

MUJI 2nd Trespass and Nuisance Jury Instructions

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CV1201 TRESPASS TO REAL PROPERTY.

In this action, [name of plaintiff] seeks to recover damages from [name of defendant] for a trespass to [name of plaintiff]'s property.

To establish [name of plaintiff]'s claim for trespass against the property involved in this case, you must find that:

- 1) [name of plaintiff] [owned/lawfully possessed] the property;
- 2) [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property by physically entering or encroaching upon [or causing some thing to physically enter or encroach upon] [name of plaintiff]'s land;
- 3) [name of defendant] intended to perform the act that resulted in the unlawful entry or encroachment upon [name of plaintiff]'s property; and
- 4) [name of defendant] had no right to do the act that constituted the unlawful entry or encroachment upon [name of plaintiff]'s property.

References:

Sycamore Family, L.L.C. v. Vintage on the River Homeowners Ass'n, Inc., 2006 UT App 387, ¶ 4, 145 P.3d 1177

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

John Price Associates v. Utah State Conference, 615 P.2d 1210 (Utah 1980)

Wood v. Myrup, 681 P.2d 1255 (Utah 1984)

CV1202 TRESPASS TO PERSONAL PROPERTY.

In this action, [name of plaintiff] seeks to recover damages from [name of defendant] for a trespass to [name of plaintiff]'s property.

To establish [name of plaintiff]'s claim for trespass against the property involved in this case, you must find that:

- 1) [name of plaintiff] had [ownership/lawful possession] of the property at the time of the alleged trespass;
- 2) [name of defendant] interfered with [name of plaintiff]'s exclusive right to possession of the property, by [specify briefly the acts alleged to constitute wrongful interference with [name of plaintiff]'s personal property];
- 3) [name of defendant] intended to perform the act that amounted to the unlawful interference with the personal property of [name of plaintiff]; and
- 4) [name of defendant] had no right to do the act that constituted the interference with the personal property of [name of plaintiff].

References:

Purkey v. Roberts, 2012 UT App 241, ¶ 17, 285 P.3d 1242

Peterson v. Petterson, 117 P. 70, 71 (Utah 1911)

CV1203 CONSENT.

[Name of defendant] asserts that [he/she/it] was given consent by [name of plaintiff] or [name of plaintiff]'s agent to [use/enter upon] [name of plaintiff]'s property, and that [name of defendant] is thus not liable for trespass.

[Name of defendant] is not liable for trespass if [he/she/it] can establish that [name of plaintiff] consented to the entry or encroachment upon the property, but only to the extent that the entire entry or encroachment was authorized.

Consent means permission to enter or encroach upon property was communicated. Consent can be expressed or implied.

References:

Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)

Restatement (Second) of Torts § 252 (1965)

Committee note:

The MUJI 1 instructions enumerated express and implied consent separately. But the Utah case law speaks only of consent, which may be express or implied.

CV1204 IMPLIED CONSENT - CUSTOM AND USAGE.

[Name of defendant] asserts that [name of defendant] had the implied consent of [name of plaintiff] or [name of plaintiff]'s agent to [use/enter upon] [name of plaintiff]'s property, and that [name of defendant] is thus not liable for trespass.

Consent is an absolute defense to an action for trespass. Consent for [use of/entry upon] real property need not be expressly given but may be implied from the circumstances. The implied consent may be derived from custom, usage, or conduct. Therefore, [name of defendant] is not liable for trespass if [name of defendant] can show that:

- 1) [name of defendant] was a member of a category of persons for whom [use of/entry upon] the property would be considered customary or common;
- 2) [name of defendant]'s [use of/entry upon] [name of plaintiff]'s property was within the fair and reasonable bounds of the implied consent to [use/enter upon] the property; and
- 3) [name of plaintiff] did not indicate, either verbally or by posted signs on the property, that [name of plaintiff] did not consent to the entry.

References:

Lee v. Langley, 2005 UT App 339, ¶ 20 n.3, 121 P.3d 33

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)

Restatement (Second) of Torts § 252 (1965)

CV1205 DAMAGES - NOMINAL DAMAGES.

