but also agreed that it belongs in the general instructions and is not unique to products liability actions.

jj. *CV 1054. Definition of "state of the art."* Mr. Simmons thought that the instruction was unnecessary because it was adequately covered in other instructions, including 1050 and 1051. He thought that "state of the art" is not a defense, that a product can comply with the state of the art and industry standards and still be defective. He circulated a proposed alternative instruction, based on the treatise *Jury Instructions on Products Liability*. Mr. Fowler, Mr. Johnson, and Ms. Brown disagreed. They thought that "state of the art" was a defense to a products liability action. The products liability subcommittee had disagreed on this point. Dr. Di Paolo thought the last sentence was hard to understand and suggested changing it to say that a manufacturer does not have a duty to incorporate into its products "all of the [instead of "only those"] features representing the ultimate in safety." The committee deleted the words "only those" from that sentence. Ms. Blanch thought that the sentence was better covered in CV 1056, but some committee members thought that CV 1056 should not be used. The committee concluded that CV 1054 was an accurate statement of the law and approved the instruction as modified.

kk. *CV 1055. Subsequent remedial measures. Standards and purchases.* Mr. Simmons thought that Utah Rule of Evidence 407 made it clear that a "subsequent" remedial measure was a measure taken after the incident and not after the product was designed or manufactured. Mr. Fowler and Ms. Brown,

however, thought that the question was unresolved under Utah law and that alternatives were therefore necessary. Mr. Summerill thought that the term "accident" should be replaced with "incident." The committee approved the instruction as written.

ll. *CV 1056. The manufacturer is not an insurer.* Messrs. Carney and West thought the instruction was the type of instruction the Utah Supreme Court has held should not be given, akin to an "unavoidable accident" instruction (*Randle v. Allen,* 862 P.2d 1329 (Utah 1993)) and a "mere fact of an accident" instruction (*Green v. Louder,* 2001 UT 62). Other committee members thought it was distinguishable from the instructions in *Randle* and *Green*. Mr. Simmons noted that the committee had voted in June 2007 to delete the instruction. The committee voted again to delete the instruction, with Messrs. Young, Carney, Simmons, Summerill, and West voting to delete it, and Ms. Blanch and Messrs. Fowler, Ferguson, and Johnson voting to keep it.

Mr. Fowler was excused.

mm. *CV 1057. Safety risks.* Mr. Simmons thought that the instruction was unnecessary, since it merely stated the converse of what a plaintiff must prove in a strict products liability action. In that respect, it was similar to the language he had proposed adding to the learned intermediary instruction and which the committee thought was unnecessary. Mr. Carney agreed and thought the instruction was argumentative and should not be used. Ms. Brown thought the instruction was supported by *Slisze v. Stanley-Bostitch,* 1999 UT 20, but Mr. Carney noted that just because an instruction may find support in the language of a case does not mean that it should be given. Mr. Johnson noted that he would still request such an instruction, even if it were not included in MUJI. Dr. Di Paolo asked if it should come earlier in the instructions. Mr. Young thought the instruction was in conflict with CV 1005. Ms. Blanch suggested adding language to CV 1005 saying that a product is not defective or unreasonably dangerous merely because it could have been made safer or because a safer model is available and deleting the rest of CV 1057. The committee deferred further discussion of the instruction until the next meeting.

2. *Next Meeting*. The next meeting will be Monday, March 10, 2008, at 4:00 p.m., at which time the committee will consider CV 1057 and the medical malpractice instructions. Mr. Young asked whether the committee meetings should start at 3:30 p.m. instead of 4:00 p.m. A majority of the committee preferred starting at 4:00 p.m. and going later if necessary rather than starting earlier.

The meeting concluded at 6:25 p.m.

Tab 2

CV 1057. Safety risks.

A [product] is not defective or unreasonably dangerous merely because it presents some safety risks that cause it to be dangerous for its intended use, nor is it defective or unreasonably dangerous merely because it could have been made safer or because a safer model of the [product] is available.

References

Slisze v. Stanley-Bostitch, 1999 UT 20, ¶ 10.

Fed. Jury Prac. and Instr., § 122.10 (5th Ed. 2000) (modified).

MUJI 1st References

Committee Notes

Staff Notes

This seems very similar to 1056.

Status

CV 117. 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 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, 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 References

2.16; 2.18.

Tab 3

ADVISORY COMMITTEE NOTE

The Advisory Committee intentionally omitted several of the MUJI 1st medical malpractice instructions.

