UCJI 10.06

EXPERT WITNESS

An expert witness may give an opinion on any matter in which that witness has special knowledge, skill, experience, training, or education. [The opinion may be given in response to a hypothetical question. A hypothetical question asks a witness to assume that certain facts are true, and then to give an opinion based on those assumed facts.]

You should consider the qualifications and credibility of the expert witness, the reasons given for the opinion, and the reasonableness of any assumptions underlying the opinion. You are not bound by the opinion. Give it the weight, if any, to which you consider it entitled.

COMMENT: *See* OEC 702 (ORS 40.410); *Wulff v. Sprouse-Reitz Co.*, 262 Or 293, 305, 498 P2d 766 (1972); *see also McEwen v. Ortho Pharmaceutical Corp.*, 270 Or 375, 391–92 n 14, 528 P2d 522 (1974); *Koch v. Southern Pacific Co.*, 266 Or 335, 341, 513 P2d 770 (1973); *Kennedy v. Industrial Acc. Com.*, 218 Or 432, 434–36, 345 P2d 801 (1959).

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UCJI 14.02

PREPONDERANCE OF THE EVIDENCE

When a party must prove a claim by a preponderance of the evidence, that party must persuade you by evidence that makes you believe the claim is more likely true than not true.

After weighing all of the evidence, if you cannot decide that something is more likely true than not true, you must conclude that the party did not prove it. You should consider all of the evidence, no matter who produced it.

[In criminal trials, the state must prove that the person charged with a crime is guilty beyond a reasonable doubt. That is not the standard to use in this civil trial. Instead, the party who is required to prove something by a preponderance of the evidence only has to prove that it is more likely true than not true.]

COMMENT: *See* ORS 10.095(5); *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 394, 737 P2d 595 (1987).

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UCJI 16.01

ABILITY TO PAY

The jury is not to consider whether any of the parties in this action has insurance or the ability to pay for any liability, loss, damage, or injury. Whether any party has insurance or the ability to pay has no bearing on the issues that you are to decide.

COMMENT: *See Brooks v. Bergholm,* 256 Or 1, 4–6, 470 P2d 154 (1970); *see also Benton v. Johnson,* 45 Or App 959, 963, 609 P2d 890, *rev den*, 289 Or 373 (1980). The Committee takes no position on when this instruction should be given. However, this instruction should not be given if insurance is an issue in the case. OEC 411 (ORS 40.205). This instruction should be modified if the jury is being asked to consider punitive damages. *See* UCJI 75.02 (punitive damages).

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UCJI 23.01

CAUSATION—"BUT FOR"

The defendant's conduct is a cause of the plaintiff's [harm / injury] if the [harm / injury] would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the plaintiff's [harm / injury] if that [harm / injury] would have occurred without that conduct.

COMMENT: *Joshi v. Providence Health Sys. of Oregon Corp.*, 342 Or 152, 161, 149 P3d 1164 (2006). In *Joshi*, the Oregon Supreme Court made clear that there are two standards for causation under Oregon law—"but for" causation and the "substantial factor" standard. The court explained that "the two standards apply to different types of negligence cases." *Joshi*, 342 Or at 162.

For example, the *Joshi* court explained that "[t]he 'but-for' test for causation, in which a plaintiff must demonstrate that the defendant's negligence more likely than not caused the plaintiff's harm, applies to the majority of cases." *Joshi*, 342 Or at 162. At the same time, the *Joshi* court noted that the "substantial factor" standard applies to certain types of cases, such as cases involving multiple tortfeasors. *Joshi*, 342 Or at 161–62.

The UCJI Committee has provided pattern instructions for each causation standard. The trial court, with the assistance of the parties, must determine which standard applies to a particular case.

12/14

UCJI 23.02

CAUSATION—"SUBSTANTIAL FACTOR"

Many factors [or things] may operate either independently or together to cause [harm / injury]. In such a case, each may be a cause of the [harm / injury] even though the others by themselves would have been sufficient to cause the same [harm / injury].

If you find that the defendant's act or omission was a substantial factor in causing the [harm / injury] to the plaintiff, you may find that the defendant's conduct caused the [harm / injury] even though it was not the only cause. [A substantial factor is an important factor and not one that is insignificant.]

COMMENT: *Lasley v. Combined Transp., Inc.*, 351 Or 1, 7–10, 261 P3d 1215 (2011); *Joshi v. Providence Health Sys. of Oregon Corp.*, 342 Or 152, 161–62, 149 P3d 1164 (2006); *McEwen v. Ortho Pharm. Corp.*, 270 Or 375, 418, 528 P2d 522 (1974).