If you found that [name of defendant] trespassed [name of plaintiff]’s [real/personal] property, you may award economic, non-economic, or nominal damages to [name of plaintiff].

Even if you find that no actual damage was suffered by [name of plaintiff] as a result of [name of defendant]’s trespass, you may still award [name of plaintiff] a trivial amount, called “nominal damages,” to compensate [name of plaintiff] for the invasion of [name of plaintiff]’s property rights. “Nominal damages” has been defined as a trivial sum such as one dollar.

References:

Haycraft v. Adams, 24 P.2d 1110, 1115 (Utah 1933)

Henderson v. For-Shor Co., 757 P.2d 465 (Utah App. 1988)

Committee note:

For a definition of economic and non-economic instructions, see CV2001 *et. seq.* For instructions on the measure of damages for injury to personal or real property resulting from a trespass, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in trespass may include the addition of discomfort and annoyance to CV2004’s list of considerations. See *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998).

CV1206 NUISANCE - INTRODUCTORY INSTRUCTION.

One person can interfere with the use or enjoyment of another person’s property even without entering that other person’s property. In some instances, the legal term for this is “nuisance.”

In this case, [name of plaintiff] claims that [name of defendant], through [describe the conduct, action, or thing], has created a nuisance that has interfered with [name of plaintiff]’s use or enjoyment of [his/her/its] property.

[Name of plaintiff] claims that [name of plaintiff] has suffered harm as a result of this nuisance, and seeks to recover damages from [name of defendant] for that harm.

References:

Utah Code § 76-10-801

Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985)

Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)

Vincent v. Salt Lake County, 583 P.2d 105 (Utah 1978)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990)

CV1207 NUISANCE PER SE.

The court has determined that, under the law, [name of defendant]’s conduct, [describe the conduct, action, or thing], constitutes a nuisance.

References:

Utah Code § 78B-6-1101 (defining certain nuisances)
Erickson v. Sorensen, 877 P.2d 144, 149 (Utah App. 1994)
Branch v. Western Petroleum, Inc., 657 P.2d 267 (Utah 1982)
Turnbaugh v. Anderson, 793 P.2d 939 (Utah App. 1990)

Committee note:

This instruction will only be given when the court has already made a determination that the conduct constitutes nuisance per se. Utah Code §§ 78B-6-1101 and 78B-6-1107 list some things that constitute nuisance per se, but there may be others. A nuisance per se exists when the conduct creating the nuisance is specifically prohibited by statute.

CV1208 STATUTORY NUISANCE CLAIM.

You must decide whether [name of plaintiff] has established a claim under the nuisance statutes.

To establish such a claim, [name of plaintiff] must show that [name of defendant]’s [describe the conduct, action, or thing]:

- 1) Was indecent, injurious to health, offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life or property;
- 2) [name of defendant]’s conduct was unreasonable or unlawful; and
- 3) [name of plaintiff]’s property was injuriously affected or plaintiff’s personal enjoyment was lessened by [describe the conduct, action, or thing].

References:

Utah Code § 78B-6-1101 et al.
Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)
Dahl v. Utah Oil Ref. Co., 262 P. 269, 273 (Utah 1927)

Committee note:

Although the statutes do not mention reasonableness, the committee added a reasonableness requirement to conform to case law. See CV1213 for a discussion of reasonableness.

The statute provides specific instructions for when tobacco smoke, manufacturing and agricultural operations, and certain types of criminal activity may or may not be considered a nuisance. Those specific statutory causes of action and exceptions to nuisance liability are not included herein, but specially tailored instructions may be warranted in cases involving those statutory provisions.

The difference between the common law and statutory private nuisance claims will only be material in limited cases. Practitioners and judges may wish to present to the jury only the instruction most applicable to the circumstances of their case.

CV1209 COMMON LAW PRIVATE NUISANCE CLAIM.

A private nuisance is any activity that substantially and unreasonably interferes with the use and enjoyment by another of that person's property, other than by entering upon it.

