

CIVIL JURY

INSTRUCTIONS

2003

Idaho Supreme Court
P.O Box 83720
Boise, ID 83720-0101

**Idaho Jury Instructions
by the
Civil Jury Instructions Committee**

2002-2003 Committee

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INTRODUCTION

A. PREFACE TO IDJI2D

Upon order of the Supreme Court, a select committee of judges and lawyers met to examine and revise the IDJI pattern jury instruction manual, which was last revised in 1988. The committee has recommended that the new manual be designated “IDJI2d” to differentiate it from the earlier manual. It is a complete overhaul of the prior work. Almost all of the previous instructions have been edited or rewritten at least somewhat to eliminate “legalese,” simplify grammatical structure, and make them gender neutral. Many of the instructions have been completely revised, and in a number of instances, we have recommended that a previous IDJI instruction be abandoned. It is the intent of the committee, and our recommendation to the court, that this manual replace the earlier IDJI manual in its entirety.

B. INSTRUCTIONS FOR USE

The organization of this manual has been revised. An Index and Cross Reference Table to the former IDJI instructions is included.

It must be emphasized that the instructions presented in this manual are “pattern” instructions, intended to present general principles of law that are accurate, uniform and understandable. However, these instructions must be used with care, for each individual case may have individual features that must be taken into consideration in the preparation and presentation of the final instructions.

A number of instructions included in the first edition of IDJI have been eliminated as too specialized, too particularized, or too remote for inclusion in a set of pattern instructions. This does not mean an earlier instruction is now disapproved; it means only that the topic is such that a manuscript instruction drafted expressly to cover the particular topic is more appropriate than an attempt to offer a pattern instruction.

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NON INSTRUCTIONS

The previous editions of IDJI listed a number of “non-instructions” – topics which at one time or another were covered by instructions, but which, under modern practice, the committee recommended should no longer be included in any instruction set. The committee recommended that these “non-instructions” be included in the current IDJI2d, with appropriate notations, cross references, and index references

IDJI	DESCRIPTION	IDJI ACTION	IDJI2D ACTION
103-107	Forms for stating other claims of various parties		Additional examples omitted as repetitious and unnecessary
113	Attempting to apply or illustrate burden of proof	Recommends no further instruction be given	Agrees
120	Evidence to be considered		Omitted as redundant to IDJI2d 100
121	Evaluation of evidence		Omitted as redundant to IDJI2d 100
130	Impeachment of witness	Recommends no special instruction be given– topic covered by IDJI2d 100	Agrees
131	Witness willfully false	Recommends no special instruction be given – topic covered by IDJI2d 100	Agrees
132	Witnesses presumed to speak the truth	Recommends no special instruction be given.	Agrees
133	Witness need not be believed	Recommends no special instruction	Agrees
134	Inherently improbable testimony may be disregarded	Recommends no special instruction. Argumentative, or comment on evidence	Agrees
135	Party competent as a witness	Recommends no special instruction.	Agrees

163	Plaintiff's case and Defendant's Counterclaim	General verdict form, no special interrogatories	Omitted
164	Plaintiff's case and Third Party or Cross Claim	General verdict form, no special interrogatories	Omitted
213	Presumption of due care	Recommends no special instruction.	Superseded by IDJI2d 126A and 126B
216	Sudden emergency, or duty of one in imminent peril	Recommends no special instruction	Agrees
217	Fact of accident alone is not evidence of negligence	Recommends no special instruction	Agrees
218	Care to be commensurate with hazard	Recommends no special instruction	Agrees
219	Presumption as to conduct of others, etc." -- (person has a right to expect that others will obey the law, for example	Recommends no special instruction	Agrees
220	Intent not an element of negligence	Recommends against negative element instruction.	Agrees

221	Possibility of avoiding accident not a test of negligence.	Recommends against “example” and “negative element” instructions	Agrees
222	Care required care required for safety of child	Recommends against “example” instructions	Agrees
223	General Miscellaneous Factors	Recommends against itemizing particular duties, other than reference to statutes or ordinances.	Agrees
227	Proximate Cause – single factor		Omitted as redundant to IDJI2d 230
231	Multiple Causes	Recommends against separate instructions	Agree – covered by IDJI2d 230A or 230B
232	Last clear chance	Omitted as covered by comparative negligence	Omitted
233	Unavoidable accident	Recommend against special situation instruction, -- comment on evidence	Agrees
246		Eliminated	
250	Principal and agent – agency admitted		Omitted See 6.40.1
251	Agency – issue as to agency		Omitted See series 6.40-6.49
253	Agency scope of authority		Omitted See 6.43.1
254	Eliminated		
297	Specific duty – amusement devices or ski lifts	Incorrect statement of law	

298	Circumstance of liability to employees of contractor	Superseded by changes to Workers' Compensation Act	
299	Liability of contractor to employees of subcontractor	Eliminated by Worker's Compensation amendments	
302	Subcontractor is invitee of general contractor	Eliminated by Worker's Compensation amendments	
320-334	Elements instruction against public entities	No longer applicable	Omitted
321	Actual notice to public entity	Deleted	Covered by 3.07
322	Constructive notice to public entity	Deleted	Covered by revised 3.05
323	Limitations on liability of governmental entity	Tort Claims Act makes liability issues same as private entities	Covered by 293, etc.
400			Covered by 10.03.1
401		Not correct statement of law	Omitted
411	Definition of "probable cause"	Determination is for Court not jury	
481	Definition of express malice	Recommended to define the elements	
490-491	Eliminated		
605	Contract discharged in bankruptcy		Omitted, as too specialized
606	Eliminated		
611	Prevention of performance	Incomplete statement of the law as written	Covered in other instructions
612	Eliminated		
614		Too specific Not correct statement of law	
654	Eliminated		

662-663	Eliminated		
630	Eliminated		
704	Eliminated		
913			See 912
916	Elements of damage – breach of contract	Consists of a catalog of various phrases for insertion into a general format instruction, such as IDJI 902. These phrases are omitted from the new compilation, as the phrases were either too vague or were fact specific and inappropriate for inclusion in a pattern instruction set.	Omitted
918	Elements of damage – business losses	Appears to be fact-specific elements extracted from the several cases cited in the comment. In most cases, the elements of damage in a “business loss” case will be fact specific, and therefore inappropriate for compilation in a pattern instruction set.	Omitted
934-938	Eliminated		

919	Elements of damage – fraud	Appears to be fact-specific elements extracted from the several cases cited in the comment. In most cases, the elements of damage in a business fraud case will be fact specific, and therefore inappropriate for compilation in a pattern instruction set.	Omitted
940	Previous infirm condition	Redundant to the previous instruction as revised	Omitted
1008-1015	Products liability – express warranty	No cause of action in product liability arises under UCC definitions	Omitted
1016	Products liability defense	Not a correct statement of law	Omitted
1018	Products liability defense – failure to examine	UCC contract elements do not apply to product liability	Omitted

Section 1.00 – General Procedure

IDJI 1.00 – Introductory instruction to jury

INSTRUCTION NO. ____

These instructions explain your duties as jurors and define the law that applies to this case. It is your duty to determine the facts, to apply the law set forth in these instructions to those facts, and in this way to decide the case. Your decision should be based upon a rational and objective assessment of the evidence. It should not be based on sympathy or prejudice.

It is my duty to instruct you on the points of law necessary to decide the case, and it is your duty to follow the law as I instruct. You must consider these instructions as a whole, not picking out one and disregarding others. The order in which these instructions are given or the manner in which they are numbered has no significance as to the importance of any of them. If you do not understand an instruction, you may send a note to me through the bailiff, and I will try to clarify or explain the point further.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits admitted into evidence, and any stipulated or admitted facts. While the arguments and remarks of the attorneys may help you understand the evidence and apply the instructions, what they say is not evidence. If an

attorney's argument or remark has no basis in the evidence, you should disregard it.

The production of evidence in court is governed by rule of law. At times during the trial, I sustained an objection to a question without permitting the witness to answer it, or to an offered exhibit without receiving it into evidence. My rulings are legal matters, and are solely my responsibility. You must not speculate as to the reason for any objection, which was made, or my ruling thereon, and in reaching your decision you may not consider such a question or exhibit or speculate as to what the answer or exhibit would have shown. Remember, a question is not evidence and should be considered only as it gives meaning to the answer.

[There were occasions where an objection was made after an answer was given or the remark was made, and in my ruling on the objection I instructed that the answer or remark be stricken, or directed that you disregard the answer or remark and dismiss it from your minds. In your deliberations, you must not consider such answer or remark, but must treat it as though you had never heard it.]

The law does not require you to believe all of the evidence admitted in the course of the trial. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it. In so doing, you bring with you to this courtroom all of the experience and background of your lives.

There is no magical formula for evaluating testimony. In your everyday affairs, you determine for yourselves whom you believe, what you believe and how much weight you attach to what you are told. The considerations you use in making the more important decisions in your everyday dealings are the same considerations you should apply in your deliberations in this case.

Comment:

This instruction is a revision of IDJI 100, to clarify the language and eliminate unnecessary verbiage. It also supercedes and replaces IDJI 120 and 121.

INSTRUCTION NO. _____

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

IDJI 1.02 – Corporate parties

INSTRUCTION NO. ____

The corporation[s] involved in this case [is/are] entitled to the same fair and unprejudiced treatment that an individual would be under like circumstances. You should decide this case with the same impartiality that you would use in deciding a case between individuals.

INSTRUCTION NO. ____

There are certain things you must not do during this trial:

- 1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.**
- 2 You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.**
- 3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.**
- 4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.**
- 5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.**
- 6. You must not go to the place where any alleged event occurred.**

Comment:

This instruction is an outline of the elements often stated to jurors at the beginning of a trial. See, IRCP 47(n). It is perhaps preferable to use the elements of this instruction as a guide for a more informal explanation to the jury of the necessary conduct expected of them, including reasons and examples as appropriate.

IDJI 1.03.1 – Admonition to jury – short form

INSTRUCTION NO. ____

Members of the jury, I remind you that you are not to discuss this case among yourselves or with anyone else, nor to form any opinion as to the merits of the case, until after I finally submit the case to you.

IDJI 1.04 - Insurance cautionary

INSTRUCTION NO. ____

Whether a party has insurance is not relevant to any of the questions you are to decide. You must avoid any inference, speculation or discussion about insurance.

Comment:

This instruction has been revised to comply with Lehmkuhl v. Bolland, 114 Idaho 503, 757 P.2d 1222 (Ct. App. 1988).

IDJI 1.05 – Statement of claims not evidence

INSTRUCTION NO. ____

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues to be decided.

IDJI 1.07 – Facts not in dispute

INSTRUCTION NO. _____

The following facts are not in dispute:

**[Set forth the facts not in dispute in simple form, without
characterization, undue emphasis or repetition.]**

IDJI 1.09 – Quotient verdicts

INSTRUCTION NO. ____

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded or percentages of fault are to be assigned, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award or percentage of negligence.

INSTRUCTION NO. _____

If it becomes necessary during your deliberations to communicate with me, you may send a note signed by one or more of you to the bailiff. You should not try to communicate with me by any means other than such a note.

During your deliberations, you are not to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

INSTRUCTION NO. _____

I have given you the rules of law that apply to this case. I have instructed you regarding matters that you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing arguments to you and then you will retire to the jury room for your deliberations.

Each of you has an equally important voice in the jury deliberations. Therefore, the attitude and conduct of jurors at the beginning of the deliberations are important. At the outset of deliberations, it is rarely productive for a juror to make an emphatic expression of opinion on the case or to state how he or she intends to vote. When one does that at the beginning, one's sense of pride may be aroused and there may be reluctance to change that position, even if shown that it is wrong. Remember that you are not partisans or advocates, but you are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views. Deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

IDJI 1.13.1 Alternate form – concluding remarks

INSTRUCTION NO. _____

Members of the Jury: In order to return a verdict, it is necessary that at least three-fourths of the jury agree. Your verdict must represent the considered judgment of each juror agreeing to it.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges – judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

IDJI 1.15.1 Completion of verdict form – general verdict

INSTRUCTION NO. _____

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

Appropriate forms of verdict will be submitted to you with any instructions. Use only the ones conforming to your conclusions and return the others unused.

A verdict may be reached by three-fourths of your number, or nine of you. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict, you will notify the bailiff, who will then return you into open court.

INSTRUCTION NO. _____

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

An appropriate form of verdict will be submitted to you with any instructions. Follow the directions on the verdict form, and answer all of the questions required of you by the instructions on the verdict form.

A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon each of the required questions in the verdict, you should fill it out as instructed, and have it signed. It is not necessary that the same nine agree on each question. If your verdict is unanimous, your foreman alone will sign it; but if nine or more, but less than the entire jury, agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdicts, you will notify the bailiff, who will then return you into open court.

Comment:

Two forms are set forth, one for use with a general verdict and one for use with special interrogatories. There are still some ambiguities, such as exactly who signs the final verdict when the same jurors do not agree to each question. However, pattern instructions drafted to fit every circumstance became too cumbersome. The committee determined that the above instruction was sufficient to meet the general case; that if an ambiguous circumstance arose which the jury could not work out for themselves, they could request further instructions from the court.

INSTRUCTION NO. ____

You have now completed your duties as jurors in this case and are discharged with the sincere thanks of this Court. You may now discuss this case with the attorneys or with anyone else. For your guidance, I instruct you that whether you talk to the attorneys, or to anyone else, is entirely your own decision. It is proper for you to discuss this case, if you want to, but you are not required to do so, and you may choose not to discuss the case with anyone at all. If you choose to talk to someone about this case, you may tell them as much or as little as you like about your deliberations or the facts that influenced your decisions. If anyone persists in discussing the case over your objection, or becomes critical of your service, either before or after any discussion has begun, you may report it to me.

IDJI 1.20.1 – Burden of proof – preponderance of evidence

INSTRUCTION NO. _____

When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

IDJI 1.20.2 – Burden of proof – clear and convincing evidence

INSTRUCTION NO. _____

When I say a party has the burden of proof on a proposition by clear and convincing evidence, I mean you must be persuaded that it is highly probable that such proposition is true. This is a higher burden than the general burden that the proposition is more probably true than not true.

IDJI 1.22 – Deposition testimony

INSTRUCTION NO. _____

Certain evidence is about to be presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing [and upon video tape]. This evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You will only receive this testimony in open court. Although there is a record of the testimony you are about to hear, this record will not be available to you during your deliberations.

Comment:

The last sentence has been added to IDJI 124 to anticipate inquiry from the jury.

IDJI 1.24.1 – Circumstantial evidence without definition

INSTRUCTION NO ____

Evidence may be either direct or circumstantial. The law makes no distinction between direct and circumstantial evidence. Each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

IDJI 1.24.2 – Circumstantial evidence with definition

INSTRUCTION NO ____

Evidence may be either direct or circumstantial. Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves the fact, by proving one or more facts from which the fact at issue may be inferred.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

Comments:

Two alternatives are offered, one including a brief definition of the term “circumstantial” and one without. The committee felt that the essential point to the instruction is that there is no difference in degree of proof required between direct and circumstantial evidence, and that the definition of the term “circumstantial” is cumbersome and unnecessary. The recommendation is to use the first alternative is the usual case. However, if the lawyers would not be permitted to explain circumstantial evidence by example within the context of the case during argument, it may be necessary to request the second alternative.

IDJI 1.26.1 – View of the premises, preliminary instruction

INSTRUCTION NO. _____

The bailiff is now going to escort you to the premises involved in this case. At the premises, you are not to make any measurements, perform any tests, or conduct any demonstrations. The view is not to be considered as evidence in this case, but is provided only to help you understand the evidence.

IDJI 1.26.2 – View of the premises, final instruction

INSTRUCTION NO. _____

You were taken out to view the premises involved in this case. What you observed there is not to be considered evidence. You should consider your view of the premises only as a means of understanding and applying the evidence produced here in trial.

IDJI 1.28 – Evidence admitted for limited purpose

INSTRUCTION NO. ____

In this case, certain evidence was admitted for a limited purpose. I called your attention to this when the evidence was admitted. I remind you that whenever evidence was admitted for a limited purpose, you must not consider such evidence for any purpose other than the limited purpose for which it was admitted.

IDJI 1.30 – Presumptions

No evidence on presumed facts

Basic facts undisputed

-- GIVE 1.30.1 (Binding instruction)

No evidence on presumed fact

Disputed evidence on basic fact

-- GIVE 1.30.2

Some evidence on existence of presumed fact

Disputed evidence on existence of basic facts

-- GIVE 1.30.3

Any substantial evidence on non-existence of presumed fact;
presumption is rebutted and evaporates.

-- NO instructions in 1.30 area

Instruction 1.30.1

The following facts are undisputed and are to be taken as true: [insert facts established by presumption.]

Instruction 1.30.2

[Name of party] claims [basic facts]. This party has the burden of proof on those facts. If you find that these facts have been proved, then you must find [the presumed fact.] If you find that the claimed facts have not been proved, then [the presumed fact] has not been proved.

Instruction 1.30.3

[Name of party] claims [basic facts]. This party has the burden of proof on those facts. If you find that these facts have been proved, then you must find [the presumed fact.]. If you find that the claimed facts have not been proved, then you must determine [the presumed fact] based upon the other evidence in the case.