MUJI 1st 6.27 (Physician Not Guarantor of Results) was deleted in view of the decisions in Green v. Louder, 2001 UT 62, 29 P.3d 638 (trial courts directed not to instruct juries that the "mere fact" of an accident does not mean that anyone was negligent), and Randle v. Allen, 863 P.2d 1329 (trial courts directed not to instruct juries on "unavoidable accidents").

MUJI 1st 6.34 and 6.35 (causation instructions) have been replaced by a single instruction.

The Advisory Committee considered but did not include instructions on the role of custom in determining the standard of care, loss-of-chance causation, and apparent agency claims against hospitals. There is no clear appellate authority on whether those claims exist in this state.

The jury should be specifically instructed on the duties of a physician or nurse according to the facts of the case, and not left with simply a form instruction. The mere giving of abstract instructions on negligence without adapting the instruction to the duties present in the case may be error. See Mikkelsen v. Haslam, 764 P.2d 1384 (Utah App. 1988).

CV301. "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.

A [health care provider/doctor/nurse] is required to use the same degree of learning, care, and skill ordinarily used by other qualified [providers/doctors/nurses] in good standing practicing in the same [specialty/field]. This is known as the "standard of care." The failure to follow the duties required under the standard of care is a form of fault known as "medical malpractice."

To establish medical malpractice, [name of plaintiff] has the burden of proving three things:

(1) first, what the standard of care is;

(2) second, that the [provider/doctor/nurse] failed to follow this standard of care; and,

(3) third, that this failure to follow the standard of care was a cause of plaintiff's harm.

References

Jensen v. IHC Hospitals, 82 P.3d 1076, 1096, 2003 UT 51.

Dalley v. Utah Valley Regional Med. Ctr., 791 P.2d 193, 195 (Utah 1990).

Dikeou v. Osborn, 881 P.2d 943, 947 (Utah 1981).

Chadwick v. Nielsen, 763 P.2d 817, 821 (Utah 1981).

Kent v. Pioneer Valley Hospital, 930 P.2d 904 (Utah App. 1997).

Robb v. Anderton, 863 P.2d 1322 (Utah App. 1993).

MUJI 1st Instruction

None

Committee Notes

It is unclear whether Utah cases follow a "similar locality" standard, but it should not be relevant in most cases involving board-certified physicians. The "similar locality" instruction clearly is not applicable in actions against "specialists." Jenkins v. Parrish, 627 P.2d 533 (Utah 1981); Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).

There may be cases in which the standard may differ from one locality to another, and in such cases counsel should review the cases cited above and amend the model instruction accordingly. If the court uses a "similar locality" instruction, then MUJI 1st 6.19 should also be considered: *A [health care provider] trained and practicing in a specialized field in a major city and holding himself out as a nationally trained and board-certified [expert] is required to use the same national standards of learning, skill and care followed by other qualified fellow [experts] in similar medical centers throughout the medical profession, wherever they might be*.

CV302. “Standard of care” for nurses defined. “Nursing negligence’ defined. Elements of claim for nursing negligence.

A nurse is required to use the same degree of learning, care, and skill ordinarily used by other qualified nurses providing similar care. This is known as the "standard of care." The failure to follow the standard of care is a form of fault known as “nursing negligence.” In order to establish nursing negligence, [name of plaintiff] has the burden of proving three things:

(1) what the standard of care is;

(2) that the nurse failed to follow this standard of care; and,

(3) that this failure to follow the standard was a cause of [name of plaintiff]’s harm.

References

Sessions v. Dee Memorial Hosp. Ass'n, 94 Utah 460, 78 P.2d 645 (1938).

MUJI 1st Instruction

6.21

CV303. Care owed by nurse under varying circumstances.

The amount of care required of a nurse is measured by the patient's condition, the danger involved in the treatment, the service undertaken by the nurse, the information and instructions given to the nurse by the attending physician or surgeon, and other surrounding circumstances. These circumstances may require continuous attention or service, or they may justify lesser vigilance. These are matters for you to consider in deciding whether the nurse followed the standard of care.

References

Potter v. Groves Latter-Day Saints Hosp., 99 Utah 71, 103 P.2d 280 (1940).

Gitzhoffen v. Sisters of Holy Cross Hosp. Ass'n, 32 Utah 46, 88 P. 691 (1907).

MUJI 1st Instruction

6.22

CV304. Duty to disclose material medical information.