[Name of plaintiff] claims that [name of defendant] has interfered with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property by [specify nature of alleged nuisance].

To establish [name of plaintiff]'s claim for private nuisance, you must find that:

- 1) [name of plaintiff] owned or possessed a legal interest in the real property that is the subject of this action];
- 2) [name of defendant] caused or was responsible for a substantial interference with [name of plaintiff]'s use and enjoyment of [name of plaintiff]'s property; and
- 3) [name of defendant]'s use of the property was either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable.

A "substantial interference" with [name of plaintiff]'s use and enjoyment of the land is typically one that results in substantial annoyance, discomfort, or harm. The degree of interference is measured by what would be offensive to a reasonable person, or to a person who has ordinary health and ordinary sensitivities.

An unintentional use that is "otherwise actionable" is generally one that is 1) negligent or reckless, or 2) that results in abnormally dangerous conditions or activities in an inappropriate place.

References:

- Whaley v. Park City Mun. Corp.*, 2008 UT App 234, 190 P.3d 1
- Sanford v. Univ. of Utah*, 488 P.2d 741 (Utah 1971)
- Johnson v. Mount Ogden Enterprises, Inc.*, 460 P.2d 333 (Utah 1969)
- Turnbaugh v. Anderson*, 793 P.2d 939 (Utah Ct. App. 1990)
- Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245 (Utah 1998)
- Canon v. Neuberger*, 268 P.2d 425, 426 (Utah 1954)
- Dahl v. Utah Oil Ref. Col.*, 71 Utah 1, 262 P. 269, 273 (1927)

Committee note:

The first element of this instruction may be omitted if there is no factual dispute over whether the plaintiff has a legal interest in the real property.

Negligence is defined in CV202A and it may be appropriate to also give that instruction to the jury. See CV1213 for a discussion of reasonableness.

The difference between the common law and statutory private nuisance claims will only be material in limited cases. Practitioners and judges may wish to present to the jury only the instruction most applicable to the circumstances of their case.

CV1210 STATUTORY PUBLIC NUISANCE CLAIM.

To establish [name of plaintiff]'s claim that defendant created a public nuisance, you must find:

- 1) The alleged nuisance consists of unlawfully doing any act or omitting to perform any duty;
- 2) [name of defendant]'s conduct was unreasonable;
- 3) The act or omission either:
 - a) Annoys, injures, or endangers the comfort, repose, health, or safety of three or more persons;
 - b) Offends public decency;
 - c) Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake, stream, canal, or basin, or any public park, square, street, or highway; or
 - d) In any way renders three or more persons insecure in life or the use of property; and
- 4) [name of plaintiff] has suffered damages different from those of society at large.

An act or omission which affects three or more persons in any of the ways specified in this instruction is still a nuisance regardless of the extent of annoyance and regardless of whether the damage inflicted on individuals is unequal.

References:

Utah Code § 76-10-803 (2019)

Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1

Solar Salt Co. v. Southern Pac. Transp. Co., 555 P.2d (Utah 1976)

Monroe City v. Arnold, 452 P.2d 321 (Utah 1969)

Turnbaugh v. Anderson, 793 P.2d 939 (Utah Ct. App. 1990)

Erickson v. Sorensen, 877 P.2d 144, 148 (Utah App. 1994)

Committee note:

This instruction cites the elements for a statutory public nuisance claim. There may also be a common law claim. *See Riggins v. Dist. Court of Salt Lake Cty.*, 51 P.2d 645, 662 (1935). See also the committee note to CV1208 regarding specific statutory nuisances and exemptions.

CV1211 DAMAGES FOR NUISANCE.

If you determine that [name of defendant] is liable to [name of plaintiff] for nuisance, you must award some amount of damages. To determine the proper amount of damages, you must consider:

- 1) the degree of [name of defendant]'s interference in the use and enjoyment of [name of plaintiff]'s land; and
- 2) the reasonableness of the interference in the context of wider community interests.

Considering these factors and the evidence presented at trial, you may award damages that range from “nominal damages” up to an amount necessary to fully compensate name of plaintiff] for [name of plaintiff]'s economic and/or non-economic harm.

