AGENDA
ADVISORY COMMITTEE
ON MODEL CIVIL JURY INSTRUCTIONS

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

August 8, 2005
4:00 TO 6:00 P.M.

Damages Instructions	Rich Humphries Paul Belnap

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

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

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

MINUTES
Advisory Committee on Model Civil Jury Instructions
June 1, 2005
12:15 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King (joined the meeting in progress), Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kelly Thacker (typist)

1. *Schedule.* Mr. Young announced that the July 5, 2005, meeting was canceled because it conflicts with the Utah State Bar annual meeting. He noted that once the committee finishes the damage instructions, it will next review the employment, medical malpractice and products liability instructions.

2. *Format.* Mr. Carney showed the committee the Alaska civil pattern instructions online, to give the committee an example of what the revised MUJI instructions may look like when they are finished. Mr. Humpherys questioned whether cross-references to the first edition of MUJI should be included. Several committee members thought they were helpful to show the history of a given instruction.

3. *Preliminary Instructions.* The committee discussed the following draft preliminary instructions:

a. *1.101: General Admonitions.* Mr. Shea proposed this instruction as a new instruction. Mr. Simmons noted that the instruction is largely repeated in instruction 1.112 (rules applicable to recesses). A majority of the committee thought that it was okay to repeat some concepts, since they will be new to jurors. The committee decided to leave both instructions (1.101 and 1.112) as they are.

b. *1.103: Nature of the Case.* The committee approved Mr. Shea's suggestion to delete the last paragraph, since it is covered by other instructions.

c. *1.106: Jurors Must Follow the Instructions.* At Mr. Shea's and Dr. Di Paolo's suggestion, the instruction was revised to read: "The instructions that I give you are the law, and your oath requires you to follow my instructions even if you disagree with them."

d. *1.107: Jurors Must Decide the Facts Based on the Evidence.* This is a new instruction. Mr. Carney thought the instruction was too choppy and suggested alternative wording. Mr. Shea suggested deleting the instruction as covered elsewhere. Mr. Fowler proposed amending instruction 1.102 (role of the judge, jury and lawyers) to add that the evidence is the testimony heard and the exhibits received. The committee decided to delete instruction 1.107 and to leave instruction 1.102 unchanged.

e. *1.110: Service Provider for Juror with a Disability; and 1.111: Duty to Abide by Official Translation.* These are new instructions, based on California instructions. Mr. Dewsnup noted that instruction 1.110 was consistent with the work of the committee on jury service, which has tried to make jury service available to a broader range of people, including those with disabilities. Mr. Simmons questioned what the instruction and oath of the service provider meant. Mr. Carney questioned why jurors were required to rely on the translation of an interpreter and not their own knowledge of a language. Mr. West questioned the need for the instructions. None of the committee members knew of a trial in which the instructions would have applied. Some committee members thought the instructions were premature and should not be considered without more guidance in a statute or rule. The committee reserved on the instructions.

Mr. Shea will research the legal bases for instructions 1.110 and 1.111.

f. *1.306: Stipulated Facts.* At Mr. Young's suggestion, the first sentence was deleted. An advisory committee note was added to the effect that the instruction should not be given until a stipulation is entered in the record. "Before the trial" was therefore deleted from the second paragraph. The last paragraph was revised to read: "Since the parties have agreed on these facts, you must accept [not "treat"] them as true for purposes of this case."

g. *1.307: Judicial Notice.* At the suggestion of Mr. Young and others, the instruction was revised to read: "I have taken judicial notice of [fact] for purposes of this trial. This means that you must accept the fact as true." An advisory committee note was added to say that the instruction should not be given until the court takes judicial notice. The staff note was deleted, and a reference to Utah Rule of Evidence 201 was added.

h. *1.401: Preponderance of the Evidence.* The instruction was compared to the new California instruction 200. Mr. Dewsnup, Dr. Di Paolo and Mr. Fowler expressed a preference for the Utah instruction. Mr. Dewsnup, however, expressed some concern that the instruction overemphasized the plaintiff's burden and suggested adding the words, "however slightly." Mr. Carney thought the matter was best left to argument. Mr. Shea suggested reversing the order of the sentences in the fourth paragraph. At Mr. Shea's suggestion, the first sentence of the third paragraph was revised to read: "Another way of saying this is proof by the greater weight of the evidence, however slight." Messrs. Ferguson and Nebeker expressed some reservations about this change.