[Name of defendant] had a duty to disclose to [name of plaintiff] material information concerning [name of plaintiff]'s condition that was unknown to [name of plaintiff], if the information would be important in making decisions about health care, and if disclosure of the information would not be expected to adversely affect [name of plaintiff]'s welfare.

Information is "material" if a reasonable person in [name of plaintiff]'s position would consider the information important in choosing a different course of treatment.

References

Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980).

MUJI 1st Instruction

6.4

Committee Notes

Nixdorf v. Hicken post-dates the informed consent statute, and we therefore presume that the decision intended to establish a related, but different, claim for relief. When that claim for relief exists and when the informed consent statute applies, remain unclear.

CV305. Duty to refer.

If [name of defendant] knew or should have known that [he] did not possess the necessary expertise to properly treat [name of plaintiff]'s condition, and a referral to another who has the appropriate expertise could have been reasonably made under the circumstances, then [name of defendant] had a duty to offer that referral.

References

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

MUJI 1st Instruction

6.3

CV306. Duty to warn of how to avoid injury.

[Name of defendant] had a duty to warn [name of plaintiff] how to avoid injury following treatment.

References

Mikkelsen v. Haslam, 764 P.2d 1384 (Utah App. 1988).

MUJI 1st Instruction

6.17

Committee Notes

A jury must be specifically instructed on the duties of a physician in this context. Merely giving abstract instructions on negligence without adapting the instruction to the duties present in the case is error. Mikkelsen, 764 P.2d at 1388, citing Everts v. Worrell, 197 P. 1043, 1046 (Utah 1921).

CV307. Duties of hospital to patients.

A hospital has a duty to act with reasonable care towards its patients. Specifically, a hospital has a duty to:

[Set forth applicable duties that are alleged to have been breached, for example:]

(1) select, train, and supervise the employees who care for the patient;

(2) provide for the needs and comfort of the patient;

(3) provide supplies, equipment and facilities that are adequate for the patient;

(4) follow reasonable orders of an attending physician;

(5) maintain its equipment and facilities in safe condition and good repair.

If a hospital employs the physician, surgeon or nurse, the hospital's duty is to have those services performed in accordance with the standard of care required of the physician, surgeon or nurse.

References

Gitzhoffen v. Sisters of Holy Cross Hosp. Ass'n, 32 Utah 46, 88 P. 691 (1907).

MUJI 1st Instruction

6.20

Committee Note

The trial court should tailor this instruction to set forth the particular duties at issue in the case before it; e.g., the duty to monitor a patient's well-being, the duty to follow reasonable orders of an attending physician, etc. Mikkelsen v. Haslam, 764 P.2d 1384, 1388 (Utah App. 1988)

CV 308. Duty of hospital personnel.

Hospital personnel had a duty to follow appropriate physician orders and to exercise reasonable care to monitor [name of plaintiff]’s condition, symptoms, activities and needs, and to provide generally for the [his] continuing care in accordance with the applicable standard of care. Hospital personnel also had a duty to notify the attending physician of any significant changes in [name of plaintiff]'s symptoms or condition.

CV309. Physicians may assume compliance with orders.

A physician is entitled to assume that appropriate orders and instructions to hospital nurses and other personnel for the care and management of a patient will be carried out. A physician is not at fault if hospital personnel fail to do so, unless that failure is brought to the physician's attention, and the physician then fails to take steps to remedy the situation.

Committee Note

Some members of the committee questioned whether this instruction would be appropriate where the physician has reason to believe, but did not know, that his orders would not be carried out.

References

Huggins v. Hicken, 6 Utah 2d 233, 310 P.2d 523 (1957).

MUJI 1st Instruction

6.28

CV310. “Cause” defined.

As used in the law, the word "cause" has a special meaning, and you must use this meaning whenever you apply the word.

"Cause" means that:

(1) [name of defendant]’s act or failure to act produced the harm directly or set in motion events that produced the harm in a natural and continuous sequence; and

(2) [name of defendant]’s act or failure to act could be foreseen by a reasonable person to produce a harm of the same general nature.

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

References

MUJI 1st Instruction

6.34; 6.35

Committee Notes

This instruction tracks the MUJI 2nd instruction on causation.

Expert testimony is usually necessary to establish causation in a medical malpractice claim. Butterfield v. Okubo, 831 P.2d 97, 102 (Utah 1992). There are exceptions when the causal link is readily apparent using only “common knowledge.” Bowman v. Gibb, 2008 UT 9.