Comment:

Rule 301 of the Idaho Rules of Evidence treats presumptions as shifting only the burden of producing evidence on the issue to the party opposing a presumption, unless a statute expressly provides for a different effect. Neither this instruction nor Instruction 125B purports to cover instances in which a statute is controlled.

Where a presumption governed by IRE 301 is involved, the court should instruct as follows:

1. Instruction 1.30.1 should be given when the basic facts which give rise to a presumption have been proved beyond reasonable dispute and no substantial evidence has been offered to disprove the fact established by the presumption, or when the fact to be proved by a presumption has otherwise been proved beyond reasonable dispute.

2. Instruction 1.30.2 should be given when the basic facts giving rise to the presumption are in dispute and no substantial evidence has been offered by the party opposing the presumption to disprove the fact established by the presumption.

Instruction 1.30.1 should be used when no substantial evidence has been introduced by either party concerning the existence of the presumed fact.

Instruction 1.30.2 should be used when the party who claims the benefit of the presumption has introduced evidence apart from the presumption, the presumption has been rebutted and disappears, the jury will decide the issue based on the evidence, and no instruction should be given.

3. Where substantial evidence of the nonexistence of the presumed fact has been presented by the party opposing the presumption, the presumption has been rebutted and disappears, the jury will decide the issue based on the evidence, and no instruction should be given.

4. Where insufficient evidence has been presented to permit the jury to find that the basic facts have been proved, the presumption does not arise.

IDJI 1.40.1 – General format, general verdict

INSTRUCTION NO. ____

On the issue of (identify issue), the (name of party) has the burden of proof on each of the following propositions:

(Set forth each element of the claim. State the ultimate fact or conclusion to be proved, not specific facts, in concise format. Use numbered paragraphs).

If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the (party claiming the issue). If you find that any of the propositions has not been proved, then your verdict should be for (party adverse to this issue).

IDJI 1.40.2 – Charging instruction plaintiffs case, general verdict

INSTRUCTION NO. ____

The plaintiff[s] have the burden of proof on each of the following propositions:

- 1. [Proposition No. 1.]**
- 2. [Proposition no. 2.]**
- 3. [Etc.]**

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff[s].

If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant[s].

Comment:

This instruction is intended in cases where the jury will be given a general verdict form and special interrogatories will not be used. This instruction is not appropriate for use where affirmative defenses or comparative negligence issues are involved.

IDJI 1.40.3 – General format for charging instruction, general verdict, plaintiff’s case with affirmative defenses, no special interrogatories. [NOT for comparative negligence issues.]

INSTRUCTION NO. _____

The plaintiff has the burden of proof on each of the following propositions:

- 1. [Proposition No. 1.]**
- 2. [Proposition No. 2.]**
- 3. [Etc.]**

In this case, the defendant has asserted the affirmative defense that [describe the affirmative defense alleged.] On this affirmative defense, the defendant has the burden of proof on each of the following propositions:

- 1. [Proposition No. 1.]**
- 2. [Proposition No. 2.]**
- 3. [Etc.]**

If you find from your consideration of all the evidence that the plaintiff has proved each of the propositions required of the plaintiff for the case in chief, and further find that the defendant has failed to prove each of the propositions required for the affirmative defense, your verdict should be for the plaintiff.

If you find that the plaintiff has failed to prove each of the propositions required for the case in chief, or find that the defendant has proved each of the propositions required for the affirmative defense, your verdict should be for the defendant.

Comment:

This instruction is for use with a general verdict form, where special interrogatories will not be used. This instruction, and the general verdict form contemplated by its use, could apply where the affirmative defense is a complete defense to the plaintiff's claim. If the defense is only a partial defense, or operates only to reduce the damages, or there are additional considerations of comparative fault, a special verdict on jury interrogatories would clarify the issues better. In such case, a set of charging instructions for use with special interrogatories would be a better choice.

IDJI 1.40.4 – Special format for charging instruction, negligence case, no comparative or affirmative defenses. For use with general verdict without special interrogatories.

INSTRUCTION NO. _____

The plaintiff has the burden of proof on each of the following propositions:

- 1. The defendant was negligent.**
- 2. The [plaintiff was injured.] [plaintiff's property was damaged.]**
- 3. The negligence of the defendant was a proximate cause of [the injury to the plaintiff.][the damage to the plaintiff's property.]**
- 4. The elements of damage and the amounts thereof.**

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. However, if you find that any of these propositions has not been proved, then the plaintiff has not met the burden of proof required and your verdict should be for the defendant.

Comment:

This is a standard form of charging or issue instruction in a negligence case where comparative negligence or affirmative defenses are not involved. Use a general verdict, without special interrogatories.

IDJI 1.41.1 – General format, verdict on special interrogatories

INSTRUCTION NO. _____

On the issue of _____, the _____ has the burden of proof on each of the following propositions:

(Set forth each element of the claim. State the ultimate fact or conclusion to be proved, not specific facts, in concise format. Use numbered paragraphs).

You will be asked the following question on the jury verdict form:

(Insert the exact jury interrogatory on the issue).

If you find from your consideration of all the evidence in the case that each of the propositions contained in this instruction has been proved, you should answer the jury question “yes.” If you find that any of these propositions has not been proved, you should answer the question “no.”

IDJI 1.41.2 – Charging instruction, plaintiffs case, verdict on special interrogatories

INSTRUCTION NO. _____

**On plaintiffs' claim of _____ against the defendant _____,
the plaintiffs have the burden of proof on each of the following propositions:**

- 1. [Proposition No. 1.]**
- 2. [Proposition No. 2.]**
- 3. [Etc.]**

You will be asked the following question on the jury verdict form:

(Insert question exactly as it appears on the verdict form.)

If you find from your consideration of all the evidence that each of these propositions has been proved, then you should answer this question "yes." If you find from your consideration of all of the evidence that any of these propositions has not been proved, then you should answer this question "no."

Comment:

This instruction is the foundation for a verdict on special interrogatories. A charging instruction such as this should be given for each discrete claim or cause of action covered by a special interrogatory on the verdict form. The introductory sentence may be modified as necessary to specifically refer to each claim or cause of action which is covered by the charging instruction and the special verdict interrogatory to which it relates.

IDJI 1.41.3 – Charging instructions on defense claims - special interrogatories

INSTRUCTION NO. _____

On the defendant[s] claim of _____ against _____, the defendant[s] [has/have] the burden of proof on each of the following propositions:

- 1. [Proposition No. 1.]**
- 2. [Proposition No. 2.]**
- 3. [Etc.]**

You will be asked the following question on the jury verdict form:

[Insert question exactly as it appears on the verdict]

If you find from your consideration of all the evidence that each of these propositions has been proved, then you should answer this question "yes." If you find from your consideration of all the evidence that any of these propositions has not been proved, then you should answer this question "no."

Comment:

The committee recommends that when there are affirmative defenses or counterclaims, and in any case involving multiple claims, cross claims or third party claims, verdicts on special interrogatories be used. Then, each party's claim, counterclaim or cross claim can be isolated into a charging instruction which defines that claim, and sets forth the elements necessary to answer the special interrogatory.

IDJI 1.41.4.1 – Charging instructions, negligence case, multiple defendants or parties, with comparative negligence.

For use with special jury verdict on interrogatories; three parts.

INSTRUCTION NO. _____

The plaintiff has the burden of proof on each of the following propositions:

- 1. The defendant was negligent.**
- 2. The plaintiff was injured.**
- 3. The negligence of the defendant was a proximate cause of the injury to the plaintiff.**
- 4. The elements of damage and the amounts thereof.**

You will be asked the following question on the jury verdict form:

Was the defendant negligent, and if so, was the negligence a proximate cause of the injuries to the plaintiff?

If you find from your consideration of all the evidence that each of these propositions has been proved, you should answer this question “Yes.” However, if you find that any of these propositions has not been proved, then the plaintiff has not met the burden of proof required and you should answer this question “No.”

IDJI 1.41.4.2 – Companion instruction – defendant’s burden

INSTRUCTION NO. _____

In this case, the defendant has alleged that the plaintiff was negligent. On this defense, the defendant has the burden of proof on each of the following propositions:

- 1. The plaintiff was negligent.**
- 2. The negligence of the plaintiff was a proximate cause of [his/her] own injuries.**

You will be asked the following question on the jury verdict form:

Was the plaintiff negligent, and if so was the plaintiff’s negligence a proximate cause of [his/her] injuries?

If you find from your consideration of all the evidence that each of these propositions has been proved, you should answer this question “Yes.” However, if you find that any of these propositions has not been proved, then the defendant has not met the burden of proof required and you should answer this question “No.”

IDJI 1.41.4.3 – Companion instruction – Non-party negligence – defendant’s burden

INSTRUCTION NO. _____

In this case, the defendant has alleged that some other individual or entity, not a party to this lawsuit, was negligent. On this defense, the defendant has the burden of proof on each of the following propositions:

- 1. Another individual or entity was negligent.**
- 2. The negligence of the other individual or entity was a proximate cause of the plaintiff’s injuries.**

You will be asked the following question on the jury verdict form:

Was another individual or entity, not a party to this lawsuit, negligent, and if so was the other individual or entity’s negligence a proximate cause of the plaintiff’s injuries?

If you find from your consideration of all the evidence that each of these propositions has been proved, you should answer the question “Yes.” However, if you find that any of these propositions has not been proved, then the defendant has not met the burden of proof required and you should answer this question “No.”

Comment:

These instructions are intended to be used together to frame the issues for the jury where comparative negligence is at issue. It is necessary that these instructions be used in conjunction with a special verdict on interrogatories to the jury, and that the questions in the instructions be identical to the questions included in the special interrogatories. Parts one and two will be used in all cases involving defendant’s contention of comparative negligence of the plaintiff. Part three will be used where the defendant alleges that a non-party is negligent.

IDJI 1.43.1 – Instruction on special verdict form

INSTRUCTION NO. _____

In this case, you will be given a special verdict form to use in returning your verdict. This form consists of a series of questions that you are to answer. I will read the verdict form to you now.

[Read the verdict form in its entirety, including all instructions, and explain the signature block for the foreperson and the signature lines for the individual jurors.]

Comment:

This instruction replaces the IDJI collection of specific instructions at IDJI 280 through 283. This instruction can be used with any special verdict form. A sample special verdict, in a simple comparative case, is included here as an example only. The format of any actual special is dependent upon the issues and facts presented in the individual case.

IDJI 1.43.1 – Example verdict on special interrogatories.

[Full Caption]

We, the Jury, answer the special interrogatories as follows:

Question No. 1: Was the defendant negligent, and if so, was this negligence a proximate cause of the plaintiff's injuries?

Answer to Question No. 1: Yes [___] No [___]

If you answered this question "No," you are done. Sign the verdict as instructed and advise the Bailiff. If you answered this question "Yes," continue to the next question.

Question No. 2: Was the plaintiff negligent, and if so, was this negligence a proximate cause of her own injuries?

Answer to Question No. 2: Yes [___] No [___]

Question No. 3: Was another individual or entity, not a party to this lawsuit, negligent, and if so was the other individual or entity's negligence a proximate cause of the plaintiff's injuries?

Answer to Question No. 3: Yes [___] No [___]

If you answered "Yes" to either or both of questions 2 and 3, answer Question No. 4. If you answered "No" to both Questions 2 and 3, then skip to Question No. 5.

Instruction for Question No. 4: You will reach this question if you have found that the defendant and either or both of the plaintiff and the other, non-party, were negligent, which negligence caused the injuries to the plaintiff. In this question, you are to apportion the fault between these parties in terms of a percentage. As to each party or entity to which you answered "Yes" to questions 1, 2, and 3, determine the percentage of fault for that party or entity, and enter the percentage on the appropriate line. If you answered "No" to any of the above questions, insert a "0" or "Zero" as to that party or entity. Your total percentages must equal 100%.

Question No. 4: What is the percentage of fault (if any) you assign to each of the following:

To the Defendant, [Insert name]	_____ %
To the Plaintiff, [Insert name]	_____ %
To the non-party, [Insert name]	_____ %

Total must equal 100%

If the percentage of fault you assigned to the plaintiff is equal to or greater than the percentage of fault you assigned to the defendant, you are done. Sign the verdict and advise the Bailiff. If the percentage of fault assigned to the plaintiff is less than the percentage of fault you assigned to the defendant, answer the next question.

Question No. 5: What is the total amount of damage sustained by the plaintiff as a result of the accident?

Answer to Question No. 5: We assess plaintiff's damages as follows:

1. Economic damages, as defined in the Instructions:
\$ _____
2. Non-economic damages, as defined in the Instructions:
\$ _____

[Date line, signature block for foreperson, and 11 signature lines
for individual jurors if verdict is not unanimous.]

Note: This form is included only as an example, and may be modified as needed to meet the specific issues of a given case. The committee recommends separate damage allocations be no more numerous than between economic and non-economic damages. In the court's discretion the liability questions may be split between negligence and proximate cause.

SECTION 2.00 – NEGLIGENCE

IDJI 2.00.1 - Duty of care - defendant

INSTRUCTION NO. _____

It was the duty of the defendant, before and at the time of the occurrence, to use ordinary care for the safety of the plaintiff [and the plaintiff's property].

IDJI 2.00.2 - Duty of care – both plaintiff and defendant

INSTRUCTION NO. ____

It was the duty of both plaintiff and defendant, before and at the time of the occurrence, to use ordinary care for the safety of both themselves and each other, [and for both their own and each other's property].

IDJI 2.00.3 - Duty of care – all parties

INSTRUCTION NO. _____

It was the duty of all parties, before and at the time of the occurrence, to use ordinary care for the safety of themselves and each other, [and for their own and each other's property].

IDJI 2.02 – Duty of care – minor child

INSTRUCTION NO. ____

A minor child has a duty to exercise the degree of care which would reasonably be expected of an ordinary child of the same age, maturity, experience and knowledge when acting under similar circumstances.

IDJI 2.04.1 – Liability of common carrier

INSTRUCTION NO. ____

A common carrier is not a guarantor of the safety of its passengers. A common carrier does have a duty to exercise the highest degree of care, skill and diligence in [receiving] [conveying] [and] [setting down] its passengers as safely as the means of conveyance and circumstances permit.

IDJI 2.04.2 Common carrier status not disputed

INSTRUCTION NO. ____

The defendant (name) was a common carrier at the time of the occurrence in question.

IDJI 2.04.3 – Definition of common carrier – where status disputed

INSTRUCTION NO. ____

A common carrier is a business enterprise that holds itself out to the general public as being engaged in the business of transporting passengers (or property) from place to place for compensation.

IDJI 2.04.4 – Definition of passenger

INSTRUCTION NO. ____

A passenger is one who is being transported by the common carrier with the consent of the carrier. Such person is a passenger from the time the individual begins to board the vehicle until the individual has completed exiting the vehicle.

Comment:

These instructions divide the previous IDJI 202 into several specific components, depending upon what is at issue. The instruction on liability of a common carrier sets out that a common carrier owes the highest duty of care, which is the holding of Clark v. Tarr, 76 Idaho 383, 283 P.2d 942 (1955), but that it is not a guarantor or insurer, which is the holding in Ness v. West Coast Air, 90 Idaho 111, 410 P.2d 965.

IDJI 2.06 – Duty of care – electrical transmission

INSTRUCTION NO. ____

A person generating or transmitting electricity has a duty to exercise the highest degree of care to avoid injury to persons or property.

INSTRUCTION NO. ____

You are instructed that _____ (nature of the activity) is considered in the law to be an ultra hazardous activity. A person who carries on an ultra hazardous activity is liable to an injured plaintiff for all damages proximately caused by that activity, regardless of the degree of care or negligence on the part of the defendant, unless the exception explained below applies.

The exception to the rule of strict liability for damages resulting from ultra hazardous activities exists where the injured person knew of the dangers involved, and either voluntarily participated in the activity or heedlessly exposed himself/herself to the dangers. In such event, any liability of the defendant to the plaintiff must be based upon a finding by the jury that the defendant was negligent, as explained elsewhere in these instructions.

Comment:

There is no Idaho case on point. Cases from other jurisdictions indicate that the determination of what is an ultra hazardous activity is a question of law for the court. (*See, e.g., Green v. Ensign-Bickford*, 595 A.2d 1383 (Conn.1991). If such be the law in Idaho, this instruction would be given only where there was an issue of fact whether the injured party was a knowing or voluntary participant, etc. If there is no issue on this point, and the activity is determined by the court to be an ultra hazardous activity, a binding instruction on liability would be given.

IDJI 2.10 - Medical malpractice instructions

IDJI 2.10.1 – Standard of care: health care professionals are specialists

INSTRUCTION NO. ____

A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree of skill and learning ordinarily possessed and exercised by other health care providers of the same or similar specialty practicing in the community in which such care is provided. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.

The defendants Name and Name are health care providers within the meaning of this instruction.

IDJI 2.10.2 - Standard of care: health care providers are not specialists.