After a break, Mr. King joined the committee.

4. *Negligence Instructions.* The committee reviewed the following draft negligence instructions:

a. *2.101: "Fault" Defined.* Messrs. Young and Carney presented a revised instruction 2.101 defining "fault." Mr. Ferguson noted that the first paragraph assumes that the plaintiff was harmed, which may be a contested issue of fact. Mr. Belnap suggested deleting the sentence in the third paragraph, "There may be more than one cause of the harm," because it is covered in another instruction and fits better there. Several committee members noted that not every act or omission causing harm is "fault." Therefore, "wrongful" was added to the first sentence of the second paragraph, before "act or failure to act." Mr. West suggested deleting the third paragraph. The committee discussed whether the jury should be directed to the special verdict form at this point in the instructions. The consensus was that the concept should be explained to them, but the court should leave the explanation of the verdict form until later. Mr. Carney noted that the instruction may have to be given in some form at different parts of the trial. After further discussion, the instruction was revised to read:

2.101. "Fault" defined.

Your goal as jurors is to decide whether [plaintiff] was harmed and, if so, whether anyone was at fault for that harm. If you decide that more than one person is at fault, you must then allocate fault among them.

Fault means any wrongful act or failure to act that causes harm to the person seeking recovery. The wrongful act or failure to act alleged in this case is [negligence, etc.].

Your answers to the questions on the verdict form will determine whether anyone is at fault. We will review the verdict form in a few minutes.

Instruction 2.101a, which tracked instruction 2.101 but used the term "responsibility" for "fault," was deleted.

b. *2.102: Standard of Care Required Generally.* The title of the instruction was revised to read, "Negligence defined." Mr. West thought that the last paragraph could be confusing: jurors might confuse comparing the conduct of a party with that of a hypothetical reasonable person with the comparisons they are required to make to allocate fault. Mr. Carney suggested that the first part of that paragraph ("You must decide whether [names of persons on the verdict form] were negligent") be the first sentence of the instruction and that the rest of the paragraph be omitted. Dr. Di Paolo thought this

sentence fit better as the last sentence of the instruction rather than the first. The committee agreed to make the paragraph regarding physical disabilities a separate instruction.

c. *2.103: Standard of Care Required When Children Are Present; 2.104: Standard of Care Required by Children; 2.105: Standard of Care Required for a Child Participating in an Adult Activity; and 2.107: Standard of Care Required in Controlling Electricity.* The titles of these instructions were all revised to delete the words "Standard of."

d. *2.108: "Cause" Defined.* Mr. Carney noted that the subcommittee had chosen to follow the California approach and use the term "cause" rather than "proximate cause" or "legal cause" because of the confusion the latter terms engender. Mr. Young suggested adding an explanation for the change to the advisory committee note. Mr. Ferguson noted that the first sentence of the instruction presumes that the defendant has done a wrongful act. The first paragraph was revised to read: "Remember, I have instructed you before that the concept of fault includes a wrongful act or failure to act that causes harm. You must decide whether [name of defendant or defendants]'s act or failure to act was a 'cause' of [name of plaintiff's] harm." Dr. Di Paolo suggested putting the word "and" between subparagraphs (1) and (2) on a separate line. Mr. King thought the word should be "or," not "and." Mr. Young noted that subparagraph (1) covered two concepts: (a) a direct cause of the harm, and (b) an indirect cause. Mr. Young thought that the instruction was inaccurate and incomplete because it did not include the concept of "unbroken by an efficient intervening cause." Mr. King and some committee members thought that intervening cause was an affirmative defense and that the plaintiff did not have the burden of proving the absence of a superseding cause. Other committee members disagreed. Mr. Ferguson noted that a "natural and continuous sequence" was equivalent to the lack of an intervening cause. Some questioned whether the concept had to be expressed twice--once in the positive and once in the negative. Dr. Di Paolo questioned what an "efficient" intervening cause was. Superseding causes are covered by another instruction. Ms. Blanch and Dr. Di Paolo suggested adding "unbroken" to the instruction. Mr. Shea and Mr. Jemming thought that the term "continuous" covered the concept. Mr. Carney and Mr. West thought that adding "unbroken" would add confusion, particularly in cases where there may be multiple causes of a person's harm. Mr. Carney indicated that he would define cause as simply an act or failure to act "but for" which the harm would not have occurred. Mr. Young suggested repeating the phrase "the person's act or failure to act" at the beginning of both subparagraph (1) and subparagraph (2) and deleting it from the first part of the sentence. "Remember" was deleted from the last sentence of the instruction.