The committee considered “loss of chance” and “increased risk of harm” instructions, but decided that Utah law is unclear on whether such instructions are appropriate. Counsel should review Restatement (Second) of Torts § 323(a) (1965); Medved v. Glenn, 2005 UT 77; 125 P.3d 913 (increased risk of harm is a cognizable injury where a related injury is also present) ; Anderson v. BYU, 879 F.Supp 1124 (D. Utah 1995); Seale v. Gowans, 923 P.2d 1361 (Utah 1996); George v. LDS Hospital, 797 P.2d 1117 (Utah App. 1990); Anderson v. Nixon, 139 P.2d 216 (Utah 1943); R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instructions 10-10 to 10-12 (LexisNexis, 6th ed. 2007).

CV311. Elements of an informed consent claim.

To establish a claim for the failure to obtain informed consent, [name of plaintiff] has the burden to prove all of the following:

(1) that a physician-patient relationship existed between [name of plaintiff] and [name of defendnt];

(2) that [name of defendant] provided care to [name of plaintiff];

(3) that the care posed a substantial and significant risk of causing serious harm;

(4) that [name of plaintiff] was not informed of the substantial and significant risk or of other reasonable alternatives,

(5) that a reasonable person in [name of plaintiff]'s position would not have consented to [or rejected] the care after having been informed of the substantial and significant risks and alternatives; and

(6) that the care was a cause of [name of plaintiff]'s harm.

References:

Utah Code Section 78B-3-406(1).

Ramon v. Farr, 770 P.2d 131 (Utah 1989).

Burton v. Youngblood, 711 P.2d 245 (Utah 1985).

Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

MUJI 1st Instruction

6.7

Committee Notes

Elements 1 and 2 will normally be undisputed, and the court should tailor the instruction accordingly.

Section 78B-3-406does not address the patient's right to be informed of the risks from *rejecting* offered treatment. The committee has inserted the bracketed portion of Paragraph 5 in case the court wishes to consider the appropriateness of an instruction on rejection of offered care, in which case Instruction CV 312, Duty to obtain informed consent. Informed consent defined should be amended accordingly.

CV312. Duty to obtain informed consent. "Informed consent" defined.

A physician has a duty to obtain the patient's informed consent to proposed care. Consent is informed if the patient gives consent after the physician outlines any substantial and significant risks of serious harm from the care as well as the reasonable alternatives

References

Utah Code Section 78B-3-406.

Burton v. Youngblood, 711 P.2d 245 (Utah 1985).

Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980).

Ficklin v. MacFarlane, 550 P.2d 1295 (Utah 1976).

Lounsbury v. Capel, 836 P.2d 188 (Utah App. 1992).

MUJI 1st Instructions

6.5; 6.9

Committee Notes

It is important to distinguish actual consent from informed consent. Informed consent is an agreement by the patient to a procedure after having been made aware of the substantial and significant risks of serious harm from the care, and the alternatives to it. One may *actually* consent to a procedure and yet not have given an *informed* consent. See Lounsbury v. Capel, 836 P.2d 188 (Utah App. 1992).

The persons authorized to provide consent to treatment are designated in Utah Code Section 78B-3-406(4). Lounsbury v. Capel, 836 P.2d 188 (Utah App. 1992) held that the reference in Section 78B-3-406(4) to "spousal" consent can only be interpreted to mean that a spouse can consent for care to an incapacitated spouse. See also Reiser v. Lohner, 641 P.2d 93, 99 (Utah 1982), for the proposition that a husband's consent is not necessary for surgery on his wife.

Section 78B-3-407 has added a new limitation on actions brought against health care providers arising out of refusal of parents or guardians to consent to recommended treatment. There are other consent statutes scattered throughout the Utah Code. See for example, Sections 15-2-5 (parental consent not required for minor's blood donation), 26-6-18 (minor's power to consent to treatment for sexually transmitted diseases), 76-7-304.5 and -305 (abortions), and 62A-6-105 (sterilization).

The committee has not intended to provide an exhaustive list of every possible instruction that may be needed in any case alleging lack of consent. For this, we refer the reader to Chapter 5 of Professor Eade's comprehensive work, R.A. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES (LexisNexis, 6th ed. 2007).

CV313. “Substantial and significant risk” defined.

A risk is “substantial and significant” if it occurs frequently enough and is serious enough that a reasonable patient would want to be informed about it.

References

Utah Code Section 78B-3-406(2).

Ramon v. Farr, 770 P.2d 131 (Utah 1989).