INSTRUCTION NO. ____

A health care provider undertaking the treatment or care of a patient has a duty to possess and exercise that degree of skill and learning ordinarily possessed and exercised by other health care providers who are trained and qualified in the same or a similar field of care and who practice in the community in which such care is to be provided. It is further the duty of health care providers to use reasonable care and diligence in the exercise of their skill and the application of their learning.

The defendants Name and Name are health care providers within the meaning of this instruction.

IDJI 2.10.3 - Charging elements of medical negligence

INSTRUCTION NO. ____

On the claim of medical negligence against the defendant for failure to meet the standard of care, the plaintiff has the burden of proof on each of the following propositions:

- 1. That the defendant failed to meet the applicable standard of care as defined in these instructions;**
- 2. That the plaintiff was injured;**
- 3. That the acts of the defendant which failed to meet the applicable standard of care were a proximate cause of the injuries of the plaintiff; and**
- 4. The elements of damage and the amount thereof.**

Comment:

Purpose of instruction: to provide a specific instruction on the elements of proof, couched in the statutory language of I.C. § 6-1012.

INTRODUCTION

The suit based upon lack of consent is an action for battery, not negligence. However, the subsidiary issue of care in an emergency, if such issue is in the case, may be dependent upon negligence for determination. (See I.C. § 39-4301 *et seq.*, for statutory provisions on medical consent.) Issues pertaining to lack of informed consent are presented in the next series of instructions. The particular instructions relevant to the case should be given.

IDJI 2.12.2 – Necessity for consent

INSTRUCTION NO. ____

A physician may not commence treatment upon a patient until a valid consent to such treatment has been obtained [unless an exception exists as defined in these instructions].

IDJI 2.12.3 – Who can give consent

INSTRUCTION NO. __

If the patient is an adult, is of ordinary intelligence, and is sufficiently aware to generally comprehend the need for, nature of and the significant risks posed by the contemplated medical treatment, the physician must obtain the consent from the patient in order for the consent to be valid.

IDJI 2.12.4 – Consent on behalf of minor or incapacitated person

INSTRUCTION NO. __

If the patient is a minor, or is incapacitated and not capable of giving consent, then the physician may obtain a valid consent from any competent parent, spouse or legal guardian. In this case, _____ (name), the patient's _____ (relationship) was a person authorized to give or withhold consent on behalf of the patient.

If no parent, spouse or legal guardian is readily available to do so, then a valid consent may be given by any competent relative representing himself or herself to be an appropriate, responsible person to act under the circumstances. If no relative is available, then any other competent individual, representing himself or herself to be responsible for the health care of such person, may provide a valid consent.

No person is authorized to override the express refusal to consent made by a patient who is a competent adult.

Comment:

Idaho Code § 39-4303A

IDJI 2.12.5 – Informed consent defined

INSTRUCTION NO. ____

In order to be a valid consent, the consent must be an informed consent.

This means that the physician must reasonably disclose and advise the patient [or the person acting on the patient's behalf] of all pertinent facts so as to permit the giving or withholding of consent to be a reasonably informed decision.

The phrase "all pertinent facts" means the disclosure of facts and giving of medical advice concerning the nature of the proposed treatment, the need for it, and the significant risks ordinarily attendant upon such treatment, which would ordinarily be made and given under similar circumstances by like physicians of good standing and practicing in the same [a similar] community, to a patient in the same circumstances as the plaintiff in this case.

Comment:

Idaho Code § 39-4304

IDJI 2.12.6 – Consequences of invalid consent

INSTRUCTION NO. ____

If it is alleged that a consent was obtained, but you find that the consent was not a valid consent as explained in these instructions, it is as if no consent had been given at all.

IDJI 2.12.7 – Emergency exception

INSTRUCTION NO. ____

If the patient is incapacitated and there is no other person available from whom consent can be obtained, and if the attending physician determines that the patient presents a medical emergency, or there is a substantial likelihood that the patient's life or health will be seriously endangered by any delay in treatment, the physician may proceed to provide the necessary treatment without obtaining a consent.

IDJI 2.12.8 – Charging instruction on elements of lack of consent

INSTRUCTION NO. ____

On plaintiff's claim against the defendant for failure to obtain consent to the treatment which was provided, the plaintiff has the burden of proof on each of the following propositions:

- 1. That the defendant failed to obtain a valid consent to treatment as explained in these instructions;**
- 2. That the defendant proceeded to treat the patient;**
- 3. That the plaintiff was injured;**
- 4. That the medical treatment provided by the defendant was a proximate cause of the injuries; and**
- 5. The nature and extent of the damages and the amount thereof.**

IDJI 2.12.9 – Charging instruction – defense of emergency exception

INSTRUCTION NO. ____

On defendant's affirmative defense that an emergency situation existed, excusing defendant from obtaining a consent before treatment, the defendant has the burden of proof on each of the following propositions:

- 1. The patient was incapacitated, or was a minor, and was therefore incapable of providing a valid consent; and**
- 2. There was no one else available who could have provided a valid consent; and**
- 3. The circumstances presented a medical emergency or a substantial likelihood that the patient's life or health would be seriously endangered by a delay in treatment.**

Comment:

See Idaho Code § 39-4301 et seq.; Sherwood v. Carter, 119 Idaho 246, 805P.2d 452 (1991); Rook v. Trout, 113 Idaho 652, 747 P.2d 61 (1987).

IDJI 2.20 – Definition of negligence

INSTRUCTION NO. ____

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the failure to do something which a reasonably careful person would do, or the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. [The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.]

Comment:

The bracketed words may be omitted when specific instructions defining standard of care, such as statutory duties, are included.

IDJI 2.22 - Violation of statute or ordinance – negligence per se

INSTRUCTION NO. ____

There was a certain statute in force in the state of Idaho at the time of the of the occurrence in question which provided that:

[quote or paraphrase the applicable statute.]

A violation of the statute is negligence, [unless (compliance with the statute was impossible) (or) (something over which the party had no control placed the individual in a position of violation of the statute) (or) (an emergency, not of the party's own making, caused the individual to fail to obey the statute) (or) (an excuse specifically provided for within the statute existed)].

Comment:

Change the term “statute” to “ordinance” as required. See Sanchez v. Galey, 112 Idaho 609 (1987) to issue whether violation of administrative regulation may constitute negligence per se.

IDJI 2.22.1 - Authorized emergency vehicles

INSTRUCTION NO. ____

- (1) The driver of an authorized emergency or police vehicle may exercise the privileges set forth below, when responding to an emergency call, or when in the pursuit of an actual or suspected violator of the law, or when responding to a fire alarm. When necessary to warn, the vehicle being operated at the time must make use of an audible signal having a decibel rating of at least one hundred (100) at a distance of ten (10) feet and/or display a flashing light visible in a 360 degree arc at a distance of one thousand (1,000) feet, under normal atmospheric conditions.**
- (2) Under the above circumstances, the driver may:**

 - (a) Park or stand, irrespective of the parking or standing provision of law;**
 - (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;**
 - (c) Exceed the maximum speed limits so long as he does not endanger life or property;**
 - (d) Disregard regulations governing direction of movement or turning in specified directions.**

(3) The foregoing provisions shall not relieve the driver of an authorized emergency or police vehicle from the duty to drive with due regard for the safety of all persons, nor shall these provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Comment:

A paraphrase of the provisions of Idaho Code § 49-623.

IDJI 2.22.2 – Intoxication defined

INSTRUCTION NO. ____

A person driving a motor vehicle is under the influence of [an intoxicating beverage] [a drug] when, as a result of [drinking an intoxicating beverage] [using a drug], the driver's physical or mental abilities are impaired to the degree that the driver no longer has the capacity to drive a vehicle with the caution characteristic of a sober person of ordinary prudence acting under similar circumstances.

[_____ (beer, wine or liquor)] is an intoxicating beverage.]

[_____ is a drug.]

Comment:

Where a violation of statute has occurred an instruction dealing with the violation of statute, such as Idaho Code § 18-8004, will normally be given. This instruction may be appropriate to accompany the instruction on violation of statute.

IDJI 2.24 – Definition of gross negligence

INSTRUCTION NO. ____

Gross negligence is distinguished as a matter of degree from ordinary negligence. Gross negligence involves carelessness that is so great that there was not just an absence of the ordinary care that should have been exercised, but a degree of negligence substantially greater than that which would constitute ordinary negligence.

Comment:

Revised definition tracks the Supreme Court language in Peterson v Parry, 92 Idaho 647, 448 P.2d 653 (1968) and Owen v. Taylor, 62 Idaho 408, 114 P.2d 258 (1940).

IDJI 2.25 – Definition of “willful and wanton”

INSTRUCTION NO. ____

The words “willful and wanton” when used in these instructions and when applied to the allegations in this case, mean more than ordinary negligence. The words mean intentional or reckless actions, taken under circumstances where the actor knew or should have known that the actions not only created an unreasonable risk of harm to another, but involved a high degree of probability that such harm would actually result.

Comment:

There appears to be no distinction between “reckless” and “willful and wanton” or “willful or wanton.” Hunter v. Horton, 80 Idaho 475, 479, 333 P.2d 459 (1958); Johnson v. Sunshine Mining Co., Inc., 106 Idaho 866, 873, P.2d 268 (1984); DeGroff v. Wight, 130 Idaho 557, 944 P.2d 712 (1997).

INSTRUCTION NO. ____

If the plaintiff proves that the instrumentality or mechanism which caused the injury or damage in this case was under the control or management of the defendant, and further proves that in the normal course of events the injury or damage would not have happened in the absence of negligence, then you may find from these facts that the defendant was negligent in causing the injury or damage in this case.

Comment:

The Supreme Court has clarified LePelley v. Grefenson, 101 Idaho 422, 614 P.2d 962 (1980), to clearly state that *res ipsa loquitur* is not available in a medical malpractice case at all; *see*, Kolln v. St. Luke's Regional Medical Center, 130 Idaho 323, 940 P.2d 1142 (1997).

IDJI 2.28 – Binding instruction on “presumption” of due care

INSTRUCTION NO. ____

You are to accept as a fact that _____ was exercising ordinary care at the time of and immediately before the accident.

Comment:

Use this instruction where there is no evidence on the issue of due care. If there is sufficient evidence on the issue, the presumption evaporates and no special instruction should be given at all. Idaho Rule of Evidence 301; see also, IDJI2d 130 and comment.

INSTRUCTION NO. _____

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the complained injury, loss or damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

[There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contribute concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.]

IDJI 2.30.2 – Proximate cause – “substantial factor,” without "but for" test.

INSTRUCTION NO. ____

When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

There may be one or more proximate causes of an injury. When the negligent conduct of two or more persons or entities contributes concurrently as substantial factors in bringing about an injury, the conduct of each may be a proximate cause of the injury regardless of the extent to which each contributes to the injury.

IDJI 2.40 – No imputation of negligence

INSTRUCTION NO. ____

The negligence, if any, of the defendant ____ (name) ____ cannot be charged to or against [any other defendant] [the defendant ____ (name) ____].

IDJI 2.41 No imputation of negligence to passenger

INSTRUCTION NO. _____

A driver's negligence is not to be charged against any passenger.

Comment:

The instruction may not be appropriate where the passenger is the employer of the driver, or the principal, partner or joint venturer, or where there is any issue in that regard. See IDJI2d 2.41.1

IDJI 2.41.1 – Imputation of liability to passenger – where driver was agent

INSTRUCTION NO. ____

There is no dispute in this case that the driver was the [agent] [employee] [partner] [joint-venturer] of the passenger, and that the driver was acting within the course and scope of that [agency] [employment]. Therefore, the negligence of the driver, if any, is imputed to the passenger.

IDJI 2.41.2 – Imputation of negligence to passenger – issue of fact on agency

INSTRUCTION NO. ____

If you find that the driver was the [agent] [employee] [partner] [joint venturer] of the passenger, and further find that the driver was acting within the course and scope of that [agency] [employment] [partnership] [joint venture] at the time of the occurrence which is the subject of this suit, then the negligence of the driver, if any, is imputed to the passenger. In all other events, the negligence of the driver is not charged against the passenger.

IDJI 2.44 - Imputation of negligence to the owner of a motor vehicle

INSTRUCTION NO. ____

The owner of a motor vehicle is responsible for the negligence of a driver who is driving the vehicle with the owner's permission. The permission may be express or implied.

In this case, if the driver is liable to an injured plaintiff, and the driver was driving with the permission of the owner, both driver and owner are equally liable.

Comment:

See Idaho Code § 49-2417

IDJI 2.45 –No imputation of negligence from parent to child

INSTRUCTION NO. ____

The negligence of a parent cannot be charged to a minor child.

IDJI 2.47 - Imputed negligence – adult signing minor’s license application

INSTRUCTION NO. _____

The adult who has signed the application of a minor for a driver’s license is liable with the minor for damages caused by the negligent act or omission of the minor in driving a motor vehicle.

Comment:

This instruction may be used if appropriate in cases involving imputed negligence under Idaho Code Section 49-310. See, also, Smith v. Sharp, 85 Idaho 17, 375 P.2d 184 (1962). If the signing adult has been relieved of liability by the provision of liability insurance as provided in Idaho Code Section 49-310(3), this instruction should not be sued.

By statute, the standard for liability may be other than “negligence”. See, e.g., Idaho Code Section 49-2415 (intentional act, intoxication, or gross negligence). The committee is of the opinion that such is consistent with the terms “any negligence or willful misconduct” in Idaho Code Section 49-310(2), and the appropriate term should be inserted in such case.

SECTION 3.00 PREMISES LIABILITY

This series eliminates the distinction found in the first series of IDJI between private and governmental ownership or occupation of the premises. The Idaho Tort Claims Act (I.C. Section 6-901 et seq.) provides that governmental entities are liable for negligent or wrongful acts just as a private person or entity would be liable. The committee recommends that there be no difference in the substantive instructions on the elements of premises liability.

IDJI 3.01 – Owner’s or occupier’s duty to avoid intentional or reckless harm

INSTRUCTION NO. _____

An [owner] [occupant] owes a duty not to cause intentional or reckless harm to persons or property on the premises.

IDJI 3.03 – Duty – condition of premises

INSTRUCTION NO. _____

The [owner] [occupier] owes a duty to exercise ordinary care to avoid exposing persons on the premises to an unreasonable risk of harm.

Comment:

For use where the duty exists – i.e., invitee vs. trespasser, etc.

IDJI 3.05 – Duty – defective condition

INSTRUCTION NO. _____

The [owner] [occupant] owes a duty to fix or warn of any dangerous or defective condition known to the [owner] [occupant], or which, in the exercise of ordinary care, should have been discovered.

IDJI 3.07 – Duty – imputed knowledge of conditions

INSTRUCTION NO. _____

If an [owner's] [occupant's] employee creates a dangerous or defective condition, or has knowledge of it, the [owner] [occupant] is deemed to have knowledge of it as a matter of law.

IDJI 3.09 – Duty to invitee

INSTRUCTION NO. _____

An [owner] [occupant] owes a duty of ordinary care under all the circumstances towards invitees who come upon the premises. This duty extends to all portions of the premises to which an invitee may reasonably be expected to go.

Comment:

Harrison v. Taylor, 115 Idaho 588, 768 P.2d 1321 (1989). This case seems to suggest that specific instructions pertaining to duty to warn, duty to inspect, duty to remedy, etc., are all subsumed within this instruction. Further reference to specific duties within the instructions become unnecessary. Counsel may argue such in the application of this instruction. *But, Cf.,* Walton v. Potlatch, 116 Idaho 892, 781 P.2d 229 (1989), where Court held that instruction on numerous separate duties was proper.

IDJI 3.11 – Specific duty – duty to inspect

INSTRUCTION NO. _____

The [owner] [occupant] owes a duty to exercise ordinary care in inspection of the premises for the purpose of discovering dangerous conditions.

Comment:

Instruction on specific duty may be redundant. See Comment to Instruction 3.09 above.

IDJI 3.13 – Definition of “invitee”

INSTRUCTION NO. _____

An invitee is a person who enters upon the premises of another for a purpose connected with business there conducted, or whose visit may reasonably be said to confer or anticipate a business, commercial, monetary or other tangible benefit to the [owner] [occupant].

Comment: *See, Holzheimer v. Johannesen*, 125 Idaho 397, 871 P.2d 814 (1994).

IDJI 3.13.1 – Invitee -- scope of invitation

INSTRUCTION NO. _____

A visitor may be an invitee for limited purpose or the invitation may be restricted in scope. If the visitor enters any part of the premises or makes any use of it beyond the scope of the invitation, or remains on the premises after the expiration of the time within which to accomplish the purpose of the invitation, the visitor's status as an invitee may end and the visitor may become a licensee or trespasser as is defined in other instructions.

IDJI 3.15 – Duty to warn a licensee

INSTRUCTION NO. ____

The [owner] [occupant] owes a duty to warn a licensee only of dangerous existing hazards on the land that were known to the [owner] [occupant] and unknown to and not reasonably discoverable by the licensee.

Comment:

“Reckless” appears to be the equivalent of “willful and wanton,” and is more understandable. See Comment to Instruction 2.25.

IDJI 3.15.1 – Definition of “licensee”

INSTRUCTION NO. _____

A licensee is a person who goes upon the premises of another in pursuit of the visitor's purpose, with the consent of the [owner] [occupant]. The consent of the [owner] [occupant] may be implied from the circumstances under which the visitor enters the premises.