e. *2.110: Superseding Cause.* Mr. Shea noted that this instruction, which is new, was his effort to restate MUJI 3.16. Mr. Carney noted that the instruction was wrong. If an intervening cause is foreseeable, it is not a superseding cause. Some questioned whether MUJI 3.16 is still good law in light of the Utah Liability Reform Act.

f. *2.111: Allocation of Fault.* The committee discussed alternative introductory sentences. Dr. Di Paolo suggested that the second paragraph also needed an introductory sentence. The instruction was revised to read:

2.111. Allocation of fault.

If you decide that more than one person is at fault, you must decide each person's percentage of fault. This allocation of fault must be done on a percentage basis, and must total 100%. Each person's percentage should be based upon how much that person's fault contributed to the harm.

You may also decide to allocate a percentage of fault to the plaintiff. [Name of plaintiff]'s total recovery will be reduced by the percentage of fault that you attribute to [him/her/it/them]. If you decide that [name of plaintiff]'s fault is 50% or greater, [name of plaintiff] will recover nothing.

When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage of fault. I will make that calculation later.

Mr. Shea's proposed alternative instruction, 2.111a (Allocation of Responsibility) was deleted.

5. *Damage Instructions.* The committee reviewed the following draft damage instructions. (A revised set of draft instructions was circulated at the meeting. The instruction numbers are the numbers of this revised set, and not necessarily the numbers of the set circulated before the meeting. The committee reviewed yet another revised set of instructions at the meeting, which were shown on a screen and used a different numbering system. The numbers of the instructions the committee actually reviewed are indicated in brackets.)

a. *15.101[1]: Introduction to Personal Injury Damage. Liability Contested.* Mr. Humpherys noted that the subcommittee had decided to use the terms "economic damages" and "non-economic damages" instead of "special damages" and "general damages." Mr. Carney added an advisory committee note to that effect. At Dr. Di

Paolo's suggestion, the first phrase was revised to read, "If you decide that [defendant's] fault" instead of "the fault of [name of defendant]." At Mr. West's suggestion, "legal" was deleted before "cause." At Mr. West's and Mr. King's suggestion, "you must award the damages, if any . . ." was revised to read, "you must decide how much money will fairly and adequately compensate [name of plaintiff] for his harm." At Mr. Fowler's and Mr. Young's suggestion, the word "damages" in the first sentence was replaced with "harm," to link the instruction to the prior, liability instructions, which talk about "harm" rather than "damages."

b. *15.125 [25]: Introduction to Personal Injury Damage. Liability Decided.*

Mr. Shea will revise the instruction to mirror the changes to instruction 15.101.

c. *15.102 [2]: Personal Injury--Economic Damage. Medical Care.* At Mr. Ferguson's suggestion, "medically related care" was replaced with "medical care and other related expenses." "Legally" was deleted from before "caused." The committee debated the meaning of "necessary" or "necessarily incurred." The instruction was revised to read:

15.102. Personal Injury--Economic Damage. Medical Care.

Economic damages include reasonable and necessary expenses for medical care and other related expenses. You should award the value of those expenses incurred in the past and for those that will probably be incurred in the future.

d. *15.102.5 [2A]: Personal Injury--Economic Damage. Medical Care.* Mr. Belnap did not think such an instruction should be given. Mr. Dewsnup noted that the introductory phrase ("The fact, if it be a fact") was stilted and archaic. Mr. Carney thought that the instruction should specify what the unnamed sources of payment were: "If any of the plaintiff's expenses were paid by health insurance, workers' compensation or other sources, this does not diminish [name of defendant's] responsibility to pay for them." At Mr. Humpherys suggestion, the committee decided to drop this instruction in favor of a more generic instruction, instruction 15.136.

e. *15.103 [3]: Personal Injury--Economic Damage. Loss of Earnings.* The committee noted that the instruction was confusing. A clearer distinction needs to be made between past and future damages and between lost earnings (and benefits) and lost future earning capacity. The committee reserved on the instruction.