See comment to UCJI 23.01.

The final sentence is bracketed because the UCJI Committee could find no Oregon case defining *substantial factor* in this context. *See Lyons v. Walsh & Sons Trucking Co., Ltd.*, 183 Or App 76, 83 n 5, 51 P3d 625 (2002), *aff'd on other grounds*, 337 Or 319 (2004) (quoting this "substantial factor" language with apparent approval). Most commentators consider the phrase undefinable. *Furrer v. Talent Irr. Dist.*, 258 Or 494, 511, 466 P2d 605 (1970) ("The term 'substantial factor' expresses a concept of relativity which is difficult to reduce to further definiteness. Little, if anything, can be done with words to help the jury decide how much causal relationship must exist between conduct and damage before it constitutes a basis for recovery."). *See also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 41, 267 (5th ed 1984 & Supp 1988); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 Mich L Rev 543, 554 (1962); Dan B. Dobbs, 1 *The Law of Torts* § 171, 416 (2001 & Supp 2005); *Restatement (Second) of Torts* § 433 (factors important to "substantial factor" determination) (cited with approval in *Lyons*, 183 Or App at 83–84).

12/14

UCJI 44.01

DUTY OF MEDICAL PROFESSIONAL

A physician has the duty to use that degree of care, skill, and diligence that is used by ordinarily careful physicians practicing in the same or similar circumstances in the same or a similar community. A failure to use such care, skill, or diligence is negligence.

COMMENT: ORS 677.095(1); *Macy v. Blatchford*, 330 Or 444, 449–50, 8 P3d 204 (2000).

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UCJI 44.02

DUTY OF SPECIALIST

Physicians who are specialists in a particular field of medicine have the duty to use that degree of care, skill, and diligence that is used by ordinarily careful specialists practicing in the same medical field and in the same or a similar community. A failure to use such care, skill, or diligence is negligence.

COMMENT: ORS 677.095(1); *Malila v. Meacham*, 187 Or 330, 335, 211 P2d 747 (1949); *Restatement (Second) of Torts* § 299A (1965).

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UCJI 44.04

INFORMED CONSENT

To obtain the informed consent of a patient, a [physician / physician assistant] must explain the following:

(1) In general terms, the procedure or treatment to be undertaken;

(2) That there may be alternative procedures or methods of treatment, if any; and

(3) That there are risks, if any, of the procedure or treatment.

After giving this explanation, the [physician / physician assistant] must ask the patient if the patient wants a more detailed explanation. If the patient requests further explanation, the [physician / physician assistant] must disclose in substantial detail the procedure, the viable alternatives, and the material risks of the procedure.

A risk of procedure or treatment is material when a reasonable person, in what the [physician / physician assistant] knows or should know to be the patient's position, would be likely to attach significance to the risk alone or in combination with other risks in deciding whether or not to undergo the procedure or treatment.

A [physician / physician assistant] is not required to give a further detailed explanation when such explanation would be materially detrimental to the patient. In determining that further explanation would be materially detrimental, the [physician / physician assistant] must give due consideration to the standards of practice of reasonable medical practitioners in the same or a similar community under the same or similar circumstances.

COMMENT: ORS 677.097; *Creasey v. Hogan*, 48 Or App 683, 695, 617 P2d 1377 (1980), *aff'd*, 292 Or 154, 637 P2d 114 (1981) (discussing materiality). See ORS 677.010(13) for definition of *physician*.

12/14

UCJI 70.02

DAMAGES—NONECONOMIC
(In Claims Subject to ORS 31.710)

Noneconomic damages are the subjective, nonmonetary losses that a [plaintiff / defendant] has sustained [or probably will sustain in the future].

The law does not furnish you with any fixed standard by which to measure the exact amount of noneconomic damages. However, the law requires that all damages awarded be reasonable. You must apply your own considered judgment, therefore, to determine the amount of noneconomic damages.

In determining the amount of noneconomic damages, if any, consider each of the following:

(1) The [pain / mental suffering / emotional distress / humiliation] that the [plaintiff / defendant] has sustained from the time [he / she] was injured until the present [and that the (plaintiff / defendant) probably will sustain in the future as the result of (his / her) injuries];

(2) Any inconvenience and interference with the [plaintiff / defendant]'s normal and usual activities apart from activities in a gainful occupation that you find have been sustained from the time [he / she] was injured until the present [and that the (plaintiff / defendant) probably will sustain in the future as the result of (his / her) injuries];

[(3) Any injury to the (plaintiff / defendant)'s reputation]; and

[(4) *Set forth either any other subjective, nonmonetary losses or any other not objectively verifiable monetary losses sustained by plaintiff or defendant.*]

[The amount of noneconomic damages may not exceed the sum of $_____.]