Comment:

See, Holzheimer v. Johannesen, 125 Idaho 397, 871 P.2d 814 (1994).

IDJI 3.15.2 – Licensee - social guest

INSTRUCTION NO. _____

A social guest is a licensee upon the premises of his host. Where the purpose of the visit is social, rendering minor incidental services or economic benefit does not change the relationship.

IDJI 3.15.7 – Licensees - police officers and firemen

INSTRUCTION NO. _____

Police officers and firemen are licensees upon the premises of the owner/occupant.

IDJI 3.17 – Duty once presence is discovered

INSTRUCTION NO. _____

Once an [owner] [occupant] discovers a visitor of any status proceeding on a course, which probably will result in harm because of a dangerous condition of the premises, which is known to the [owner] [occupant] but not known to the visitor, the [owner] [occupant] owes a duty to use reasonable means to warn the visitor of the dangerous condition. The failure to do so amounts to reckless conduct.

Comment:

Instruction may be redundant to either 303 (licensee) or 308 (trespasser). “Reckless” appears to be the equivalent of “willful and wanton,” and is more understandable. See Comment to Instruction 2.25.

IDJI 3.19 – Trespasser, duty to

INSTRUCTION NO. _____

The [owner] [occupant] owes no duty to a trespasser whose presence on the premises is unknown or could not reasonably have been anticipated.

But, if the presence of the trespasser becomes known or reasonably could have been anticipated, the [owner] [occupant] has a duty not to injure the trespasser by any intentional or reckless act.

Comment:

“Reckless” appears to be the equivalent of “willful and wanton,” and is more understandable. See Comment to Instruction 2.25.

IDJI 3.19.1 – Trespasser, definition

INSTRUCTION NO. _____

A trespasser is a person who goes or remains upon the premises of another without permission, invitation or lawful authority. Permission or invitation may be express or implied.

INSTRUCTION NO. ____

The plaintiff has the burden of proof on each of the following propositions:

1. A structure or condition existed on the defendant's premises that was peculiarly or unusually attractive to children;

2. The structure or condition on the property was such that it presented a reasonably foreseeable risk of injury to any children who might go onto or into the premises;

3. The structure or condition on the property was such that the danger or risk of harm it presented to children would not be readily apparent to a child of the age, experience and maturity of the plaintiff;

4. The defendant was aware, or in the exercise of ordinary care should have been aware, of the attractiveness of the premises to children and of the risks of harm to children that it presented;

5. The plaintiff was attracted onto the defendant's property by such structure or condition;

6. The plaintiff was injured;

7. The structure or condition was a proximate cause of the injury;

and

8. The nature and extent of the injuries, the elements of damage, and the amount thereof.

You will be asked the following question on the jury verdict form:

Was the defendant negligent in maintaining or permitting an attractive nuisance on his property, which negligence was the proximate cause of plaintiff's injuries?

If you find from your consideration of all the evidence that each of the propositions in this instruction has been proved, then you should answer the question "yes". If you find from your consideration of all the evidence that any of these propositions has not been proved, then you should answer the question "no."

SECTION 4.00 – OTHER AND SPECIFIC TORTS

IDJI 4.10 – False arrest and false imprisonment

INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the following propositions:

1. The defendant by the exercise of force or by an express or implied threat of force [arrested plaintiff] [restrained, confined, or detained plaintiff’s personal liberty] [caused plaintiff to be (arrested) (confined) (detained)];

2. Defendant acted intentionally in [arresting] [restraining] [confining] [detaining] plaintiff;

3. Defendant acted unlawfully;

4. The [arrest] [restraint] [confinement] [detention] was against the will and without the consent of the plaintiff;

5. The nature and extent of the damages, if any, and the amount thereof.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff; but, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

INSTRUCTION NO. _____

On plaintiff’s claim of battery, the plaintiff has the burden of proving each of the following propositions:

- 1. The defendant intentionally touched the plaintiff;**
- 2. The plaintiff did not permit or consent to the touching;**
- 3. The defendant knew the touching was not permitted; and**
- 4. The touching was unlawful, harmful or offensive.**

The intent means only an intent to touch without permission. It is not necessary to prove that the defendant intended the touching to be harmful or offensive.

You will be asked the following question on the jury verdict form: “Did the defendant commit a battery upon the plaintiff, as defined in the instructions?” If the plaintiff proves all of the propositions in this instruction, you should answer the question “Yes.” If any of these propositions has not been proved, you should answer the question “No.”

COMMENT:

The tort of battery is complete upon the completion of the prohibited act and the plaintiff is entitled to at least nominal damages. Bonner v. Roman Catholic Diocese of Boise, 128 Idaho 351, 913 P.2d 567 (1996); Pierson v. Brooks, 115 Idaho 529, 768 P.2d 792 (Ct.App. 1989). Elements of damage should be outlined in a separate instruction.

The intent required is intent to do the act constituting the battery, not intent to do harm to the plaintiff. Neal v. Neal, 125 Idaho 617, 873 P.2d 871 (1994); White v. University of Idaho, 118 Idaho 400, 797 P.2d 108 (1990); Rajspic v. Nationwide Mutual Insurance Co., 110 Idaho 729, 718 P.2d 1167 (1986).

ALTERNATIVE FOR GENERAL VERDICT

If the plaintiff proves all of the propositions contained in this instruction, you should consider the issue of damages. If any of the propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. ____

On plaintiff’s claim of battery, the plaintiff has the burden of proving each of the following propositions:

- 1. The defendant did an act that caused contact upon the person of the plaintiff;**
- 2. The plaintiff did not permit or consent to the contact;**
- 3. The defendant knew the contact was not permitted;**
- 4. The contact was unlawful or harmful or offensive; and**
- 5. The defendant intended the contact, or intended to place the plaintiff in immediate fear of the contact.**

The intent required means only an intent to cause the contact or the fear of contact. It is not necessary to prove that the defendant intended the contact to be harmful or offensive.

You will be asked the following question on the jury verdict form: “Did the defendant commit a battery upon the plaintiff, as defined in the instructions?” If the plaintiff proves all of the propositions in this instruction, you should answer this question “Yes.” If any of these propositions has not been proved, you should answer the question “No.”

ALTERNATIVE FOR GENERAL VERDICT

If the plaintiff proves all of the propositions contained in this instruction, you should consider the issue of damages. If any of the propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. ____

In this case the defendant has asserted the affirmative defense of [self-defense] [or defense of others]. On this affirmative defense, the defendant has the burden of proof on each of the following propositions:

1. The defendant believed that there was an imminent danger from the plaintiff and believed that force was necessary for [self-protection] [or protection of others];

2. The defendant’s belief in the necessity of force was reasonable under all of the circumstances then appearing; and

3. The defendant used, in such defense, no more force than was reasonably necessary under the circumstances.

You will be asked the following question on the jury verdict form: “Did the defendant establish the affirmative defense, as defined in the instructions?”

If the defendant proves all of the propositions in this instruction, you should answer this question “Yes.” If any of these propositions has not been proved, you should answer the question “No.”

Alternative for General Verdict

If the defendant proves all of the propositions contained in this instruction, the affirmative defense to the claims of the plaintiff has been established and your verdict should be for the defendant. If any of the propositions has not been proved, the affirmative defense has not been proved.

Comment:

This instruction covers only the basic circumstances of self defense of the person. Defense of property, defense of others or defense of other's property requires specific analysis to the facts of the case and the exceptions which apply.

INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the following propositions:

- 1. The defendant acted intending to cause a harmful or offensive contact with the person of the plaintiff or a third person, or an immediate fear of such contact; and**
- 2. As a result, the plaintiff feared that such contact was imminent.**

You will be asked the following question on the jury verdict form: “Did the defendant assault the plaintiff, as defined in the instructions?” If the plaintiff proves all of the propositions in this instruction, you should answer this question “Yes.” If either of these propositions has not been proved, you should answer the question “No.”

Alternative to paragraph 2

If you find that either of these propositions has been proved, then you should consider the issue of damages. If you find that any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the following propositions:

- 1. That the defendant went upon the plaintiff's land;**
- 2. That the plaintiff did not consent to defendant's entry on plaintiff's land;**
- 3. The nature and extent of the damages to plaintiff and the amount thereof.**

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff; but, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Comment:

The requirement that the jury find that the plaintiff's land, or title to his land, was harmed by the defendant's entry has been deleted in the revised instruction. "Trespass is a tort against possession committed when one, without permission, interferes with another's exclusive right to possession of the property." Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund, 128 Idaho 539, 549, 916 P.2d 1264, 1274 (1996). In a common law trespass action, the plaintiff is entitled to recover actual damages for defendant's wrongful entry on plaintiff's property, even if defendant's conduct was not "wilfull or intentional." Bumgarner v. Bumgarner, 124 Idaho 629, 639, 862 P.2d 321, 331 (Ct. App. 1993). The plaintiff must prove "a causal connection between the defendant's alleged wrongful conduct and the plaintiff's injury, as

well as the extent of the injury sustained." Nelson v. Holdaway Land and Cattle Co., 107 Idaho 550, 552, 691 P.2d 796, 798 (Ct. App. 1984). However, the plaintiff "need not prove actual harm in order to recover nominal damages." Aztec Ltd., Inc. v. Creekside Inv. Co. 100 Idaho 566, 570, 602 P.2d 64, 68 (1979). Nominal damages are "presumed to flow naturally from a wrongful entry upon land." *Id.*

IDJI 4.42 – Trespass; withdrawal of permission – issues

INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the following propositions:

- 1. That the defendant was upon the plaintiff's land;**
- 2. That the plaintiff requested defendant to leave, or otherwise withdrew the permission to remain;**
- 3. That the defendant remained on the land after the withdrawal of permission;**
- 4. The nature and extent of the damages to plaintiff and the amount thereof.**

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff; but, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the following propositions:

- 1. That the defendant [took] [kept] plaintiff's (name of item taken or held) without a right to do so;**
- 2. The nature and extent of the damages to plaintiff and the amount thereof.**

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff; but, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

Comment:

Those conversions covered by the Uniform Commercial Code are not necessarily covered by this form. The Committee recommends that in cases covered by that Code, this form be used but that, in addition, the relevant portion of the appropriate Code section be read or paraphrased as a definition, description, or explanation of the phrase “exercised dominion over” or of the phrase “deprived of possession.”

See Carver v. Ketchum, 53 Idaho 595, 26P.2n 139; Klam v. Koppel, 63 Idaho 171, 118 P.2d 729; Adair v. Freeman, 92 Idaho 773, 451 P2d 519.

INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the following propositions by clear and convincing evidence:

- 1. That the defendant stated a fact to the plaintiff;**
- 2. The statement was false;**
- 3. The statement was material;**
- 4. The defendant either knew the statement was false or was unaware of whether the statement was true at the time the statement was made.**
- 5. The plaintiff did not know that the statement was false;**
- 6. The defendant intended for the plaintiff to rely upon the statement and act upon it in a manner reasonably contemplated;**
- 7. The plaintiff did rely upon the truth of the statement;**
- 8. The plaintiff's reliance was reasonable under all the circumstances;**
- 9. The plaintiff suffered damages proximately caused by reliance on the false statement.**
- 10. The nature and extent of the damages to the plaintiff, and the amount thereof.**

If you find from your consideration of all the evidence that the elements of fraud have been proved by clear and convincing evidence, then your verdict should be for the plaintiff on this issue. If you find from your consideration of all the evidence that any of the foregoing propositions has not been proved by clear and convincing evidence, then your verdict should be for the defendant.

Comment:

A definition of materiality can be found in IDJI 6.08.5.

See Samuel v. Hepworth, Nungester & Lezamiz, Inc., 134 Idaho 84, P.2d 303 (2000); Watts v. Krebs, 131 Idaho 616, 962 P.2d 387 (1998); Magic Lantern Prods. Inc. v. Dolsot, 126 Idaho 805, 892 P.2d 480 (1995).

See also, Witt v. Jones, 111 Idaho 477, 722 P.2d 474 (1986); Umphrey v. Sprinkel, 106 Idaho 700, 682 P.2d 1247 (1983); Faw v. Greenwood, 101 Idaho 387, 613 P.2d 1338 (1980); Smith v. King, 100 Idaho 331 597 P.2d 217 (1979); King v. McNeel, Inc., 94 Idaho 444, 489 P.2d 1324.

IDJI 4.70 – Tortious interference with contract – issues

INSTRUCTION NO. _____

With respect to the plaintiff’s claim for tortious interference with contract, the plaintiff has the burden of proving each of the following propositions:

- (1) The plaintiff was a party to an existing contract;**
- (2) The defendant knew of the contract;**
- (3) The defendant intentionally interfered with the contract, causing a breach;**
- (4) The plaintiff was damaged as a proximate result of the defendant’s interference; and**
- (5) The nature and extent of damage, and the amount thereof.**

Comment:

See, Barlow v. International Harvester Co., 95 Idaho 881, 522 P.2d 1102 (1974); Magic Valley Truck Brokers, Inc. v. Meyer, 133 Idaho 110, 982 P.2d 945 (Ct. App. 1999).

Affirmative defenses: Many of the affirmative defenses applicable to this issue have not been addressed or approved in the decisions of Idaho appellate courts. For further reference, see Section 767 through 774 of the Restatement (Second) of Torts.

IDJI 4.80 – Definition of defamation

INSTRUCTION NO. _____

Defamation is the communication of false information which tends to impugn the honesty, integrity, virtue or reputation of the person [or entity] about whom the statement is made, or exposes that person [or entity] to public hatred, contempt or ridicule.

Libel is a form of defamation. Libel is the communication of defamatory information by written words, or by some form that has the characteristics of written words.

Slander is a form of defamation by any other means.

Comment:

Gough v. Tribune-Journal Co., 73 Idaho 173, 177, 249 P.2d 192 (1952). Restatement (Second) of Torts, § 568(1); Restatement (Second) of Torts, § 568(2).

Whether a given incident is libel or slander is a question of law for the court. Use such parts of this instruction as may be necessary to inform the jury for the purposes of the case at bar.

IDJI 4.82 – Elements of defamation – general case

INSTRUCTION NO. _____

In order to prove a claim of defamation, the plaintiff has the burden of proving each of the following elements;

1. The defendant communicated information concerning the plaintiff to others; and

2. The information impugned the honesty, integrity, virtue or reputation of the plaintiff or exposed the plaintiff to public hatred, contempt or ridicule; and

3. The information was false; and

4. The defendant knew it was false, or reasonably should have known that it was false; and

5. The plaintiff suffered actual injury because of the defamation; and

6. The amount of damages suffered by the plaintiff.

Comments:

See Carver v. Ketchum, 53 Idaho 595, 26 P.2d 139; Klam v. Koppel, 63 Idaho 171, 118 P.2d 729; Adair v. Freeman, 92 Idaho 773, 451 P.2d 519.

IDJI 4.82.5 - Elements of defamation claim – public official or public figure

INSTRUCTION NO. _____

The plaintiff is a [“public official” or “public figure”]. In order to prove a claim of defamation against the defendant in this case, the plaintiff has the burden of proving each of the following elements;

- 1. The defendant communicated information concerning the plaintiff to others; and**
- 2. The information impugned the honesty, integrity, virtue or reputation of the plaintiff or exposed the plaintiff to public hatred, contempt or ridicule; and**
- 3. The information was false; and**
- 4. The plaintiff was damaged because of the communication; and**
- 5. The amount of damages suffered by the plaintiff.**

The plaintiff must prove the following additional element by clear and convincing evidence:

- 6. The defendant knew the information was false, or acted with reckless disregard for its truth, at the time the information was communicated to others.**

Comments:

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); Wiemer v. Rankin, 117 Idaho 566, 790 P.2d 347 (1990); Bandeline v. Pietsch, 98 Idaho 337, 563 P.2d 395 (1977).

IDJI 4.84 - Libel or slander per se – presumed damages

INSTRUCTION NO. _____

The plaintiff is deemed to have been injured by the defamation in this case, and the plaintiff need not prove actual injury in order to recover damages.

IDJI 4.84.5 - Libel or slander per se – presumed damages (media defendants)

INSTRUCTION NO. _____

If in this case, the plaintiff proves by clear and convincing evidence that the defendant knew the information was false, or acted with reckless disregard for its truth, at the time the information was communicated to another, the law deems the plaintiff to have been injured by the defamation, and the plaintiff need not prove actual injury in order to recover damages.

Comment:

Gertz v. Robert Welch, Inc., 418 U.S. 232, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974);
Wiemer v. Rankin, 117 Idaho 566, 790 P.2d 347 (1990).

NOTE: The issue of whether a defamatory communication rises to the level of libel *per se* is ordinarily a question of law, dependent upon whether the alleged libel is evident on its face, without need for resort to innuendo, implication or extrinsic interpretation. *See, Gough v. Tribune-Journal Co.*, 73 Idaho 173, 249 P.2d 192 (1952). The categories of slander *per se* are somewhat differently defined under Idaho law and are compartmentalized, unlike libel *per se*. In addition, Idaho case law seems to suggest that some types of slander *per se* are issues of law for the court to decide, while other types are issues of fact for jury determination. *See, Barlow v. International Harvester, Co.*, 95 Idaho 881, 522 P.2d 1102 (1974).