Reiser v. Lohner, 641 P.2d 93 (Utah 1982).

Ficklin v. MacFarlane, 550 P.2d 1295 (Utah 1976).

MUJI 1st Instruction

6.6

Committee Notes

Chadwick v. Nielsen, 763 P.2d 817 (Utah App. 1988), discusses the need for expert testimony in informed consent cases to establish the materiality of risks; that is, what the risks are, how serious they are, and how often they occur. But whether those risks should be disclosed is a matter for the jury to decide based upon their determination of substantiality and significance, not upon standard medical practice.

CV314. Standard for judging patient's consent.

To determine whether a reasonable person would have consented to the care, you must use the viewpoint of a patient in [name of plaintiff]'s position before the care was provided and before any harm occurred.

References

Utah Code Section 78B-3-406(1).

MUJI 1st Instruction

6.8

CV315. Oral consent valid.

A consent to [refusal of] treatment is binding even if it is not in writing.

References

MUJI 1st Instruction

6.10

Committee Notes

The "safe harbor" defense for written consent forms of Utah Code Section 78B-3-406(2)(e) does not foreclose consent obtained by other means; such as orally, by acquiescence, or by a writing that does not comply with the statute. The statute simply means that if there is a writing that complies with its requirements, it is a defense to the action for lack of informed consent unless the patient proves lack of capacity or fraud.

CV316. Consent is presumed.

When a person submits to health care, it is presumed, unless proven otherwise, that the care was authorized.

References

Utah Code Section 78B-3-406(1).

Lounsbury v. Capel, 836 P.2d 188 (Utah App. 1992).

MUJI 1st Instruction

6.11

Committee Note

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

Some members of the committee thought this instruction was unnecessary: that it unduly emphasizes plaintiff's burden. These members thought that the instruction says nothing more than that the plaintiff has the burden of proving lack of informed consent.

CV317. Patient’s negligence in failing to follow instructions.

[Name of plaintiff] had a duty to follow [name of health care provider]'s reasonable instructions. You may consider the failure to do so in deciding whether the [name of plaintiff] was at fault and whether any of [name of plaintiff]’s fault was a cause of [his] harm.

MUJI 1st Instruction

6.23

CV318. Patient's negligence in giving medical history.

A patient must use ordinary care in giving an accurate history to [his] treating physician. In determining whether this was done, you may consider whether the physician's questions were sufficient to alert the patient of the need to disclose particular aspects of that history.

References

Mackey v. Greenview Hosp., Inc., 587 S.W.2d 249 (Ky. Ct. App. 1989).

MUJI 1st Instruction

6.25

CV319. Patient's fault: preexisting conditions.

You are not to consider any of these matters as evidence of [name of plaintiff]'s fault:

[List plaintiff's prexising conditions or behaviors, e.g. smoking.]

References

Steiner Corporation v. Johnson & Higgins of California, 996 P.2d 531, 2000 UT 21.

MUJI 1st Instruction

Committee Notes

A patient's failure to follow medical instructions for the treatment of an ailment may constitute comparative fault in the appropriate case; for example, failure to get recommended tests for the detection of cancer, leading to a delay in diagnosis. However, a patient's conduct should not be usually relevant to the issue of comparative fault where it predates the physician's treatment. The doctor takes the patient as he finds him, even if the patient's poor condition is due to the patient's own poor choices, such as diet, smoking, or lack of exercise.

Comparative fault instructions should therefore be limited to those cases where the patient's negligence occurs at or after the time of the defendant's conduct, as in Birkner v. Salt Lake County, 771 P.2d 1053 (Utah 1989) (plaintiff participated in sexual misconduct by therapist) or Harding v. Bell, 57 P.3d 1093, 2002 UT 108.

A patient's conduct is relevant to fault in a medical malpractice case when the conduct specifically and directly impedes the efficacy of the defendant physician's care, such as failure to comply with instructions for follow up care, failure to accurately report symptoms, or failure to follow instructions regarding return to work.