COMMENT: ORS 31.710. The final sentence applies to claims in which the plaintiff or defendant has alleged a specified amount of noneconomic damages in the prayer. *See* ORCP 18 B; *Lovejoy Specialty Hosp., Inc. v. Advocates for Life, Inc.*, 121 Or App 160, 167, 855 P2d 159, *rev den*, 318 Or 98 (1993).

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UCJI 70.03

DAMAGES—ECONOMIC
(In Claims Subject to ORS 31.710)

Economic damages are the objectively verifiable monetary losses that the plaintiff has incurred or will probably incur. In determining the amount of economic damages, if any, consider:

[(1) The reasonable value of necessary (medical / hospital / nursing / rehabilitative / and other health) care and services for treatment of the plaintiff.]

[(2) The amount of lost income incurred by the plaintiff since the injury to date.]

[(3)(a) The amount for past impairment of earning capacity.]

[(b) The amount for probable future impairment of earning capacity.]

[(4) The reasonable value of substitute domestic services that the plaintiff has incurred and probably will incur.]

[(5) The reasonable value of economic damages to the plaintiff's reputation.]

[(6) *Specify other objectively verifiable economic or monetary losses proved by plaintiff.*]

The total amount of economic damages may not exceed the sum of $_____.

COMMENT: ORS 31.710(2)(a); *DeVaux v. Presby*, 136 Or App 456, 461, 902 P2d 593 (1995); *Kahn v. Pony Express Courier Corp.*, 173 Or App 127, 20 P3d 837, *rev den*, 332 Or 518 (2001); *State v. Jordan*, 249 Or App 93, 100, 274 P3d 289, *rev den*, 353 Or 103 (2012). See UCJI 70.08, UCJI 70.09, and UCJI 70.10 for personal property losses.

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UCJI No. 70.06

DAMAGESCPREVIOUS INFIRM CONDITION

If you find that the [plaintiff / defendant] had a bodily condition that predisposed [him / her] to be more subject to injury than a person in normal health, nevertheless the [plaintiff / defendant] would be liable for any and all injuries and damage that may have been suffered by the [plaintiff / defendant] as the result of the negligence of the [plaintiff / defendant], even though those injuries, due to the prior condition, may have been greater than those that would have been suffered by another person under the same circumstances.

COMMENT: In *Crismon v. Parks,* 238 Or App 312, 241 P3d 1200 (2010), the court of appeals distinguished between UCJI Nos. 70.06 and 70.07, stating that UCJI No. 70.06 applies to previously asymptomatic conditions that make the plaintiff more susceptible to injury, and suggesting (but not deciding) that UCJI No. 70.07 applies where there is a previous injury or disability that is symptomatic before the accident.

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UCJI No. 70.07

DAMAGES–AGGRAVATION OF PREEXISTING INJURY OR DISABILITY

In the present case the [plaintiff / defendant] has alleged that the injury which [he / she] sustained as the result of the negligence of the [plaintiff / defendant] aggravated a preexisting [injury / disability] of [his / hers].

In determining the amount of damages, if any, to be awarded the [plaintiff / defendant] in this case, you will allow [him / her] reasonable compensation for the consequences of any such aggravation that you find to have taken place as the result of [plaintiff / defendant]'s negligence. The recovery should not include damages for the earlier [injury / disability] but only those that are due to its enhancement or aggravation.

COMMENT: In *Crismon v. Parks,* 238 Or App 312, 241 P3d 1200 (2010), the court of appeals distinguished between UCJI Nos. 70.06 and 70.07, stating that UCJI No. 70.06 applies to previously asymptomatic conditions that make the plaintiff more susceptible to injury, and suggesting (but not deciding) that UCJI No. 70.07 applies where there is a previous injury or disability that is symptomatic before the accident.

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UCJI 75.03

PUNITIVE DAMAGES—
HEALTHCARE PRACTITIONER
(In Claims Arising on or After September 27, 1987)

If you have found that the [plaintiff is / plaintiffs are] entitled to economic [and / or] noneconomic damages, you must then consider whether to award punitive damages. A jury may award punitive damages to punish misconduct and deter similar misconduct from occurring in the future.

You may award punitive damages against [the / a] defendant if the [plaintiff / plaintiffs] [shows / show] by clear and convincing evidence that the defendant has acted with malice.