IDJI 4.86.1 – Punitive damage elements – general case

INSTRUCTION NO. _____

If you find by clear and convincing evidence that the defendant knew the defamatory information was false, or acted with reckless disregard for its truth, at the time of the communication of the information to another, you may consider the issue of punitive damages;

Comments:

Please see Instruction 9.20 for additional elements of punitive damages.

Gertz v. Robert Welch, Inc., 418 U.S. 3223, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); Wiemer v. Rankin, 117 Idaho 566, 790 P.2d 347 (1990). This instruction incorporates the constitutional requirements of defamation cases to the punitive damage standard in Idaho.

NOTE: This applies to defamation cases brought by a private figure against a media defendant in a case involving matters of public concern. The issue of whether the allegedly defamatory communication involves a matter of public concern is a question of law for the court.

IDJI 4.86.2 - Punitive damages – malice required where media defendant

INSTRUCTION NO. _____

In this case, the law requires that the plaintiff shall not be entitled to recover punitive damages unless the defendant acted with actual malice in the communication of the defamatory information. Therefore, you are instructed that in order to recover punitive damages, the plaintiff must prove all of the elements of a defamation claim *and* must prove by clear and convincing evidence that the defendant communicated the defamatory information with “actual malice.”

Comment:

Please see Instruction 9.20 for additional elements of punitive damages.

IDJI 4.88.1 - Defamation – truth is a defense

INSTRUCTION NO. _____

An essential element of defamation is that the information communicated was false. Consequently, if the information was, in fact true, there is no defamation, regardless of defendant’s motivation.

IDJI 4.88.3 - Truth is a defense - alternate

INSTRUCTION NO. _____

To be defamatory, the communication must be false in a material fashion. This means that the “gist” or “sting” of the communication, when taken in its entirety and in context, must be false. It is not sufficient to prove that some insignificant detail is false if the “gist” or “sting” of the communication is otherwise true.

Comments:

Baker v. Burlington Northern, Inc., 99 Idaho 688, 587 P.2d 829 (1978).
Laughton v. Cawford, 68 Idaho 578, 201 P.2d 96 (1948).

NOTE: This will ordinarily be an issue submitted to the court in a dispositive motion. However, there must be instances where the court concludes that it cannot rule on the issue as a matter of law. The form of the instruction set out above also presumes that Idaho law requires the plaintiff to bear the burden of proving falsity even in cases involving non-media defendants.

IDJI 4.90 – Livestock – herd districts

INSTRUCTION NO. _____

If you find that livestock owned by defendant was at large within a herd district, then the defendant is liable for any damage or injury caused by that livestock, unless the defendant proves that the livestock was lawfully at large, as defined in these instructions.

Comment:

See I.C. § 25-2408; Cunningham v. Bundy, 100 Idaho P.2d 132 (1979); and Corthell v. Pearson, 88 Idaho 295, 399 P.2d 266 (1965).

SECTION 5.00 – INSTRUCTIONS RESERVED

SECTION 6.00 INSTRUCTIONS – CONTRACTS

IDJI 6.01.1 – Elements of contract - introductory

INSTRUCTION NO. ____

A contract is an agreement between two or more parties to do or not do something that is supported by consideration.

There are four elements to complete a contract. Every contract must have these four elements. The four elements are:

- 1. Competent parties;**
- 2. A lawful purpose;**
- 3. Valid consideration; and**
- 4. Mutual agreement by all parties to all essential terms.**

It is not disputed that the following elements are present in the contract alleged in this case: [State the elements of the contract that are not in dispute, such as “The parties are competent to enter into a contract, and the alleged contract was for a lawful purpose.”].

Comment:

The committee recommends that this instruction be used only where the jury actually needs a "lecture on contracts" The detailed instruction should usually be unnecessary, as only specific issues in dispute need be covered.

IDJI 6.02.1 - Capacity to contract – individual

INSTRUCTION NO. ____

In this case, (name of party) alleges that (name of party) was not competent to enter into the contract. In order to be competent to contract, a natural person must be of legal age and have the mental capacity to enter into a contract.

Comment:

See IDJI 6.02.3 for special instruction on contracting with minors. See IDJI 6.02.4 for instruction on mental capacity.

IDJI 6.02.2 -- Capacity to contract – corporation

INSTRUCTION NO. ____

In this case, (name of party) alleges that (name of party) was not competent to enter into the contract. In order to be competent to contract, a corporation or other business entity must exist and be authorized to enter into the agreement by action of its officers or directors.

Comment:

This instruction is intended to cover only the general case. Separate or additional instructions will be necessary where the alleged contract is entered into by promoters prior to incorporation, or by individuals acting for a defunct corporation. Further instructions may also be necessary where it is alleged that the corporation ratified or adopted the action of its employee or agent after the fact.

IDJI 6.02.3 – Capacity to contract - minors liable in contract

INSTRUCTION NO. ____

The defendant has asserted the affirmative defense of minority in this case. To establish this defense, the defendant has the burden of proof on each of the following propositions:

1. The defendant was unmarried and under the age of eighteen at the time the contract was entered into, and;

2. The defendant disaffirmed the contract before becoming eighteen, or within a reasonable time thereafter and restored or offered to restore the consideration the defendant received as a result of the contract.

[Provided, however, a minor cannot disaffirm a contract to pay the reasonable value of things necessary for the support of the minor [or that of the minor's family], entered into by the minor when not under the care of a parent (or guardian) able to provide for the minor.]

IDJI 6.02.4 – Capacity to contract - mental capacity to contract

INSTRUCTION NO. ____

A person has the mental capacity to enter into a contract when the person possesses sufficient mind to understand, in a reasonable manner, the nature, extent, character, and effect of the contract in question.

IDJI 6.03.1 - Lawful purpose

INSTRUCTION NO. ____

In this case, (party) alleges that the contract did not have a lawful purpose.

The purpose for which the contract was made, and the actions or non-actions expected of the parties in order to perform under the contract, must all be lawful when the contract was made.

Comment:

Whether a particular purpose is lawful is a question of law for the court. What the purpose of the contract was is a question of fact for the jury, if disputed.

A fact specific instruction should be given as to which purposes raised in the case are lawful or unlawful.

INSTRUCTION NO. ____

In this case, (party) alleges that there was (no)(insufficient) consideration to support the existence of a contract.

A promise is not enforceable as a contract unless something of value was given or was agreed to be given in exchange for it. In law, the giving of value or agreement to give value is called "consideration." Consideration is the benefit given or agreed to be given by one party in exchange for the other party's performance or promise to perform.

[Consideration can be a promise to do something the party is not required to do, or a promise not to do something the party otherwise would be free to do.]

Consideration must have value; if it has no value at all, it is not sufficient. If the parties have agreed upon the specific consideration to be given in this case, then any value, however slight, is sufficient.

IDJI 6.05.1 – Agreement on all material terms

INSTRUCTION NO. __

In this case, (party) alleges that all parties did not agree to all essential terms of the contract. This requirement is sometimes referred to as the "meeting of the minds," and means that all parties to a contract must have understood and accepted all of the essential terms of the contract.

There is no contract unless all of the essential terms have been communicated to all parties, understood by all parties, and accepted by all parties.

IDJI 6.05.2 – Material terms - offer and acceptance

INSTRUCTION NO. ____

A contract may consist of an offer by one party that is accepted by another party.

An offer is any proposal that is intended to become binding upon the party making the offer if it is accepted by the party to whom it is directed.

An acceptance of an offer is an expression by the party to whom the offer was directed that accepts the offer in accordance with the terms of the offer.

[To complete the contract, the acceptance must be absolute and unqualified. If the response to the offer changes the terms of the offer in any manner, it is a counter offer but not an acceptance.]

[The acceptance is not complete until it has been communicated to the party making the offer.]

IDJI 6.05.4 - Silence as acceptance

INSTRUCTION NO. ____

Silence does not operate as acceptance of an offer unless

(1) The silent party accepts services from the offering party, after a reasonable opportunity to reject, with knowledge that the offering party expects compensation; or

(2) Because of the past dealings of the parties, it is reasonable that the silent party should notify the offering party that the silent party does not accept; or

(3) The offering party has notified the silent party that the offer could be accepted by silence, and the silent party does intend to accept the offer by silence.

If you find any of these circumstances exist, silence is an acceptance of the offer.

Comments:

Note: the act of sending or providing unordered goods or services is unfair and deceptive pursuant to Idaho Consumer Protection Rules, IDAPA 04.02.01220 Subchapter V, 220. General Rule, and therefore does not fall under this instruction.

IDJI 6.05.5 - Method of acceptance specified by offer

INSTRUCTION NO. ____

If a particular method of acceptance is required by the terms of the offer, then no contract occurs unless that method is satisfied.

IDJI 6.05.7 – Mutual mistake

INSTRUCTION NO. ____

Mutual mistake occurs when both parties, at the time of contracting, share a misconception regarding a basic assumption or vital fact upon which the bargain is based.

Comment:

Hines v. Hines, 129 Id. 847, 853 (1997); Dennet v. Kuenzli, 130 Id. 27 (Ct. App. 1997); Moore v. Mullen, 123 Id. 985, 988 (Ct. App. 1993); Leydet v. City of Mountain Home, 119 Id. 1041.

IDJI 6.06.1 – Contract may be written or oral

INSTRUCTION NO. ____

A contract may be written or oral, or may contain both written terms and oral terms. So long as all the required elements are present, it makes no difference whether the agreement is in writing.

IDJI 6.06.2 – Necessity for a written agreement

INSTRUCTION NO. ___

Ordinarily, a contract results when negotiations are complete and all essential terms have been agreed upon. This is true even though the parties expect to put their agreement in writing. However, if the parties have agreed not to be bound until their agreement is reduced to [a signed] writing, no contract results until this is done.

IDJI 6.06.3 – Necessity for written agreement - alternate

INSTRUCTION NO. ____

Ordinarily, a contract results when negotiations are complete and all essential terms have been agreed upon. This is true even though the parties expect to put their agreement in writing.

However, if a party has conditioned acceptance of the agreement on reducing the agreement to [a signed] writing, which condition is communicated to or understood by the other party, no contract results until this is done.

IDJI 6.06.4 – Certain agreements must be in writing

INSTRUCTION NO. ____

Certain contracts must be in writing to be enforceable. If such a contract exists but is not in writing, this does not mean that there is no contract, or that it is illegal or improper, it simply means that the contract may not be enforced in court.

IDJI 6.06.5 – Oral contracts are binding

INSTRUCTION NO. ____

An oral agreement that contains all of the elements of a contract is a binding contract.

IDJI 6.06.6 – Oral contracts - alternate

INSTRUCTION NO. ____

An oral agreement is a binding contract unless the parties have agreed that it must be reduced to writing [and signed] before it becomes binding.

Comments:

See Revised 6.06.2 above.

INSTRUCTION NO. ____

An implied-in-fact contract is a contract where the terms and existence of the contract are demonstrated by the conduct of the parties, with the request of one party and the performance by the other often being inferred from the circumstances attending the performance. To find an implied-in-fact contract, the facts must be such that the intent of the parties to make a contract can be inferred from their conduct. An implied-in-fact contract is given the same legal effect as any other contract.

To establish an implied-in-fact contract, the plaintiff has the burden of proof on each of the following propositions:

- 1. The circumstances imply a request by the defendant for performance by plaintiff; and**
- 2. The circumstances imply a promise by the defendant to compensate the plaintiff for such performance; and**
- 3. The plaintiff performed as requested.**

IDJI 6.07.2 - Unjust enrichment – equitable theories

INSTRUCTION NO. ____

Even though there is no agreement between the parties, under certain circumstances where a party has been unjustly enriched by the actions of another the law will require that party to compensate the other for the unjust gain. To recover under this theory, the plaintiff has the burden of proving each of the following:

- 1. The plaintiff provided a benefit to the defendant;**
- 2. The defendant accepted the benefit; and**
- 3. Under the circumstances, it would be unjust for the defendant to retain the benefit without compensating the plaintiff for its value.**

Comment:

For the elements of unjust enrichment, *see Hertz v. Fiscus*, 98 Idaho 456, 567 P.2d 1 (1977); *Common Builder, Inc. v. Rice*, 126 Idaho 616, 888 P.2d 790 (App. 1995).

IDJI 6.07.3 - No unjust enrichment if gift – equitable theories

INSTRUCTION NO. ____

**If the plaintiff intended to make a gift of the benefit to the defendant,
there is no unjust enrichment.**

Comment:

Matter of Estate of Keeven, 126 Idaho 290, 882 P.2d 457 (App. 1994), holding where the plaintiff intended that the benefit be gratuitous, retention of benefits is not unjust.

IDJI 6.08.1 – Interpretation of contracts - intention of parties

Note: The court must first decide whether determination of the intent of the parties is properly a jury issue. If it is not, obviously the instruction would not be given. Should the court determine that issue is properly before the jury, the following instruction may be appropriate:

INSTRUCTION NO. ____

The terms of the contract are in dispute as to the following provisions:

(set forth the proposition to be resolved).

You must determine what was intended by the parties as evidenced by the contract in this case. In making this determination you should consider, from the evidence, the following:

- 1. The contract must be construed as a whole, including all of the circumstances giving rise to it, to give consistent meaning to every part of it.**
- 2. Language must be given its ordinary meaning, unless you find from the evidence that a special meaning was intended.**
- 3. Any communications, conduct or dealings between the contracting parties showing what they intended and how they construed the doubtful language may be considered, provided that such may not completely change the agreement or construe one term inconsistently with the remainder of the terms.**

4. The contract should be construed to avoid any contradiction or absurdities.

[Persons within a specialized field are deemed to have contracted with reference to any generally known and customarily accepted language in that field, unless you find from the evidence that this was not intended].

IDJI 6.08.2 – Interpretation of contract - witness's testimony, ambiguity of contract

INSTRUCTION NO. ____

You may not consider any explanation or interpretation of the contract offered by any witness, or any oral agreement of the parties occurring before execution of the written agreement, which is inconsistent with the plain, ordinary meaning of the written agreement. While you may consider the testimony of witnesses if necessary to clarify an ambiguity, you may not consider such testimony to completely change the agreement, or to construe a term of the agreement in such a fashion that it no longer fits with the other, non-ambiguous terms or parts.

IDJI 6.08.3 – Interpretation of contract - ambiguity resolved against drafter

INSTRUCTION NO. ____

Where there is ambiguous language in a contract, and where the true intent of the parties cannot be ascertained by any other evidence, the ambiguity can be resolved by interpreting the contract against the party who drafted the contract or provided the ambiguous language.

IDJI 6.08.4 – Interpretation of contract - definition of material fact

INSTRUCTION NO. ____

A "material fact" is one which constitutes substantially the consideration of the contract, or without which it would not have been made.

Comments:

Black's Law Dictionary (West Pub; Fifth Ed., 1979)

INSTRUCTION NO. ____

"Materiality" refers to the importance of the representation in determining the party's course of action. A representation is material if (a) a reasonable person would attach importance to its existence or nonexistence in determining a choice of action in the transaction in question, or (b) the maker of the representation knows or has reason to know that the recipient is likely to regard the matter as important in determining the choice of action, whether or not a reasonable person would so consider.

Comments:

Watts v. Krebs, 131 Idaho 616 (1998) (tort standard, referring to Restatement (Second) of Torts, Sections 538(2).)

IDJI 6.09.1 – Amendments to contracts

INSTRUCTION NO. ____

A contract may be amended or modified by an agreement of the parties.

This requires all of the elements of any other contract.

IDJI 6.10.1 – Breach of bilateral contract – general case – no affirmative defenses

INSTRUCTION NO. ____

The plaintiff has the burden of proving each of the following propositions:

- 1. A contract existed between plaintiff and defendant;**
- 2. The defendant breached the contract;**
- 3. The plaintiff has been damaged on account of the breach; and**
- 4. The amount of the damages.**

If you find from your consideration of all the evidence that each of the propositions required of the plaintiff has been proved, then you must consider the issue of the affirmative defenses raised by the defendant, and explained in the next instruction. If you find from your consideration of all the evidence that any of the propositions in this instruction has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. ____

In order to establish plaintiff’s claim of breach of a unilateral contract, the plaintiff has the burden of proving each of the following propositions:

1. The defendant made statements which constituted an “offer” as defined in these instructions.

2. The defendant intended that a person, such as the plaintiff, would perform acts in accordance with the offer.

3. The plaintiff performed the acts required or requested by the defendant’s offer.

4. The plaintiff performed the acts with the intention that the acts would constitute an acceptance of the defendant’s offer.

5. The defendant was notified of plaintiff’s performance within a reasonable time.

6. The defendant has not fulfilled defendant’s part of the offer.

7. The nature of the performance required of defendant to complete the contract, and the value or dollar amounts thereof.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiff.

INSTRUCTION NO. _____

In this case the defendant has asserted certain affirmative defenses. The defendant has the burden of proof on each of the affirmative defenses asserted.

[Insert the specific affirmative defense elements applicable to the defendant’s claims.]