See, e.g., DeMoss v. Hamilton, 644 N.W.2d 302 (Iowa 2002); Jensen v. Archbishop Bergan Mercy Hospital, 459 N.W.2d 178, 186-87 (Neb. 1990); Fritts v. McKinne, 934 P.2d 371, 374 (Okla. Civ. App. 1996); Ostrowski v. Azzara, 545 A.2d 148 (N.J. 1988); Harding v. Deiss, 2000 MT 169, 3 P.3d 1286; Lambert v. Shearer, 616 N.E.2d 965 (Ohio Ct. App. 1992); Krklus v. Stanley, 833 N.E.2d 952 (Ill. App. Ct.), *appeal denied*, 844 N.E.2d 38 (Ill. 2005); Spence v. Aspen Skiing Co., 820 F. Supp. 542 (D. Colo. 1993); Matthews v. Williford, 318 So.2d 480 (Fla. Dist. Ct. App. 1975); Eiss v. Lillis, 357 S.E.2d 539 (Va. 1987); R.W. Eades, JURY INSTRUCTIONS ON MEDICAL ISSUES, Instruction 13-2 (Lexis-Nexis 6th ed. 2004).

CV320. 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 may not be negligence 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 [he] used was an approved method.

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).

MUJI 1st Instruction

6.29

Committee Notes

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

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: what defendant “thinks best,” whether within the standard of care or not.

The committee did not agree whether this instruction should ever be used. Some committee members 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.

In any event, 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).

CV321. “Common knowledge” defense.

If the risk of harm was commonly known to the public, then [name of plaintiff] may not recover on a claim of failure to obtain informed consent.

References

Utah Code Section 78B-3-406(2)(b).

MUJI 1st Instruction

6.13

CV322. Refusal of information defense.

If [name of plaintiff] declined to be informed of the risk of harm, then [he] may not recover on a claim of failure to obtain informed consent.

References

Utah Code Section 78B-3-406(2)(c).

MUJI 1st Instruction

6.14

CV323. “Reasonable non-disclosure” defense.

If [name of defendant] reasonably believed that disclosure of the risk of harm could have had a substantial and adverse effect on [name of plaintiff]’s condition, then [he] was not required to make that disclosure.

References

Utah Code Section 78B-3-406(2)(d).

MUJI 1st Instruction

6.15

CV324. Written consent defense.

A written consent is a defense to a claim for failure to obtain informed consent, unless:

[(1) [Name of plaintiff] proves by a preponderance of the evidence that the person giving consent lacked the capacity to do so.]

[(2) [Name of plaintiff] proves by clear and convincing evidence that [name of defendant] obtained the consent by fraudulent misrepresentation or fraudulent failure to state material facts.]

References

Utah Code Section 78B-3-406(2)(e).

MUJI 1st Instruction

6.16

Committee Notes

The committee felt that the court would normally decide whether a written consent complies with the requirements of Section 78B-3-406(2)(e). Thus, there is no need for a jury instruction on the statutory elements of the "safe harbor" written consent as was contained in MUJI 1st 6.16. In this new instruction, "written consent" presumes a written consent that has been found to meet the statutory requirements. Otherwise, it should not be used.

It would be the unusual case where both lack of capacity and fraud are raised as defenses to a statutorily-compliant written consent. Therefore, the trial court will normally give only subsection (1) or (2) of this instruction, not both.

CV325. Timely filing claim; Discovery of injury defined.

You must decide the date by which [name of plaintiff] should have discovered the injury. A plaintiff must file a medical malpractice claim within two years from the date [he] discovered the injury or the claim is barred.

“Discovery” of an injury from medical malpractice occurs when a patient knows or through reasonable diligence should know each of the following:

(1) that he sustained a physical injury;

(2) the cause of the injury; and

(3) the possibility of a health care provider’s fault in causing the injury.

References

Seale v. Gowans, 923 P.2d 1361 (Utah 1996).

Chapman v. Primary Children's Hosp., 784 P.2d 1181 (Utah 1989).

Brower v. Brown, 744 P.2d 1337 (Utah 1987).

Hove v. McMaster, 621 P.2d 694 (Utah 1980).

Foil v. Ballinger, 601 P.2d 144 (Utah 1979).

McDougal v. Weed, 945 P.2d 175 (Utah App. 1997).

Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1989).

Hargett v. Limberg, 598 F. Supp. 152 (D. Utah 1984).

MUJI 1st Instruction

6.37

CV326. Expert testimony required.

You may use only the standard of care established through evidence presented in this trial by expert witnesses and through other evidence admitted for the purpose of defining the standard of care. You may not use a standard derived from your own experience or any other standard of your own.

References

Dalley v. Utah Valley Reg. Med. Ctr., 791 P.2d 193 (Utah 1990).

Farrow v. Health Servs. Corp., 604 P.2d 474 (Utah 1979).