“Nominal damages” is an amount such as one dollar.

Economic and non-economic damages are defined in other instructions.

References:

Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245 (Utah 1998)

Committee note:

For a definition of economic and non-economic damages, see CV2001 et. seq. For instructions on the measure of damages for injury to personal or real property resulting from a nuisance, see CV2004-2011. The damages instructions may be adapted to the circumstances of the case. For example, the noneconomic damages in a nuisance case may include the addition of discomfort and annoyance to CV2004's list of considerations. *See Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1245-1249 (Utah 1998) and CV1212. A possessor of land may be allowed to recover “incidental damages for harms to his person or chattels” in an action for nuisance. *See Turnbaugh for Benefit of Heirs of Turnbaugh v. Anderson*, 793 P.2d 939, 942–43 (Utah Ct. App. 1990). The committee concluded that “incidental damages” are included in either economic or non-economic damages. In public nuisance claims, the first element of interference in the use and enjoyment of land may not apply; there may be other factors to consider.

CV1212 NON-ECONOMIC DAMAGES FOR NUISANCE.

In addition to any economic damages incurred by [name of plaintiff], you may also award damages for personal inconvenience, annoyance, and discomfort caused by the existence of a nuisance.

References:

Wade v. Fuller, 365 P.2d 802, 805 (Utah 1961)

Walker Drug Co. v. La Sal Oil Co., 972 P.2d 1238, 1245–49 (Utah 1998)

Committee note:

This instruction reflects the language of the case law on nuisance. Parties may also consider adapting CV2004.

CV1213 REASONABLENESS.

[Name of defendant]’s [specify nature of alleged nuisance] may be “unreasonable” under circumstances where the harm caused by [name of defendant]’s [alleged nuisance] outweighs whatever benefit it may have to society, or the [alleged nuisance] is not suitable to the location.

To determine if [name of defendant]’s [alleged nuisance] is “reasonable” or “unreasonable,” you may consider things such as the specific location where the nuisance is alleged to have occurred, when [name of defendant]’s [alleged nuisance] began, the nature and value of [name of defendant]’s [alleged nuisance], the character of the neighborhood, the extent and frequency of the injury to [name of plaintiff], and the effect on the enjoyment of [name of plaintiff]’s life, health, and property.

References:

Utah Code § 78B-6-1101 et al.

Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954)

Dahl v. Utah Oil Ref. Col, 71 Utah 1, 262 P. 269, 273 (1927)

Whaley v. Park City Mun. Corp., 2008 UT App 234, 190 P.3d 1

Walker Drug Co. v. La Sal Oil Col, 972 P.2d 1238, 1245 (Utah 1998)

Committee note:

Utah courts appear to be conflicted on the applicable considerations of “unreasonableness,” with some addressing it by focusing on the conduct:

[W]hat is a reasonable use of one's property must necessarily depend upon the circumstances of each case, for a use for a particular purpose and in a particular way, in one locality, that would be lawful and reasonable might be unlawful and a nuisance in another. The test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case.

Cannon v. Neuberger, 268 P.2d 425, 426 (Utah 1954) (cleaned up) (emphasis in original). While others address it by focusing on the injury:

Unlike most other torts, [private nuisance law] is not centrally concerned with the nature of the conduct causing the damage, but with the nature and relative importance of the interests interfered with or invaded. The doctrine of nuisance

has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of action or omission which has lead to the invasion.... Distinguished from negligence liability, liability in nuisance is predicated upon unreasonable injury rather than upon unreasonable conduct.

Whaley v. Park City Mun. Corp., 2008 UT App 234, ¶22, 190 P.3d 1. This conflict seems understandable because “no hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another.” *Dahl v. Utah Oil Ref. Co.*, 71 Utah 1, 262 P.269, 273 (1927). This is a fact-specific inquiry that “requires the finder of fact to evaluate, among other things, the severity of the harm vis-a-vis its social value or utility.” *Walker Drug Co. v. La Sal Oil Col*, 972 P.2d 1238, 1245 (Utah 1998).

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