Mr. Humpherys will review the law on lost earnings and loss of earning capacity and revise the instruction.

f. *15.104 [4]: Personal Injury--Economic Damage. Loss of Household Services.* Mr. Ferguson asked whether household services needed to be defined. The consensus of the committee was that they did not have to be defined in the instruction. Jurors should understand what they are, and they will generally be identified in the damage expert's economic report. Mr. Shea thought the second sentence was confusing; it implies that the plaintiff must prove both the reasonable value of the household services the plaintiff has been unable to do and the reasonable value of the services that he will likely be unable to do in the future to recover either past or future damages. Dr. Di Paolo thought that the difference between past and future should be explained, that is, that the jury should be told that "past" means between the time of the injury and the time of trial. The instruction was revised to read:

> 15.104. Personal Injury--Economic Damage. Loss of Household Services.
>
> Economic damages also include loss of household services. To recover damages for this loss, [name of plaintiff] must prove the reasonable value of the household services that he has been or will be unable to do since the harm.

g. *15.105 [5]: Non-economic Damages.* The committee thought that the instruction was confusing. Mr. Ferguson suggested making bullet points for each factor the jury may consider in assessing non-economic damages. Mr. Fowler asked whether there was authority for awarding damages for "loss of enjoyment of life" and reserved the right to research the issue further. The committee decided to use "determine" for "award." Mr. Shea suggested dropping the phrase "and the damages you fix shall be just and reasonable in light of the evidence" from the end of the second paragraph. Mr. Fowler and Ms. Blanch thought that the instruction went too far, that the jury has no duty to award non-economic damages in every case but only to consider them. Mr. King suggested that the committee needed more research on whether the jury must award non-economic damages if it finds that a defendant was at fault. The committee tentatively revised the instruction to read:

> 15.105. Non-economic Damages.
>
> In awarding non-economic damages, among the things that you may consider are:

(1) the nature and extent of injuries;
(2) the pain and suffering, both mental and physical;
(3) the extent to which [name of plaintiff] has been prevented from pursuing his ordinary affairs;
(4) the degree and character of any disfigurement;
(5) the extent he has been limited in the enjoyment of life.

You may consider whether the consequences of these injuries will, with reasonable probability, continue in the future. If so, you should award such damages as will fairly and adequately compensate him throughout his life expectancy.

Non-economic damages are not capable of being exactly determined, and there is no fixed rule, standard or formula for them. Even though they may be difficult to compute, non-economic damages must still be awarded where sustained. It is your duty to make this determination with calm and reasonable judgment. The law does not require the testimony of any witness to establish the amount of non-economic damages.

While you may not award damages based upon mere speculation, the law requires only that the evidence provide a reasonable basis for assessing the damages and does not require a mathematical certainty.

Next Meeting. The next meeting will be Monday, June 13, 2005, at 4:00 p.m. The committee will continue its review of the damage instructions. There will be no meeting in July.

The meeting concluded at 5:35 p.m.

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 13, 2005
4:00 p.m.

Present: John L. Young (chair), Paul M. Belnap, Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, L. Rich Humpherys, Jonathan G. Jemming, Paul M. Simmons and David E. West

Excused: Francis J. Carney, Timothy M. Shea

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.103. Personal injury--economic damage. Medical care collateral source.* The committee noted that this instruction has been dropped in favor of the general collateral source instruction, 15.123.