MUJI 1st Instruction

6.2

Committee Notes

In Nielson v. Pioneer Valley Hospital, 830 P.2d 270 (Utah 1992), and Brady v. Gibb, 886 P.2d 104 (Utah App. 1994), the courts held that instructions similar to this should not be given in conjunction with a "common knowledge" or res ipsa loquitor instruction unless plaintiff is also alleging breach of a different standard of care.

MUJI 2nd CV129 (Statement of Opinion) should not be given when this instruction is used, as it instructs the jurors that they may disregard expert testimony.

CV327. Inference of negligence (res ipsa loquitur).

You may draw an inference that [name of defendant] was negligent if three things are proved by a preponderance of the evidence:

(1) that [name of plaintiff]'s injury was of a kind which, in the ordinary course of events, would not have happened if due care had been observed;

(2) that [name of plaintiff]'s actions were not responsible for the injury; and,

(3) that the cause of the injury was under the exclusive control of [name of defendant].

If you find that all three of these things has been proved, this is sufficient to support a finding of fault on the part of [name of defendant]. [Name of defendant] may introduce evidence to rebut the inference of fault.

References

Dalley v. Utah Valley Regional Medical Ctr., 791 P.2d 193 (Utah 1990).

Nixdorf v. Hicken, 612 P.2d 348 (Utah 1980).

Talbot v. Dr. W.H. Groves Latter-Day Saints Hosp., 21 Utah 2d 73, 440 P.2d 872 (1968).

Robb v. Anderton, 863 P.2d 1322 (Utah App. 1993).

Virginia S. v. Salt Lake Care Ctr., 741 P.2d 969 (Utah App. 1987).

Robinson v. Intermountain Health Care, Inc., 740 P.2d 262 (Utah App. 1987).

Roylance v. Rowe, 737 P.2d 232 (Utah App. 1987).

Weeks v. Latter-Day Saints Hosp., 418 F.2d 1035 (10th Cir. 1969).

MUJI 1st Instruction

6.32

CV328. Common knowledge and need for expert testimony.

Expert testimony is not needed to establish the standard of care if the medical procedure is of a kind, or the outcome so offends commonly held notions of proper medical treatment, that the standard of care can be established by the common knowledge, experience and understanding of jurors.

References

Bowman v. Gibb, 2008 UT 9.

Nixdorf v. Hicken, 612 P.2d 348, 352 (Utah 1980).

Kim v. Anderson, 610 P.2d 1270 (Utah 1980).

Malmstrom v. Olsen, 16 Utah 2d 316, 400 P.2d 209 (1965).

Fredrickson v. Maw, 119 Utah 385, 227 P.2d 772 (1951).

MUJI 1st Instruction

6.33

Committee Notes

Nielson v. Pioneer Valley Hospital, 830 P.2d 270 (Utah 1992), and Brady v. Gibb, 886 P.2d 104 (Utah App. 1994), held that instructions similar to this one are inconsistent with "need for expert testimony" instructions and should not be given together.

This instruction should be given only if there is another instruction stating the need for expert testimony on the standard of care as, for example, when a patient claims a needle was improperly left in the surgical site and that the suturing was done incorrectly. The first claim would probably not require expert testimony under Nixdorf v. Hicken; the second would. The instruction should also clarify which claim requires expert testimony and which does not.

CV329.Patient may rely on advice.

A patient may rely on the physician’s professional skill and advice. A patient is not required to determine whether the physician's advice is correct.

References

Mikkelsen v. Haslam, 764 P.2d 1384 (Utah App. 1988).

MUJI 1st Instruction

6.24

CV330. No recovery for oral promises.

To find [name of defendant] at fault for violating a guarantee, warranty, contract or assurance regarding a result to be obtained from the health care, you must find that the guarantee, warranty, contract or assurance is in writing and signed by [name of defendant] or [his] authorized agent.

References

Utah Code Section 78B-3-408.

MUJI 1st Instruction

6.36

CV2##. Out-of -state or -town experts

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

CV2##. 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

Special Verdict Forms

Committee Notes on Special Verdict Forms

The Advisory Committee recommends that the so-called "net verdict" (two deductions for fault) be avoided in comparative fault cases by advising the jury not to make a deduction from damages for any percentage of fault assessed, but to leave it to the judge to do so. See *Bishop v. GenTec*, 2002 UT 36; 48 P.3d 218; *Haase v. Ashley Valley Med. Center*, 2003 UT App. 260 (unpublished opinion).