If you find from your consideration of all the evidence that each of the propositions required of the defendant has been proved, then your verdict should be for the defense. If you find from your consideration of all the evidence that any of the propositions has not been proved, then the defendant has not proved the affirmative defense in this case.

IDJI 6.11 – Material breach

INSTRUCTION NO. ____

A “material breach of contract,” as that term is used in these instructions, means a breach that defeats a fundamental purpose of the contract.

Comments:

Ervin Const. v. Van Orden, 125 Id. 695, 699 (1993)

IDJI 6.12 - Reasonable satisfaction requirement

INSTRUCTION NO. ____

Where a contract includes a provision requiring performance to the satisfaction of a party, or similar language, and the level or quality of performance is not otherwise spelled out, a party may reject the performance by the other party, upon grounds of dissatisfaction, only where a reasonable person in the same situation would find the performance unsatisfactory.

Comment:

See Cheney v. Jemmitt, 107 Idaho 829 (1984); compare Merideth Corp. v. Design Lithograph Center, 101 Idaho 391, (1980) where contract required actual personal satisfaction.

IDJI 6.13 – Performance of contract - substantial performance

INSTRUCTION NO. ____

When I say that a party must have "substantially performed" the contract or that "substantial performance" of the contract is required, I mean that the important and essential benefits called for by the terms of the contract have been delivered or performed. A contract may be substantially performed even though there may have been some deviations or omissions from the performance called for by the precise language of the contract.

IDJI 6.14.1 - Time for performance of a contract

INSTRUCTION NO. ____

Where a contract does not specify a time for performance, the law will imply a requirement that it be performed within a reasonable time, as is determined by the subject matter of the contract, the situation of the parties, and the nature of the performance required. In such case, it is for the jury to determine what a reasonable time would be under the circumstances, given all of the evidence in the case.

IDJI 6.14.2 – Time not expressed – reasonable time

INSTRUCTION NO. _____

When a contract expresses no specific time for its performance, the law implies that it is to be performed within a reasonable time, as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance. If you find a contract exists in this case, you are to determine what a reasonable time would be for the performance of this contract under these circumstances.

Comment:

See Curzon v. Wells Cargo, Inc., 86 Idaho 38, 382 P.2d 906; *Irvine v. Perry*, 78 Idaho 132, 299 P.2d 97 and I.C. § 28-1-204.

IDJI 6.14.3 - Affirmative defense - prevention of performance

INSTRUCTION NO. ____

The defendant has asserted the defense of prevention of performance. The defendant has the burden of proving that the plaintiff unreasonably prevented or substantially hindered the defendant's performance of the contract. If this affirmative defense is proved, the defendant is excused from performance.

Comment:

Sullivan v. Bullock, 124 Idaho 738, 742-743n.2 (Ct. App. 1993); Ferguson v. City of Orofino, 131 Idaho 190, 193, (Ct. App. 1998)

INSTRUCTION NO. ____

The defendant has asserted the affirmative defense of equitable estoppel. This is a legal term which means the plaintiff may be prevented from enforcing a contract or term of contract by reason of the plaintiff's own conduct.

To establish the defense of equitable estoppel, the defendant has the burden of proof on each of the following propositions:

- 1. The plaintiff falsely represented or concealed a material fact to the defendant;**
- 2. The plaintiff knew or should have known the true facts;**
- 3. The defendant did not know and could not discover the true facts;**
- 4. The defendant relied on the misrepresentation or concealment to the defendant's prejudice.**

Comment:

Willig v. Dept. of Health & Welfare, 127 Idaho 259, 261 (1995); Medical Serv. Group v. Boise Lodge, 310, 126 Idaho 90, 95 (1994 Ct. App.); Tommerup v. Albertson's, Inc., 101 Idaho 1, 5-6 (1980); Bjornstad v. Perry, 92 Idaho 402 (1968). Quasi-estoppel; Quasi estoppel is distinguished from equitable estoppel in that no concealment or misrepresentation of existing facts on the one side, no ignorance or reliance on the other, is a necessary ingredient. The doctrine of quasi estoppel applies when it would be unconscionable to allow a party to assert a right which is inconsistent with a prior position. Willig v. State Dept. of Health & Welfare, 127 Idaho 259, 261 (1995). Determination of the application of the doctrine of quasi estoppel is an equitable issue for the court to determine, and not a jury issue. The jury may be asked to determine the existence of predicate facts, but would not be instructed on the application of the doctrine.

INSTRUCTION NO. ____

The defendant has raised the defense of waiver by estoppel. This is a legal term which means that a party is deemed to have waived a claimed breach of contract by reason of the party's own conduct. To establish the defense of waiver by estoppel, the defendant has the burden of proof on each of the following propositions:

1. The plaintiff represented to the defendant [by words or conduct] [or] [by silence when a duty to speak and protest the action of the defendant existed] that plaintiff was waiving, excusing or forgiving the defendant's breach of contract; and

2. The defendant relied upon this representation and materially changed position in reliance thereon; and

3. The reliance was reasonable in light of all of the circumstances; and

4. The change of position was to the defendant's detriment.

If you find that each of these propositions has been proved, you should find that the defendant is not liable to the plaintiff for the claimed breach of contract. If the defendant fails to prove all of the propositions, the defendant has not established the affirmative defense of estoppel.

Comments:

Note: This instruction is to be distinguished from "quasi estoppel", "promissory estoppel" or "equitable estoppel."

INSTRUCTION NO. ____

The defendant has asserted the defense of accord and satisfaction. An accord and satisfaction is a new contract which discharges the rights and obligations created by a previous contract. The defendant has the burden of proof on each of the following propositions:

- 1. A bona fide dispute existed between the parties as to the performance due under the original contract;**
- 2. The defendant offered some stated performance in full satisfaction of the obligation due under the original contract;**
- 3. The plaintiff accepted the performance offered, and understood, or reasonably should have understood, that it constituted full satisfaction of the obligation due under the original contract.**

If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the defendant. If you find that any of the propositions has not been proved, then your verdict should be for the plaintiff.

IDJI 6.24.1 - Waiver

INSTRUCTION NO. ____

Waiver is a voluntary relinquishment of a known right and may be evidenced by conduct, by words, or by acquiescence.

Comment:

Dennett v. Kuenzli, 131 Idaho 21, 936 P.2d 219 (1997)

IDJI 6.24.2 - Release

INSTRUCTION NO. ____

A release is a written declaration by a party that releases a particular claim or right to pursue a claim against another party. A release may be made with or without consideration.

Comment:

Restatement of Contracts (Second) §284

INSTRUCTION NO. ____

A contract is abandoned where both parties expressly abandon the contract, or where one party acts in a manner indicating an intention to abandon the contract, or acts in a manner inconsistent with the continuation of the contract, and the other party acquiesces therein. Abandonment of a contract is a question of intent. It may be implied from the parties' actions. If the contract is abandoned, the law leaves the parties where it finds them.

Comments:

Jensen v. Chandler, 77 Id. 303, 307 (1955); Copenhagen v. Lavin, 92 Id. 681, 684 (1968); American Silver Min. Co. v. Coeur d'Alene Mines Corp., 94 Id. 54, 60 (1921); Russel v. Russel, 99 Id 151, 154 (1978); Liebelt v. Liebelt, 118 Id. 845, 849 (Ct. App. 1990)

IDJI 6.26 – Impossibility as a defense

Caution: Impossibility as a defense will invariably be based upon a specific fact circumstance. The pattern instruction focuses on the elements of the defense rather than on any attempt to catalog the circumstances giving rise to it. In the ordinary case, it may be necessary to include additional instructions addressing the specific circumstances of the case.

INSTRUCTION NO. ____

In this case, the defendant has claimed the defense of impossibility because of the following circumstance:

[Insert description of circumstance, such as death of essential participant, destruction of essential property, unforeseen change of law, act of God, etc.]

In order for this defense to apply, the defendant has the burden of proof on each of the following:

- 1. The circumstance alleged by the defendant exists or existed through no fault of the defendant.**
- 2. The happening of this circumstance could not reasonably have been anticipated by the defendant when the contract was entered into.**
- 3. The happening of this circumstance was not assigned or assumed as the responsibility of any party by the contract itself.**
- 4. The happening of this circumstance prevents the performance of the contract in its essential and important terms.**

If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the defendant. If you find that any of the propositions has not been proved, then your verdict should be for the plaintiff.

INSTRUCTION NO. ____

To establish the defense of fraud, the defendant has the burden proving by clear and convincing evidence each of the following propositions:

- 1. The plaintiff made a representation of a past or present fact;**
- 2. The representation was false;**
- 3. The represented fact was important;**
- 4. The plaintiff knew the representation was false (or acted with a reckless disregard of the truth of the representation);**
- 5. The defendant was not aware of the falsity of the representation;**
- 6. The plaintiff intended that defendant rely upon the representation in agreeing to enter into the contract;**
- 7. The defendant did rely upon the representation;**
- 8. The defendant's reliance was justified; and**
- 9. The defendant [has returned] [has offered to return] to the plaintiff (whatever the defendant would be legally obligated to return in order to prevent his being unjustly enriched.**

If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the defendant. If you find that any of the propositions has not been proved, then your verdict should be for the plaintiff.

Comment:

Materiality is defined in Instruction 6.08.5

INSTRUCTION NO. ____

A party is not obligated to perform a contract if that party establishes the defense of nondisclosure. To establish the defense of non-disclosure, the defendant has the burden of proving each of the following propositions by clear and convincing evidence.

- 1. The plaintiff was aware of a fact vital to the essence of the contract;**
- 2. The defendant was unaware of the fact, and could not reasonably learn of it;**
- 3. The plaintiff knew that the defendant was unaware of the true fact and knew that disclosure of the true fact would correct a basic assumption upon which the defendant was making the contract;**
- 4. The plaintiff did not disclose the fact to the defendant, intending that the defendant would act in ignorance of the fact;**
- 5. The failure to disclose the true fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing; [and]**
- 6. The defendant entered into the contract upon the reasonable assumption that the non-disclosed fact did not exist; and**

7. [Defendant returned or offered to return to the plaintiff any benefit received under the contract which the defendant should not, in fairness, retain if defendant is to be relieved from the contract.]

If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the defendant. If you find that any of the propositions has not been proved, then your verdict should be for the plaintiff.

Comment:

There is not definitive Idaho authority on point. This instruction is felt to be superior to the previous IDJI 651. *See*, Restatement (Second) of Contracts, Section 161; *obiter dicta* in Janinda v. Lanning, 87 Idaho 97 (1964).

The subject of duty to speak was tangentially addressed in Bethlahmy v. Bechtel, 91 Idaho 55, and Tusch Enterprises v. Coffin, 113 Idaho 37, with references to Restatement (Second) of Torts, Section 551. The committee feels the above instruction is consistent with those cases and the tort restatement, although cast in light of the Restatement of Contracts provisions.

IDJI 6.28.4 – Duress - physical or emotional distress

INSTRUCTION NO. ____

Duress consists of oppressive, coercive or wrongful acts or conduct on the part of one party towards another that was intended to overcome the other party's free choice of decision to enter into the contract. The party oppressed must be overwhelmed by such conduct, or must believe there is no means of relief or other alternative to submission.

If you find that there was duress, then the contract is void.

INSTRUCTION NO. ____

To establish the defense of undue influence, the party must prove each of the following propositions:

- 1. The party was compelled to accept the contract by deceit, force or fear;**
- 2. But for the deceit, force or fear, the party would not have entered into the contract.**

A person has a right by fair persuasion or argument to induce another person of sound mind to contract in his favor, and a transaction under such influence will not be invalid on that account.

If you find from your consideration of all the evidence in the case that each of the foregoing propositions has been proved, your verdict should be for the [party claiming the issue]. If you find that any of the propositions has not been proved, then your verdict should be for [party adverse to this issue].

IDJI 6.40.1 – Agency defined

INSTRUCTION NO. ____

The term "agent" refers to a person authorized by another, called the "principal," to act for or in the place of the principal. The principal is responsible for any act of the agent within the agent's scope of authority.

IDJI 6.40.2 – Agency - express

INSTRUCTION NO. ____

**The law recognizes agency relationships created by express authority.
Agency by express authority exists when a person has been actually given
authority by the principal to act in the principal's name for stated purposes.**

IDJI 6.40.3 – Agency - implied

INSTRUCTION NO. ____

The law recognizes agency relationships created by implied authority. Agency by implied authority exists and applies to those acts by a person that are necessary, usual and proper to accomplish or perform within the express authority given by the principal.

IDJI 6.40.4 – Agency - apparent

INSTRUCTION NO. ____

The law recognizes agency relationships created by apparent authority. Agency by apparent authority exists when the principal voluntarily places a person in such a position that a third person, [conversant with the business usages and the nature of a particular business,] is justified in believing that the agent is authorized to act for the principal.

Comments:

Podolan v. Idaho Legal Aid, 123 Idaho 937; Clark v. Gneiting, 95 Idaho 10

IDJI 6.40.5 – Agency defined

INSTRUCTION NO. _____

An agency relationship exists where one, called the “principal,” has authorized another, called the “agent,” to act on behalf of the principal.

Agency requires the consent of the principal, which consent may be expressed or implied. [A business purpose is not required.] [Compensation of the agent is not required.] [The term “principal” includes employers, and the term “agent” includes employees.]

Comments:

Note: Use bracketed portions applicable to case. *See, Thornton v. Budge*, 257 P.2d 238, 240, 74 Idaho 103 (Idaho 1953).

IDJI 6.40.6 – Agent or independent contractor

INSTRUCTION NO. _____

In an agency relationship, the principal has the right to control the agent’s manner and method of work, whether that right is exercised or not. Where, however, the principal has engaged a contractor for a specific job, result or objective, and the principal does not retain any right to control the manner or method of work, the relation is not an agency but is that of independent contractor. An independent contractor is not an agent. The acts [or omissions] of an independent contractor are not the acts [or omissions] of the principal.

Comments:

But see: Harpole v. State, 131 Idaho 437, 958 P.2d 594 (1998); Eagunes v. State, 116 Idaho 173, 774 P.2d 343 (Ct. App. 1989); Peone v. Regulous Stud Mills, Inc., 113 Idaho 374, 744 P.2d 102 (1987) for discussion of exceptions to this rule, including the “peculiar risk doctrine.”

IDJI 6.41.1 - Agent's act binds principal - agency admitted

INSTRUCTION NO. ____

There is no dispute in this case that (agent's name) was the agent of the principal, (principal's name), at the time of the transaction described by the evidence. Therefore, (principal's name), the principal, is responsible for any act of (agent's name), the agent, within the scope of the agent's authority.

IDJI 6.41.2 – Liability of principal and agent

INSTRUCTION NO. ____

Both agent and principal are liable for acts by the agent, acting within the scope of authority for the principal, unless the identity of the principal and nature of the agency are known to the plaintiff at or before the time of the act in question. Where the identity of the principal and nature of the agency were known, only the principal is liable.

IDJI 6.43.1 – Scope of authority

INSTRUCTION NO. ____

Conduct is within the scope of the agent's authority if it occurs while the agent is engaged in the duties that the agent was asked or expected to perform and relates to those duties. It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's authority. Conduct for the benefit of the principal that is incidental to, customarily connected with, or reasonably necessary for the performance of such duties is within the scope of the agent's authority.

Comment:

See, Landvik v. Herbert, 936 P.2d 697, 702, 130 Idaho 54 (Idaho App. 1997). (The Court of Appeals noted that agency by apparent authority has not been extended to tort law in Idaho, but declined to address the issue further because the case was decided on other grounds).

INSTRUCTION NO. ____

If an agent acts outside the scope of authority, a principal may still become bound by the agent's actions if the principal ratifies the agent's actions.

Ratification may be express or implied. Implied ratification requires:

- 1. Knowledge on the part of the principal of the material facts connected with the transaction; and**
- 2. Word or conduct on the part of the principal indicating an intention to adopt the acts of the agent;**

Comments:

See Manning v. Twin Falls Clinic & Hosp., 122 Idaho 47, 54 (1992); Twin Falls Livestock v. Mid-century Ins., 117 Idaho 176, 182-183 (1998).

INSTRUCTION NO. _____

One of the issues to be decided by you is whether _____ (name) and _____ (name) were engaged in a joint enterprise. A joint enterprise exists if all of the following elements are present:

(1) an agreement, express or implied, between two or more persons to carry out a common purpose as a group;

(2) a community of pecuniary interest in the common purpose shared among each member of the group; and

(3) an equal voice in the control of the enterprise held by each member of the group.

The phrase "community of pecuniary interest" means that the common purpose of the enterprise must be the accomplishment of a commercial or business objective, carried out for the mutual profit of the group. It is not present where the purposes of the individual members of the group are separable or entirely personal to the individuals or their families, even if the separate purposes or personal purposes are pecuniary gain.

Comments:

See Easter v. McNab, 97 Idaho 180, 541 P.2d 604 (1975); *Maselli v. Ginner*, 119 Idaho 702, 809 P.2d 1181 (Id. App. 1991)

SECTION 7.00 – ON CONDEMNATION

IDJI 7.01.1 - Explanation of eminent domain

INSTRUCTION NO. ____

This lawsuit is a condemnation action brought under the governmental power of eminent domain. In this case, the [insert name of condemning authority] has been authorized to acquire a certain [parcel of real property] [and] [property rights] belonging to the defendant for the purpose of [describe general nature of project].