2. *15.104. Personal injury--economic damage. Loss of earnings.* Mr. Humpherys read from *Clawson v. Walgreen Drug Co.,* 162 P.2d 759, 764 (Utah 1945), regarding the distinction between lost earnings and loss of earning capacity. Mr. Simmons suggested adding a sentence after the first sentence of the third paragraph to say, "A person may have lost earning capacity even if he was not employed at the time of the injury." Mr. Belnap thought the sentence was argument. Messrs. Simmons and Dewsnup and Dr. Di Paolo thought the sentence was helpful because the paragraph's emphasis on actual earnings diminished the reference to the plaintiff's "potential to earn income." Ms. Blanch suggested adding to subpoint (2) of the third paragraph the phrase "and the likelihood that he would have continued in his chosen profession." Mr. Young thought that a transition was needed between the second paragraph (talking about lost earnings) and the third paragraph (talking about loss of earning capacity). Mr. Belnap suggested splitting the instruction into two instructions: one on lost earnings and one on loss of earning capacity. Mr. Young noted that MUJI included separate instructions on each concept. Mr. West pointed out that the concepts are generally combined on the verdict form: There is one line for past lost earnings or loss of earning capacity, and another for future lost earnings or loss of earning capacity. A given case, however, may involve only one or the other (that is, either lost earnings or lost earning capacity but not both). Mr. Belnap suggested that future damages are always damages for loss of earning capacity, whereas past damages may be for loss of actual earnings or loss of earning capacity. Mr. Jemming suggested additional language for the third paragraph, based on *Clawson:* "Lost earnings is the amount a person might reasonably have earned in pursuit of his ordinary occupation." Mr. Belnap expressed a preference for the original MUJI instructions. Mr. Dewsnup noted that lost earnings should also include lost benefits. Mr. Belnap thought that benefits were covered by the term "earnings," but other committee members thought that jurors need to be specifically instructed on lost benefits, or they may think they cannot award them. Mr. Humpherys noted that another case the subcommittee relied on for the instruction, *Dalebout v. Union Pacific Railroad Co.,* 980 P.2d 1194, 1200 (Utah Ct. App. 1999), included the ability to weather economic storms as part of lost earning capacity, but *Dalebout* was a FELA case, and Mr. Humpherys was not sure whether it accurately reflected Utah law on

damages. Messrs. Belnap, Young and West were confident that FELA cases are governed by state damage law. Mr. Simmons asked how other jurisdictions' pattern jury instructions explain lost earnings and earning capacity. After further discussion, the committee decided to separate the two concepts into separate instructions and to defer further discussion until the damages subcommittee has had an opportunity to revise the instructions.

Mr. Jemming will e-mail Mr. Humpherys proposed language for the instructions.

3. *15.105. Personal injury--economic damage. Loss of household services.* The committee approved the draft instruction.

4. *15.106. Non-economic damages.* Mr. Young suggested revising the language in the second full paragraph stating that future damages should be awarded "throughout [the plaintiff's] life expectancy," since some future damages are resolved before death. Ms. Blanch suggested deleting the phrase and adding the phrase "and for how long" to the first sentence of that paragraph. Mr. Simmons asked whether "with reasonable probability" meant something different from "probably" or "more likely than not." Messrs. Young, Belnap and Humpherys suggested using the term "preponderance of the evidence" in the instruction, to reemphasize the standard of proof. After further discussion, the second paragraph was revised to read:

> You may consider whether the consequences of these injuries will, by a preponderance of the evidence, be likely to continue in the future and for how long. If so, you should award such damages as will fairly and adequately compensate him.

Mr. Young and Dr. Di Paolo thought the phrase "where sustained" in the third full paragraph was cumbersome and confusing. At Mr. Humpherys' suggestion, the second sentence of that paragraph was revised to read:

> Non-economic damages must still be awarded even though they may be difficult to compute.

At Mr. Young's suggestion, "mere" was deleted from the last paragraph. Dr. Di Paolo noted that she was still not clear how the jury is to compute non-economic damages. Nevertheless, the instruction was approved as revised.

5. *15.107. Personal injury damages. Susceptibility to injury.* Dr. Di Paolo asked how this instruction differed from instruction 15.108 (aggravation of pre-existing conditions). Mr. Simmons suggested that "is" in the last line be replaced with "may be." Mr. Young thought that the jury needed to make a finding as to whether or not the plaintiff is more susceptible to

injury and that "is" was therefore appropriate. Other committee members thought the only issue for the jury to decide was causation and not susceptibility. After further discussion, the committee replaced "is" in the last sentence with "may be."