In addition, economic damages need to be itemized on the verdict form in medical malpractice actions, for various reasons:

First, Utah Code Section 78B-3-405 requires the court to make deductions from past medical expenses for those paid by collateral sources. This cannot be done unless the amount of past medical expenses is specifically determined by the jury.

Second, liens and reimbursement claims are routine in medical malpractice actions. An unspecified award of special damages gives no guidance to lien claimants on whether the lien attaches--did the jury award economic damages for medical expenses, for lost wages, for something else, or all of them? If so, in what amounts?

Third, a judge cannot feasibly assess prejudgment interest on past economic damages if there is no distinction made in the special verdict between past and future economic damages.

Finally, amounts may incorrectly be awarded for economic damages that are not supported by the evidence, and specificity in the special verdict allows the court the opportunity to correct such miscalculations or improper awards without the need for a new trial.

SPECIAL VERDICT - ONE DEFENDANT (NO COMPARATIVE FAULT)

MEMBERS OF THE JURY:

Please answer the following questions *in the order they are presented*. If you find that the evidence favors the issue by a preponderance, answer "Yes." If you find that the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the greater weight of evidence is against the issue, answer "No."

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and then advise the bailiff.

(1) Was [name of defendant] at fault? (Check one.)

Yes_____ No_____

(*If you answer "Yes," please answer Question 2. If you answer "No," stop here, and sign and return this verdict*.)

(2) Was this fault a cause of [name of plaintiff]'s harm? (Check one.)

Yes_____ No_____

(*If you answer Yes," please answer question 3. If you answer "No," stop here, and sign and return this verdict*.)

(3) What amount do you find would fairly compensate [name of plaintiff] for [his] harm? (*Only answer this if you checked "yes" on both Questions 1 and 2.*)

(a) Economic Damages:

(1) Past Medical Expenses $_____

(2) Future Medical Expenses: $_____

(3) Past Lost Wages: $_____

(4) Future Lost Wages: $_____

(5) Other Economic Damages: $_____

(b) Noneconomic Damages: $_____

Total Damages: $_____

(*When you have completed this verdict, please have your foreperson date and sign it, and advise the bailiff that you have reached a verdict*.)

_____ _____

Date Jury Foreperson

SPECIAL VERDICT ONE DEFENDANT- COMPARATIVE FAULT

MEMBERS OF THE JURY:

Please answer the following questions *in the order they are presented*. If you find that the evidence favors the issue by a preponderance, answer "Yes." If you find that the evidence is so equally balanced that you cannot determine a preponderance of the evidence, or if you find that the greater weight of the evidence is against the issue, answer "No."

At least six jurors must agree on the answer to each question, but they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question that is required to be answered, your foreperson should sign and date the form and then advise the bailiff.

(1) Was [name of defendant] at fault? (Check one.)

Yes_____ No_____

(If you answer "Yes," please answer Question 2. If you answer "No," stop here, and sign and return this verdict.)

(2) Was this fault a cause of harm to [name of plaintiff]? (Check one.)

Yes_____ No_____

(*If you answer "Yes," please answer question 3. If you answer "No," stop here, and sign and return this verdict*.)

(3) Was [name of plaintiff] also at fault as alleged by defendant? (Check one.)

Yes_____ No_____

(*If you answer "Yes," please answer Question 4. If you answer "No," please skip Questions 4 and 5 and go on to Question 6.*)

(4) Was [name of plaintiff]'s fault a cause of his own harm?

Yes_____ No_____

(*If you answered Question 4 "Yes," please answer Question 5. If you answered Question 4 "No," please skip Question 5 and go on to Question 6*.)

(5) Assuming all the fault that caused plaintiff's harm totals 100%, what percentage of that fault is attributable to:

[Name of Defendant]: _____ %

[Name of Plaintiff]: _____ %

Total: 100 %

(*Please answer Question 6 if you checked "yes" on both Questions 1 and 2. Do not make a deduction from damages for any percentage of fault that you have assessed to plaintiff. The judge will make any necessary deductions later*.)

(6) What amount do you find would fairly compensate [name of plaintiff] for [his] harm?

(a) Economic Damages:

(1) Past Medical Expenses $_____

(2) Future Medical Expenses: $_____

(3) Past Lost Wages: $_____

(4) Future Lost Wages: $_____

(5) Other Economic Damages: $_____

(b) Noneconomic Damages: $_____

Total Damages: $_____

(*When you have completed this verdict, please have your foreperson date and sign it, and advise the bailiff that you have reached a verdict.*)

_____ _____

Date Jury Foreperson