Under our law, no private property may be taken through the power of eminent domain without the payment of just compensation. The sole issue for your determination is the just compensation to be paid to the defendant by the plaintiff [name of condemning authority].

IDJI 7.01.2 – Explanation of eminent domain - alternate

INSTRUCTION NO. ____

Under the Constitution of the State of Idaho, private property may not be taken for or damaged on account of public use without the payment of just compensation. The sole issue for your determination is the just compensation to be paid by the plaintiff.

Comments:

This is a shorter version of IDJI 701. Give one or the other but not both. This instruction may be more appropriate in inverse condemnation cases.

INSTRUCTION NO. ____

In this case, the defendants have the burden of proving that the just compensation for the taking of their property exceeds the sum of \$_____, which is the amount for just compensation presented in this trial by the state [name of condemning authority]. Since the condemning authority has conceded this value, your verdict should not be for an amount less than the amount of \$_____.

Comments:

State ex rel Moore v. Bastain, 87 Idaho 444 (1976); State v. McGill, 79 Idaho 467 (1958); State v. Dunlick, 77 Idaho 45 (1955) and Village of Lapwai v. Alligier, 69 Idaho 397(1949), hold that the condemnee (defendant) has the burden of proof. There should be no distinction between a direct condemnation and an indirect or inverse condemnation case, as in both cases the question of whether there has been a "taking" is an issue for the court, not the jury, thus in both cases the sole issue for the jury is that of just compensation. Further, in any issue tried in a court, legal principle requires that someone have the "burden of proof." In a condemnation action, the burden of proof should be on the defendant to prove that the just compensation is an amount greater than that offered or conceded by the state.

In an inverse condemnation case, the standard burden of proof instruction is appropriate, as there may be no concession of value by the condemning authority.

IDJI 7.05 – Definition of “just compensation”

INSTRUCTION NO. ____

**Just compensation means the fair market value of the property taken,
measured as of _____ [date].**

Comments:

This instruction applies to a total take with no element of severance damage.

IDJI 7.05.1 – Just compensation including specific improvement

INSTRUCTION NO. ____

**Just compensation means the fair market value of the property taken,
including all permanent improvements thereon, measured as of _____ [date].**

IDJI 7.05.5 – Just compensation including direct damages

INSTRUCTION NO. ____

Just compensation means the fair market value of the property taken, including all permanent improvements thereon, together with any direct damages suffered by the defendant, all measured as of _____ [date].

Comments:

[Note: In a direct condemnation action, the date inserted in the instruction will be the date of issuance of the summons -- I.C. § 7-712. In an inverse condemnation case, the date will be the actual date of taking as determined by the court.]

IDJI 7.07 - Fair market value – factors to be considered

INSTRUCTION NO. ____

In determining the fair market value of property, you may consider not only the opinions of the various witnesses who testified as to market value, but also all other evidence in the case which may aid in determining market value, such as location of the property, the surroundings and general environment, any peculiar suitability of the property for particular uses, and the reasonable probabilities as to future potential uses, if any, for which the property is or would be suitable or physically adaptable, all as shown by the evidence in the case to have existed on _____ [date]

Comment:

In a direct condemnation action, the date inserted in the instruction will be the date of issuance of the summons -- I.C. § 7-712; in an inverse condemnation case, the date will be the date of taking as determined by the court. *City of Caldwell v. Roark*, 92 Idaho 99 (1968), *State v. City of Mt. Home*, 94 Idaho 528 (1972) and *Eagle Sewer Dist. v. Hormaechea*, 109 Idaho 418 (App. 1985).

IDJI 7.09 – Definition of fair market value

INSTRUCTION NO. ___

The term "fair market value" means the cash price at which a willing seller would sell and a willing buyer would buy the subject property, in an open marketplace free of restraints, taking into account the highest and most profitable use of the property.

It presumes that the seller is desirous of selling, but is under no compulsion to do so, and that the buyer is desirous of buying, but is under no compulsion to do so.

It presumes that both parties are fully informed, knowledgeable and aware of all relevant market conditions and of the highest and best use potential of the property, and are basing their decisions accordingly.

It presumes that the market is open and competitive, and that the subject property has been exposed to the market for a reasonable time.

IDJI 7.11 – Special use of property

INSTRUCTION NO. ____

If the subject property is being used for a special purpose, that fact may be considered by the jury in determining the highest and best use as a component of market value. Market value should be determined with respect to all uses to which the property is peculiarly adapted.

Comments:

State v. Dunlick, Inc., 77 Idaho 45 (1955), and is supported by City of Caldwell v. Roark, 92 Idaho 99, and State v. City of Mt. Home, 94 Idaho 528.

IDJI 7.14 – Owner’s development plan

INSTRUCTION NO. ____

You may consider the owner's particular plan for development and use of the property only for the purpose of determining uses for which the property is adaptable.

IDJI 7.16 – Partial taking – just compensation

INSTRUCTION NO. ____

Just compensation is the difference between the market value of the entire property before the taking and the market value of the remainder after the acquisition, together with any special damages caused by the taking, measured as of [date].

Comments:

This instruction applies where there is a partial take with severance damage to the remainder and no offsetting benefit.

IDJI 7.16.1 - Factors to be considered, partial take - severance damages

INSTRUCTION NO. ____

In determining what compensation should be paid for damages, if any, to the remainder of the property, you should take into consideration the uses for which the land is adaptable before and after the taking, the character and quality of the property, the shape and condition in which the remaining property is left, the convenience of using the property before and after the taking, and such other factors as you find would affect the market value of the property.

Comments:

This instruction is somewhat redundant to IDJI 7.07. Where there is no benefit claimed to the remainder, the approach of State v. Dunlick, Inc., 77 Idaho 45 (1955), of determining just compensation by subtracting the fair market value of the remainder from the fair market value of the whole before the take would eliminate the necessity for this instruction. Where, however, the parcel taken and the parcel remaining are separately valued, this instruction might be useful.

IDJI 7.16.5 – Additional severance damage instruction

INSTRUCTION NO. ____

Severance damages may arise where the property being taken is only part of a larger parcel belonging to the defendant. Severance damage consists of either or both of the following:

- a. A diminution in the value of the remainder caused by the taking or severance of the parcel taken from the remainder; or**
- b. A diminution in the value of the remainder caused by the construction upon and use put to the property taken.**

Severance damages are calculated by ascertaining the fair market value of the remainder immediately before the taking, and deducting from this value the fair market value which results after the severance of the part taken and after the construction of the project in the manner proposed by the plaintiff.

Comments:

Recommendation: Include both 7.16.1 and 7.16.5 in severance damage situations.

IDJI 7.18 - Partial take with severance damage and a benefit to the remainder

INSTRUCTION NO. ____

In this case, you should determine the just compensation as follows:

First, determine the fair market value of the parcel being taken for the project, including all improvements thereon, as of [date].

Next, determine the fair market value of the remaining portion as it existed immediately before the take, and the fair market value of this parcel as it will exist immediately after the take, determined as of [date]. In determining these values, you may not consider the impact of the project in determining the value before the take, but you should consider the impact of the project and any special benefits which will result from the construction of the improvements in the manner proposed by the plaintiff after the take, in determining the value of the remainder of the property after the take.

If you determine that the fair market value of the remainder after the take is less than the fair market value of the remainder before the take, and that the diminution of value is because of the take, the difference is considered severance damage and the property owner is entitled to this difference as part of the just compensation.

If you determine that the fair value of the remainder after the take is greater than the value before the take, because of benefits conferred upon the property by the project or because of the construction of the improvements in

the manner proposed by the plaintiff, then there are no severance damages and no other adjustment to value. Do not offset any excess in value applicable to the remainder, or property not taken, against the value of the property taken.

Finally, determine whether the defendants have incurred any special damages or costs on account of the taking, and the amounts thereof.

Combine the amounts you find under each of the elements in this instruction to find the amount of just compensation that is due from the plaintiff to the defendants in this case.

Comment:

Idaho Code § 7-711; State v. Collier, 93 Idaho 19 (1969); Orofino v. Swayne, 95 Idaho 125 (1972).

IDJI 7.20 - No damages for improvements installed after service of summons

INSTRUCTION NO. ____

Improvements on the lands that were made after [date] should not be considered in determining fair market value or just compensation.

SECTION 8.00 – INSTRUCTIONS RESERVED

SECTION 9.00 - DAMAGES

IDJI 9.00 – Cautionary instruction on damages

INSTRUCTION NO. ____

By giving you instructions on the subject of damages, I do not express any opinion as to whether the plaintiff is entitled to damages.

INSTRUCTION NO. ____

If the jury decides the plaintiff is entitled to recover from the defendant, the jury must determine the amount of money that will reasonably and fairly compensate the plaintiff for any damages proved to be proximately caused by the defendant’s negligence.

The elements of damage the jury may consider are:

A. Non-economic damages

- 1. The nature of the injuries;**
- 2. The physical and mental pain and suffering, past and future;**
- 3. The impairment of abilities to perform usual activities;**
- 4. The disfigurement caused by the injuries;**
- 5. The aggravation caused to any preexisting condition.**

B. Economic damages

- 1. The reasonable value of necessary medical care received and expenses incurred as a result of the injury [and the present cash value of medical care and expenses reasonably certain and necessary to be required in the future];**
- 2. The reasonable value of the past earnings lost as a result of the injury;**

3. The present cash value of the future earning capacity lost because of the injury, taking into consideration the earning power, age, health, life expectancy, mental and physical abilities, habits, and disposition of the plaintiff, and any other circumstances shown by the evidence.

4. The reasonable value of necessary services provided by another in doing things for the plaintiff, which, except for the injury, the plaintiff would ordinarily have performed [and the present cash value of such services reasonably certain to be required in the future];

5. [Any other specific item based upon the evidence.]

Whether the plaintiff has proved any of these elements is for the jury to decide.

IDJI 9.02 – Aggravation of pre-existing condition

INSTRUCTION NO. ____

A person who has a pre-existing condition or disability is entitled to recover damages for the aggravation of such preexisting condition, if any, that is proximately caused by the occurrence. The person is not entitled to recover damages for the pre-existing condition or disability itself.

If you find that before the occurrence causing the injuries in this case the plaintiff had a preexisting bodily condition or disability, and further find that because of the new occurrence in this case the pre-existing condition or disability was aggravated, then you should consider the aggravation of the condition or disability in fixing the damages in this case. You should not consider any condition or disability that existed prior to the occurrence, or any aggravation of such condition that was not caused or contributed to by reason of this occurrence.

You are to apportion, if possible, between the condition or disability prior to this occurrence and the condition or disability caused by this occurrence, and assess liability accordingly. If no apportionment can reasonably be made by you, then the defendant is liable for the entire damage.

Comment:

See, Blaine v. Byers, 91 Idaho 665, 429 P.2d 405 (1967); *Bushong v. Kamiah Grain Growers*, 96 Idaho 659, 534 P.2d 1099 (1975).

IDJI 9.03 – Damages for breach of contract – general format

INSTRUCTION NO. ____

If the jury decides the plaintiff is entitled to recover from the defendant, the jury must determine the amount of money that will reasonable and fairly compensate the plaintiff for any of the following elements of damages proved by the evidence to have resulted from the defendant’s breach of contract:

[Insert the elements of damage that have a basis in the evidence]

Whether any of these elements of damage has been proved is for you to determine.

INSTRUCTION NO. ____

In this case, the contract in question contains a liquidated damage provision stating the amount of damages to be awarded in the event of a breach. The law allows liquidated damage provisions, provided that the provision for such damage is not intended as a penalty or punishment and bears a reasonable relation to the damages that might actually be sustained if the contract is breached.

**Therefore, if you find for the plaintiff on the issue of breach of contract, the plaintiff is entitled to the liquidated damages as stated in the contract, unless you further find that the liquidated damage provision of the contract is not enforceable as explained in this instruction. The defendant has the burden of proof on this defense by proving either or both of the following propositions:
The liquidated damages stated in the contract, when considered in light of all the circumstances, do not bear any reasonable relation to the damages actually sustained and are exorbitant; and/or**

The liquidated damages stated in the contract are not intended to be compensation for the consequences of any breach of the contract, but rather are intended to be a penalty to deter a party from not performing or as punishment against a party for breaching the contract.

If the defendant proves either or both of these propositions, the liquidated damage provision of the contract is not enforceable. In such event, the plaintiff is only entitled to such actual damages, if any, that are proved as stated and defined in other instructions.

Comment:

The issue of liquidated damages will usually require jury instructions only where there is a defense that such damages provisions are not enforceable. Therefore, the only pertinent instruction on point is the referenced instruction on the defense burden of proof.

“The burden of proving that the damages specified in the contract bear no reasonable relation to actual damages or that the liquidated damages are exorbitant and unconscionable rests upon the party seeking relief from the liquidated damages clause.” Magic Valley Truck Brokers, Inc. v. Meyer, 982 P.2d 945, 133 Idaho 110 (App. 1999), citing Howard v. Bar Bell Land & Cattle Co., 81 Idaho 189, 340 P.2d 103, (1959); McEnroe v. Morgan, 106 Idaho 326, 678 P.2d 595; Lockhart Co. v. B.F.K., Ltd., 107 Idaho 633, 691 P.2d 1248 (Ct.App.1984); Fleming v. Hathaway, 107 Idaho 157, 686 P.2d 837 (App. 1984).

Where this defense is not raised, then in the usual case the jury can be given a binding instruction on the liquidated damage provision, directing the jury to return the stated liquidated damages.

INSTRUCTION NO. ____

If the jury decides the plaintiff is entitled to recover from the defendant, the jury must determine the amount of money that will reasonably and fairly compensate the plaintiff for any damages proved to be proximately caused by defendant's negligence.

The elements of damage the jury may consider are:

- 1. The reasonable cost of the decedent's funeral.**
- 2. The reasonable value of necessary medical care and expenses incurred prior to the decedent's death.**
- 3. The reasonable value to the plaintiff of the loss of the decedent's [services] [training] [comfort] [conjugal relationship] and [society] and the present cash value of any such loss that is reasonably certain to occur in the future, taking into consideration the life expectancy of the plaintiff, the decedent's age and normal life expectancy, habits, disposition and any other circumstances shown by the evidence.**
- 4. The plaintiff's loss of financial support from the decedent, and the present cash value of financial support the decedent would have provided to the plaintiff in the future, but for the decedent's death, taking into account the plaintiff's life expectancy, the decedent's age and normal life expectancy,**

the decedent's earning capacity, habits, disposition and any other circumstances shown by the evidence.

Death is inevitable. Although the law compensates for the untimeliness of a death caused by another, no damages are allowed for grief or sorrow.

[There can be no recovery for any pain or suffering of the decedent prior to death.]

Comments:

Note: Include bracketed phrase if evidence would be confusing on issue. In usual case, the phrase is unnecessary.

INSTRUCTION NO. ____

If the jury decides that the plaintiff is entitled to recover from the defendant, the jury must determine the amount of money that will reasonably and fairly compensate the plaintiff for any damages proved to be proximately caused by the defendant’s negligence.

The elements of damage to plaintiff’s property are:

[either]

1. The reasonable cost of necessary repairs to the damaged property, plus the difference between its fair market value before it was damaged and its fair market value after repairs.

[or]

1. The difference between the fair market value of the property immediately before the occurrence, and its [salvage value] [fair market value without repairs] after the occurrence.

[and, if applicable]

2. (Any incidental or consequential damage suffered by the plaintiff that is within the foreseeable chain of proximate causation: e.g., “The reasonable rental charges incurred by the plaintiff for substitute property during the time the subject property was being repaired.”)

IDJI 9.09 - Crop damages

INSTRUCTION NO. _____

For damages, if any, to plaintiff's crop you may award a sum equal to:

The difference between the reasonable value of the crop actually raised upon the land and the reasonable value of the crop which would have been raised upon it under normal conditions during the same year, less the cost of maturing, harvesting and marketing the additional portion of the crop.

Comment:

Merrill v. Penrod, 109 Idaho 46, 704 P2d 950 (1985), citing Casey v. Nampa & Meridian Irrigation District, 85 Idaho 299, 370 P2d 409 (1963). A review of subsequent cases, Davidson's Air Service v. Montierth, 119 Idaho 967m 812 P2d 298 (1990) and Walker v. American Cyanamid, 130 Idaho 824, 948 P2d 1123 (1997) discloses that our Supreme Court continues to follow that exact same definition.

INSTRUCTION NO. ____

If the jury decides that the plaintiff is entitled to recover from the defendant, the jury may consider the following damages:

[either]

If the property has been returned, the plaintiff may recover the reasonable cost of necessary repairs to the property, plus the difference between its fair market value before it was taken and its fair market value after its return. In addition, you may award the plaintiff the reasonable value of the use of the property during the time it was detained by the defendant.

[or]

If the property is not returned, the plaintiff is entitled to recover the fair market value of the property taken.

[and]

The plaintiff may recover the reasonable costs and expenses incurred in connection with defendant's taking the property and in connection with plaintiff's attempts to recover the property. These expenses are not, however, to include the court costs or attorney fees incurred in this litigation.