6. *15.108. Personal injury damages. Aggravation of pre-existing conditions.* The committee deleted "legally" before the word "caused" in the last line, consistent with its approach to the issue of proximate causation. At Mr. Young's suggestion, the committee deleted "from another's fault" from the first line of the last paragraph. The committee revised the first part of the sentence to read, "When a pre-existing condition makes the outcome of the injuries greater than they would have been . . ." Dr. Di Paolo suggested replacing "attributable to" in the next sentence with "a result of," but Ms. Blanch thought that "resulting from" was a different standard than "attributable to" and not an accurate statement of the law. The committee reserved further discussion of the instruction.

Other. At Mr. Dewsnup's suggestion, the committee commended Dr. Di Paolo for her dedicated service and acknowledged her invaluable contributions to the committee's work.

Next Meeting. The next meeting will be Monday, August 8, 2005, at 4:00 p.m. There will be no meeting in July.

The meeting concluded at 5:45 p.m.

15.103. Personal injury - economic damage. Loss of earnings.

Economic damages also include lost earnings and loss of earning capacity from the time of harm.

As to lost earnings, you should award the lost earnings and benefits to [name of plaintiff] for work he has been unable to do, and the reasonable value of his earnings and benefits that will be lost in the future.

Earning capacity is not the same as lost earnings, and means the potential to earn income. It is not necessarily determined by the actual loss of earnings. In determining this amount, you should consider evidence of: (1) [name of plaintiff]'s actual earnings; (2) his work before and after [describe event]; (3) what he was capable of earning had he not been injured; and (4) any other fact that relates to employment.

MUJI 1st References.

27.04; 27.05.

References.

Dalebout v. Union Pacific R. Co., 980 P.2d 1194, 1200 (Ut. App. 1999)
Corbett v. Seamons dba Big O Tire, 904 P.2d 232, N.2 (Ut. App. 1995)

Advisory Committee Notes.

Staff Notes.

Separate into 2 instructions.

Status: Changes from June 1, 2005

15.104. Personal injury - economic damage. Loss of earning capacity.

MUJI 1st References.

References.

Advisory Committee Notes.

Staff Notes.

Status:

15.108. Personal injury damages. Aggravation of pre-existing conditions.

A person who has a physical [or emotional] condition before the time of [described event] is not entitled to recover damages for that condition or disability. However, the injured person is entitled to recover damages for any aggravation of the pre-existing condition that results from another's fault, even if the person's pre-existing condition made him more susceptible to damages than the average person. This is true even if another person would not have suffered any damages from the event at all.

When a pre-existing condition makes the outcome of injuries greater than they would have been without the condition, it is your duty, if possible, to determine what portion of the plaintiff's disability, impairment, pain, suffering, and other damages is attributable to the pre-existing condition and what portion is attributable to the [described event]. But if you find that the evidence does not allow you to make such a determination, then you must conclude that the entire disability, impairment, pain, suffering, and other damages are caused by the defendant's fault.

MUJI 1st References.

27.06.

References.

Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 (1966)
Tingey v. Christensen, 987 P.2d 588 ,592 (Utah 1999)
Robinson v. All-Star Delivery, 992 P.2d 969, 972 (Utah 1999)

Advisory Committee Notes.

Staff Notes.

Status: Changes from June 13, 2005

15.109. Personal injury damages. Aggravation of dormant pre-existing condition.

If a person has a pre-existing condition that otherwise does not affect him, he may recover the full amount of damages legally caused by an aggravation of that condition. In other words, when a pre-existing condition does not cause pain or disability, but [describe the event] causes the person to suffer pain, disability or other problems.

MUJI 1st References.

27.07.

References.

Biswell v. Duncan, 742 P.2d 80 (Utah 1987)

Advisory Committee Notes.

Staff Notes.

The "In other words" sentence is not complete.

Status: New.