Clear and convincing evidence is evidence that makes you believe that the truth of the claim is highly probable.

There is no fixed standard for determining the amount of punitive damages and you are not required to award punitive damages. If you decide to award punitive damages, you should consider all of the following [separately for each defendant] in determining the amount:

(a) How reprehensible was that defendant's conduct, considering the nature of that conduct and the defendant's motive?

[(b) Is there a reasonable relationship between the amount of punitive damages and the [plaintiff's / plaintiffs'] harm[s]?]

(c) In view of [the / that] defendant's financial condition, what amount is necessary to punish [them / it] and discourage future wrongful conduct? You may not punish a defendant merely because a defendant has substantial financial resources.

The amount of punitive damages you award may not exceed the sum of $_____ [which is the amount requested by the plaintiff / plaintiffs].

CAVEAT: UCJI 75.02 instructs the jury on the state-law standards for awarding punitive damages, and the constitutional limitations on those awards. *See State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 US 408, 123 S Ct 1513, 155 L Ed2d 585 (2003); *BMW of North America v. Gore*, 517 US 559, 116 S Ct 1589, 134 L Ed2d 809 (1996). It may be necessary to instruct the jury on certain other federal constitutional limitations on punitive damages. *See* UCJI 75.02A (jury may not punish for out-of-state harm); UCJI 75.02B (jury may not punish for harm to others).

COMMENT: The parties may consider additional factors for the factfinder to consider beyond paragraphs (a) through (c) above. Paragraph (b) above is bracketed because the law is not clear on whether the reasonable-relationship element is a question for the jury, or for the court on postverdict review. *Andor v. United Air Lines, Inc.*, 303 Or 505, 510–12, 739 P2d 18 (1987); *Wolf v. Nordstrom, Inc.*, 291 Or 828, 831–35, 637 P2d 1280 (1981).

The recovery of punitive damages against healthcare practitioners is limited by ORS 31.740. Punitive damages may not be recovered in the absence of proof of malice, provided that certain other elements are present. Those elements are not addressed by this instruction because, typically, they will be questions of law for the court. In this regard, see ORS 31.740.

ORS 31.730(1) requires clear and convincing evidence for punitive damages to be awarded. For a definition of *clear and convincing evidence*, *see* UCJI 14.03.

The items that may be considered by the jury when fixing the amount of punitive damages depend on the statutory and common-law factors permitted to be considered for the specific kind of claim at issue. *Oberg v. Honda Motor Co.*, 320 Or 544, 549, 888 P2d 8 (1995), *cert den*, 517 US 1219 (1996). Additional or different items beyond items (a) to (c) should be included in this instruction when supported by the evidence and permitted for the specific kind of claim at issue. *See Williams v. Philip Morris, Inc.*, 340 Or 35, 55–56, 127 P3d 1165 (2006), *vacated on other grounds by Philip Morris USA v. Williams*, 549 US 346, 419, 127 S Ct 1057, 166 L Ed2d 940 (2007) (discussion of the considerations when evaluating the reprehensibility of a defendant's conduct). The writ of certiorari granted on June 9, 2008, *Philip Morris USA, Inc. v. Williams*, 553 US 1093 (2008), was dismissed as improvidently granted by *Philip Morris USA, Inc. v. Williams*, 556 US 178 (2009).

ORS 31.740 uses, but does not define, the term *malice.* The Oregon Supreme Court has defined the meaning of *malice* in ORS 18.550 (former version of ORS 31.740). *Johannesen v. Salem Hospital*, 336 Or 211, 82 P3d 139 (2003). The court concluded that in civil cases *malice* means "the intentional doing of [an] injurious act without justification or excuse," including a tortious act "committed with a bad motive or so recklessly as to be in disregard of social obligations, or an act wantonly, maliciously or wickedly done." *Johannesen*, 336 Or at 217 (quoting *Linkhart v. Savely*, 190 Or 484, 505–06, 227 P2d 187 (1951)). For a definition of *malice*, *see* UCJI 75.02C.

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UCJI 14.03

CLEAR AND CONVINCING EVIDENCE

When a party must prove a claim by clear and convincing evidence, that party must persuade you by evidence that makes you believe the truth of the claim is highly probable.

You should consider all of the evidence no matter who presented it.

[This is a higher standard of proof than preponderance of the evidence, but lower than the criminal standard of beyond a reasonable doubt.]

COMMENT: *Riley Hill Gen. Contractor, Inc. v. Tandy Corp.*, 303 Or 390, 402, 737 P2d 595 (1987).

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