IDJI 9.12 – “Value” or “fair market value” defined

A. Instruction as to property:

INSTRUCTION NO. ____

When I use the term “value” or the phrase “fair market value” or “actual cash value” in these instructions as to any item of property, I mean the amount of money that a willing buyer would pay and a willing seller would accept for the item in question in an open marketplace, in the item’s condition as it existed immediately prior to the occurrence in question.

B. Instruction as to services:

INSTRUCTION NO. ____

When I use the term “value” or the phrase “fair market value” in these instructions as to services rendered, I mean the amount of money that a willing employer would pay and a willing employee would accept for the services in question, under circumstances as existed immediately prior to the occurrence in question, in an open marketplace.

IDJI 9.13 – Present cash value

INSTRUCTION NO. ____

When I use the phrase “present cash value” as to any damage that may accrue in the future, I mean that sum of money determined and paid now which, when invested at a reasonable rate of interest, would be sufficient to pay the future damages at the time and in the amount the future damages will be incurred.

IDJI 9.14 – Mitigation of damages

INSTRUCTION NO. ____

A person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered.

IDJI 9.15 – Mortality tables

INSTRUCTION NO. ____

Under a standard table of mortality, the life expectancy of a (male/female) age ____ is ____ years. This figure is not conclusive. It is an actuarial estimate of the average probable remaining length of life based upon statistical samples of death rates and ages at death in this country. This data may be considered in connection with all other evidence relating to the probable life expectancy, including the subject's occupation, health, habits, and other activities.

INSTRUCTION NO. ____

If you find that defendant's acts which proximately caused injury to the plaintiff were an extreme deviation from reasonable standards of conduct and that these acts were performed by the defendant with [malice] [fraud] [oppression] [wantonness] [gross negligence], you may, in addition to any compensatory damages to which you find the plaintiff entitled, award to plaintiff an amount which will punish the defendant and deter the defendant and others from engaging in similar conduct in the future.

Alternate

Punitive damages statute, I.C. § 16-604, was amended effective July 1, 2003. Instruction for use under statute as amended.

INSTRUCTION NO. ____

If plaintiff proves by clear and convincing evidence that the defendant's acts which proximately caused injury to the plaintiff were an extreme deviation from reasonable standards of conduct and that these acts were [malicious] [fraudulent] [oppressive] or [outrageous] you may, in addition to any compensatory damages to which you find the plaintiff entitled, award to plaintiff an amount which will punish the defendant and deter the defendant and others from engaging in similar conduct in the future.

INSTRUCTION NO. ____

Punitive damages are not a matter of right, but may be awarded in the jury's sound discretion, which is to be exercised without passion or prejudice. The law provides no mathematical formula by which such damages are to be calculated, other than any award of punitive damages must bear a reasonable relation to the actual harm done, to the cause thereof, to the conduct of the defendant, and to the primary objective of deterrence.

Comments:

See Robinson v. State Farm Insurance, 137 Idaho 173, 45 P.3d 829 (2002).

IDJI 9.20.5 – Punitive damages - consideration of defendant’s wealth

INSTRUCTION NO. _____

(You have been permitted to hear evidence pertaining to defendant’s wealth and financial condition. This evidence was admitted for your consideration only with reference to the question of punitive damages in light of all other evidence before you if you determine that such an award should be made in this case.)

Punitive damages are not a matter of right, but may be awarded in the jury’s sound discretion, which is to be exercised without passion or prejudice. The law provides no mathematical formula by which such damages are to be calculated, other than any award of punitive damages must bear a reasonable relation to the actual harm done, to the cause thereof, to the conduct of the defendant, and to the primary objective of deterrence.

Comments:

See Robinson v. State Farm Insurance, 137 Idaho 173, 45 P.3d 829 (2002).

SECTION 10.00 – PRODUCT LIABILITY

IDJI 10.01.1 – Product liability – definition of defective product

INSTRUCTION NO. _____

A product may be defective because of a defect in its [design] [or] [manufacture] [or] [because of a failure to adequately warn the consumer of a hazard involved in the foreseeable use of the product]. A product has a defect when it exposes a user or bystander to an unreasonable risk of physical injury, or if it is more dangerous than would be expected by an ordinary person who may reasonably be expected to use it. The law does not say what would be expected by an ordinary person or who may reasonably be expected to use the product. Both of these issues are for you to decide.

Comment:

Include such bracketed portions as are indicated by the issues in the case. Specific instructions setting forth the elements of claims of manufacturing defect, design defect and failure to warn follow.

Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174 (1999). See, also: Restatement (Second) of Torts, § 402A, comments (g) and (i); Restatement (Third) of Torts, Products Liability § 2 (Tent. Draft 1994).

IDJI 10.01.2 - Negligence of manufacturer

INSTRUCTION NO. ____

The manufacturer of a product owes a duty to design and manufacture its product to avoid the unreasonable risk of foreseeable injury to persons using the product with ordinary care. A breach of this duty is negligence.

Comment:

If general negligence instructions and specific issue instructions are to be given, a separate instruction on the duty of a manufacturer may not be necessary.

IDJI 10.01.3 – Negligence of product seller – duty to inspect

INSTRUCTION NO. ____

A product seller owes a duty to use ordinary care to conduct a reasonable inspection of the product before selling the product to others. A breach of this duty is negligence.

[Unless the seller has made an express warranty to the contrary,] [T]he duty to inspect does not apply if the seller receives the product in a sealed container, and sells the product in the same container.

Comment:

Idaho Code §6-1307(1). This instruction presumes that the standard IDJI negligence or comparative negligence instructions will be given.

IDJI 10.01.4 – Negligence of product seller – duty to warn

INSTRUCTION NO. ____

A product seller owes a duty to exercise ordinary care to warn all those who may reasonably be expected to use its product where the seller:

Knows or should know that the product is unreasonably dangerous while being used with ordinary care; and

Knows or should know that those who may reasonably be expected to use the product may not realize the danger.

A breach of this duty is negligence.

Comments:

Restatement (2d) of Torts §308. This instruction presumes that the standard IDJI negligence or comparative negligence instructions will be given.

This instruction is addressed specifically to actions arising under the Idaho Product Liability Reform Act, Idaho Code §§6-1401, et seq. It may not be appropriate for use in actions arising before the effective date of that Act. The instructions and verdict forms as a whole presume the use of either the *short or long verdict forms in this section. If a general verdict form is used, some modifications of the instruction may be necessary.

IDJI 10.01.5 - Defense of “reasonable care” inapplicable

INSTRUCTION NO. _____

The exception to the duty to inspect on the part of a seller other than the manufacturer does not apply if the plaintiff proves one, or more, of the following:

- 1. The defendant knew or should have known that the product was defective;**
- 2. The defendant altered, modified, or installed the product, and such alteration, modification or installation was (a) not authorized or requested by the manufacturer, [“or” see note.] (b) was not performed in compliance with the manufacturer’s directions or specifications, and (c) that such alteration or installation was a proximate cause of the incident giving rise to the injuries or damage.**
- 3. The defendant designed the product, or provided the design of the product to the manufacturer, and that the design of the product was a proximate cause of the plaintiff’s injuries [damages]; or**

4. **The defendant expressly represented to the plaintiff that he had, in fact, inspected the product.**

Comments:

Idaho Code §6-1407(1). This statute connects two conditions of element 2 above, that the alteration, modification or installation was not authorized by the manufacturer and that it was not in accordance with specifications, with the conjunction “and”. The Committee observes that the conjunctive “and” should perhaps be the disjunctive “or” for logical symmetry.

IDJI 10.02.1 – Product Liability – Manufacturer – general case

INSTRUCTION NO. _____

In order to prove the claim of product liability by a manufacturer, the plaintiff has the burden of proving each of the following propositions:

The defendant is, or was during the relevant time in question, a “manufacturer” of the product, as explained in these instructions;

The product was “defective,” as explained in these instructions;

The defect existed when the product left the defendant’s control;

The defect was a proximate cause of injury to the plaintiff; and

The nature and extent of the injuries, the elements of damages, and the amount thereof.

You will be asked the following question on the jury verdict form:

[Insert verdict question verbatim.]

If you find from your consideration of all of the evidence that each of these propositions has been proved, then on the verdict form, you should answer the question “Yes.” If you find that any of these propositions has not been proved, you should answer the question “No.”

Comments:

Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174 (1999).

IDJI 10.03.1 – Products Liability – Seller (other than manufacturer) – general case.

INSTRUCTION NO. ____

In order to prove the claim of product liability by a seller other than the manufacturer, the plaintiff has the burden of proving each of the following propositions:

- 1. The defendant sold the product to [the plaintiff] [or sold the product to _____ name of person or entity]; and**
- 2. The product was “defective,” as explained in these instruction;
and**
- 3. The defect existed when the product left the defendant’s control;
and**
- 4. The defendant knew or should have known of the defect; and**
- 5. The defect was a proximate cause of injury to the plaintiff; and**
- 6. The nature and extent of the injuries, the elements of damage,
and the amount thereof.**
- 7. You will be asked the following question on the jury verdict
form:**
- 8. [Insert verdict question verbatim.]**

If you find from your consideration of all of the evidence that each of these propositions has been proved, then on the verdict form, you should

answer this question “Yes.” If you find that any of these propositions has not been proved, you should answer the question “No.”

Comments:

This instruction is appropriate for use in a case involving a claim against a seller other than a manufacturer. It attempts to incorporate all the jury questions raised by I.C. § 6-1307(1). Issues raised by this section of the statute that deal with whether the manufacturer must indemnify the seller, such as § 6-1307(1)(c), (d), and (e), and the issue raised by (b) concerning whether the seller’s alterations, modifications or installation were requested or authorized by the manufacturer, or performed in compliance with the manufacturer’s directions or specifications, should not usually be presented to the jury.

I.C. § 6-1307

Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174 (1999); Hoopes v. Deere & Co., 117 Idaho 386, 788 P.2d 201 (1990); Hawks v. EPI Products USA, Inc., 129 Idaho 281, 923 P.2d 988 (1996).

INSTRUCTION NO. _____

In order to prove the claim of product liability by a seller other than the manufacturer, the plaintiff has the burden of proving each of the following propositions:

- 1. The defendant sold the product to [the plaintiff] [or sold the product to _____ name of the person or entity]; and**
- 2. The product was “defective,” as explained in these instructions; and**
- 3. The defect existed when the product left the defendant’s control; and**
- 4. The defendant altered, modified or installed the product, which alteration, modification or installation was either not authorized by the manufacturer, or was not carried out in the manner authorized or directed by the manufacturer; and**
- 5. The defect was the proximate cause of injury to the plaintiff; and**
- 6. The nature and extent of the injuries, the elements of damage, and the amount thereof.**

You will be asked the following question on the jury verdict form:

[Insert verdict question verbatim.]

If you find from your consideration of all of the evidence that each of these propositions has been proved, then on the verdict form, you should answer the question “Yes.” If you find that any of these propositions has not been proved, you should answer the question “No.”

Comments:

This instruction may be modified to accommodate the unusual circumstances of a seller which is a wholly owned subsidiary, or a seller which sells the product after a product expiration date, or a seller which provides the design or specification for the product. The modifications can be inserted in Paragraph 4 of this instruction. Idaho Code Section 6-1307(1)c, (d), and (e).

IDJI 10.03.3 Elements of “knowledge” on part of product seller

INSTRUCTION NO. _____

In order to find that a seller knew or should have known of a defect in the product, you must find that the seller had actual knowledge of the defect or had knowledge of circumstances that would have put a reasonable person on notice of the existence of the defect.

A product seller has a duty to reasonably inspect products offered for sale in a manner which would, or should in the exercise of ordinary care, reveal the existence of the defect. [A seller who acquires a product in a sealed package or container and sells the product in the same sealed package or container does not have a reasonable opportunity to inspect the product.]

INSTRUCTION NO. ____

Under the theory of strict liability, the plaintiff has the burden of proving each of the following:

- 1. The defendant [Name] was a “product seller” with respect to the product involved in this case;**
- 2. The product was in a defective and unreasonably dangerous condition when it left the hands of the defendant;**
- 3. The defective condition was a proximate cause of injuries [damages] sustained by the plaintiff; and**
- 4. The nature and extent of the injuries, the elements of damage, and the amount thereof.**

Comments:

Restatement (2d) of Torts §402A. But see Idaho Code §6-1405(4), which puts the burden of proving a change in condition of the product upon the defendant.

This instruction is addressed specifically to actions arising under the Idaho Product Liability Reform Act, Idaho Code §§6-1401 et seq. It may not be appropriate for use in actions arising before the effective date of that Act. The instructions and verdict forms as a whole presume the use of either the short or long verdict forms in this section. If a general verdict form is used, some modifications of the instruction may be necessary.

IDJI 10.05.1 - Product seller defined

INSTRUCTION NO. ____

“Product seller” means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor, or retailer of the relevant product. The term also includes a party who is in the business of leasing or bailing such products.

Comments:

Idaho Code §6-1302(1). See this section for exclusions from the definition of “product seller,” including providers of services, sellers of used products, and finance lessors.

IDJI 10.05.2 – Manufacturer defined

INSTRUCTION NO. ____

A “manufacturer” is a person or business entity that designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer. A product seller acting primarily as a wholesaler, distributor, or retailer of a product may also be a “manufacturer’ but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product before its sale.

Comments:

Idaho Code §6-1302(2)

IDJI 10.05.3 – Unreasonably dangerous defined

INSTRUCTION NO. ____

The term “unreasonably dangerous” as that term applies to the use of the product in this case, means that the product was more dangerous than would be expected by an ordinary reasonably prudent person who is likely to use the product in the same or similar circumstances.

Comments:

Restatement (2d) of Torts §402A, Comments (g) and (i). Idaho Code Section §6-1302(5).

INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the following propositions:

- 1. The defendant [sold] [manufactured] the product; and**
- 2. The defendant knew or should have known that danger to users [or bystanders] could result from a particular use of the product; and**
- 3. The defendant failed to give adequate warning of such danger; and**
- 4. The failure to give adequate warning was a proximate cause of injury to the plaintiff; and**
- 5. The nature and extent of the injuries, the elements of damage, and the amount thereof.**

You will be asked the following question on the jury verdict form:

[Insert verdict question]

If you find from your consideration of all of the evidence that each of these propositions has been proved, then you should answer the question “Yes.” If any of these propositions has not been proved, you should answer this question “No.”

Comments:

Puckett v. Oakfabco, Inc., 132 Idaho 816, 979 P.2d 1174 (1999); Rindlibaker v. Wilson, 95 Idaho 752, 519 P.2d 421 (1974); Restatement (Second) Torts, § 402A, comment h (1977).

IDJI 10.10.1 Products liability defense – product misuse

INSTRUCTION NO. _____

Under the defense of product misuse as a basis for comparative fault, the defendant has the burden of proving each of the following:

- 1. The product was not used in a manner expected of a reasonably prudent person likely to use the product under the same or similar circumstances; and**
- 2. The misuse was a proximate cause of the injuries or damages to the plaintiff.**

Comments:

Idaho Code § 6-1305(3).

IDJI 10.10.2 Products liability defense – knowledge of the risk

INSTRUCTION NO. _____

Under the defense that plaintiff had knowledge of the risk as a basis for comparative fault, the defendant has the burden of proving each of the following:

- 1. The user of the product knew of the defective condition and voluntarily used the product anyway; and**
- 2. In using the product, the user did not act as an ordinary reasonably prudent person; and**
- 3. The use of the product was a proximate cause of the injuries or damages to the plaintiff.**

Comments:

Idaho Code §6-1305(2).

IDJI 10.10.3 Products liability defense – alteration of product

INSTRUCTION NO. _____

Under the defense of alteration of the product as a basis for comparative fault, the defendant has the burden of proving each of the following propositions:

- 1. A person other than the defendant [changed the design, construction or formula of the product after it left the hands of the defendant] [or changed or removed warnings or instructions that accompanied or were displayed on the product at the time it left the hands of the defendant]; and**
- 2. The change was a proximate cause of the injuries or damages of the plaintiff.**

Comments:

Idaho Code §6-1405(4).

IDJI 10.10.4 Products liability defense – failure to observe

INSTRUCTION NO. _____

Under the defense of failure to observe as a basis for comparative fault, the defendant has the burden of proving the following:

- 1. The defective condition of the product would have been obvious to a reasonably prudent person exercising ordinary care; and**
- 2. The plaintiff's failure to observe the defective condition was a proximate cause of the injuries or damage to the plaintiff.**

Comments:

Idaho Code §6-1405(1).

IDJI 10.11 - Defense of alteration of product inapplicable

INSTRUCTION NO. _____

The defense of alteration of the product as a basis for comparative fault does not apply if the plaintiff proves any one of the following:

- 1. The change to the product design, construction or formula was in accord with the defendant's instructions or specifications; or**
- 2. The change was done with the express or implied consent of the defendant; or**
- 3. The defendant, in the exercise of ordinary care, should have anticipated the change of the product by others, and that the product was defective because of the defendant's failure to provide warnings or instructions concerning the dangers of such change.**

Comments:

Idaho Code §6-1305(4).