15.110. Personal injury damages. Mitigation of damages.

[Name of plaintiff] has a duty to exercise reasonable diligence and ordinary care to minimize the damages caused by [name of defendant]'s fault. Any damages awarded to [name of plaintiff] should not include damages for losses that [name of plaintiff] could have avoided by taking reasonable steps. It is [name of defendant]'s burden to prove that [name of plaintiff[could have minimized his damages, but failed to do so. If [name of plaintiff] made reasonable efforts to minimize his damages, then your award should include the amounts he reasonably incurred for this purpose.

MUJI 1st References.

27.08.

References.

Advisory Committee Notes.

Staff Notes.

Status: New.

15.111. Personal injury damages. Life expectancy.

According to the mortality tables, [name of plaintiff] is expected to live ____ more years. You may consider this fact in deciding the amount of future damages. A life expectancy is merely an estimate of the average remaining life of all persons in our country of a given age and gender, with average health and exposure to danger. Some people live longer and others die sooner. You may consider all other evidence bearing on the expected life of [name of plaintiff], including his occupation, health, habits, life style, and other activities.

MUJI 1st References.

27.12.

References.

JIFU No. 90.36 (1957)
BAJI No. 14.69 (Supp. 1992). Reprinted with permission; copyright © 1986 West publishing Company

Advisory Committee Notes.

Staff Notes.

Status: New.

15.112. Personal injury damages. Wrongful death claim. Adult.

In determining damages, you shall award an amount which will compensate [name of plaintiff] for the loss suffered due to [name of decedent]'s death. You shall base the amount of your award on all circumstances existing at the time of the [name of decedent]'s death which establish [name of plaintiff]'s loss, including the following:

(1) The loss of financial support or the right to receive financial support, if any, that [name of plaintiff] would likely have received from [name of decedent] had name of decedent] lived. You should consider whether [name of decedent] provided or was legally obligated to provide financial support to [name of plaintiff] in the past and the earning capacity of [name of decedent].

(2) The loss of love, companionship, society, comfort, care, protection and affection which [name of plaintiff] has sustained and will sustain in the future.

(3) The age, health and life expectancies of [name of decedent] and [name of plaintiff] immediately prior to the death.

(4) Whether [name of decedent and name of plaintiff]'s relationship was kind and affectionate or otherwise.

(5) The loss of inheritance from [name of decedent] [name of plaintiff] is likely to suffer because of [name of decedent]'s death.

(6) Any other evidence of assistance or benefit that [name of plaintiff] would likely have received had [name of decedent] lived.

[In determining this award, you are not to consider any pain or suffering of name of [decedent] prior to his death.]

MUJI 1st References.

27.09.

References.

Utah Code Ann. §§ 78-11-7 - 12 (1992)
In re Behm's Estate, 117 Utah 151, 213 P.2d 657 (1950)
Allen v. United States, 558 F. Supp. 247 (D. Utah 1984)
Platis v. United States, 288 F. Supp. 254 (D. Utah 1968), aff'd, 409 F.2d 1009 (10th Cir. 1969)
Morrison v. Perry, 104 Utah 151, 140 P.2d 772 (1943)
BAJI No. 14.50 (Supp. 1992). Reprinted with permission; copyright © 1986 West Publishing Company.

Advisory Committee Notes.

This instruction applies to claims for wrongful death of an adult under U.C.A. §78-11-7. It should be given along with Instruction ____ in cases involving both wrongful death claims and survival claims under U.C.A. §78-11-12, and in such cases the bracketed provision should be deleted. In appropriate cases, the court may also include a specific reference within this instruction to reasonable funeral and burial expenses, the decedent's medical expenses resulting from the subject event causing the death, and damage to or destruction of the decedent's personal property.

Staff Notes.

Status: New.

15.113. Wrongful death claim. Minor.

In determining damages, you shall award an amount which will compensate [name of plaintiff] for the loss suffered due to [name of decedent]'s death. You shall base the amount of your award on all circumstances existing at the time of the [name of decedent]'s death which establish [name of plaintiff]'s loss, including the following:

(1) The loss of financial support, if any, that [name of plaintiff] would likely have received from [name of decedent] had [name of decedent] lived. You should consider whether [name of decedent] provided or would likely provide financial support to [name of plaintiff] and the earning capacity of [name of decedent]. This amount should be reduced by the costs that [name of plaintiff] would likely have incurred to support [name of decedent] had the child survived, until the child reached 18 years of age.

(2) The loss of love, companionship, society, comfort, care, protection and affection which [name of plaintiff] has sustained and will sustain in the future.

(3) The age, health and life expectancies of [name of decedent] and [name of plaintiff] immediately prior to the death.

(4) Whether [name of decedent and name of plaintiff]'s relationship was kind and affectionate or otherwise.

(5) Any other evidence of assistance or benefit that [name of plaintiff] would likely have received had [name of decedent] lived.

(6) The reasonable and necessary expenses incurred by [name of plaintiff] for [name of decedent] for any medical care because of [circumstances causing death].

(7) The reasonable expenses that were incurred for [name of decedent's] funeral and burial.

[In determining this award, you are not to consider any pain or suffering of [name of decedent] prior to his death.]

MUJI 1st References.

27.10.

References.

Utah Code Ann. §§ 78-11-7 through 78-11-12 (1992)
In re Behm's Estate, 117 Utah 151, 213 657 (1950)
Allen v. United States, 588 F. Supp. 247 (D. Utah 1984)

Platis v. United States, 288 F. Supp. 254 (D. Utah 1968), aff'd, 409 F.2d 1009 (10th Cir. 1969)

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Advisory Committee Notes.

This instruction applies to claims for wrongful death of a minor under U.C.A. §78-11-6. It should be given along with Instruction ____ in cases involving both wrongful death claims and survival claims under U.C.A. §78-11-12, and in such cases the bracketed provision should be deleted.

Staff Notes.

Status: New.

15.114. Personal injury damages. Survival claim.

If you find that: (1) [name of decedent] lived for a period of time after the [circumstances of claim]; and that (2) [name of decedent] died as a result of the injuries caused by the [circumstances of claim], then you should award economic and non-economic damages as defined elsewhere in these instructions.

MUJI 1st References.

None.

References.

Utah Code Ann. §§ 78-11-7 through 78-11-12 (1992)
In re Behm's Estate, 117 Utah 151, 213 657 (1950)
Allen v. United States, 558 F. Supp. 247 (D. Utah 1984)
Platis v. United States, 288 F. Supp 254 (D. Utah 1968), aff'd, 409 F.2d 1009 (10th Cir. 1969)
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Advisory Committee Notes.

There is no Utah law at the time this was drafted regarding the meaning of "survival," and whether the decedent must be conscious to bring a survival action.

Staff Notes.

Status: New.

15.115. Personal injury damages. Survival claim. Disputed cause of death.

You may not award non-economic damages suffered by [name of decedent] if [name of decedent]'s death resulted from a cause other than an injury caused by [name of defendant]'s fault. If you decide that [name of decedent]'s death resulted from some other cause, you may award only economic damages resulting from [name of defendant]'s fault, as explained elsewhere in these instructions.

MUJI 1st References.

None.

References.

Advisory Committee Notes.

This instruction applies only to a claim made under U.C.A. §78-11-12, where the cause of death is contested.

Staff Notes.

If death is not caused by defendant's fault, then jury would never reach the question of damages.

Status: New.

15.116. Personal injury damages. Effect of settlement.

You have heard evidence that [name of plaintiff] has settled his claim against [name of settled party]. Your award of damages to [name of plaintiff] should be made without considering any amount that he may or may not have received under this settlement. After you have returned your verdict, I will make any appropriate adjustment to your award of damages.

MUJI 1st References.

None.

References.

Advisory Committee Notes.

Staff Notes.

Status: New.

15.117. Arguments of counsel not evidence of damages.

You may consider the arguments of the attorneys to assist you in deciding the amounts of damages, but their arguments are not evidence.

MUJI 1st References.

None.

References.

Advisory Committee Notes.

Staff Notes.

Covered in 1.301.

Status: New.

15.118. Personal injury damages. Proof of damages.

Before you may award damages, [name of plaintiff] must prove two points.

First, he must prove that damages occurred. The evidence must do more than raise speculation that damages actually occurred; there must be a reasonable probability that [name of plaintiff] suffered damages from [name of defendant]'s fault.

Second, [name of plaintiff] must prove the amount of damages. The level of evidence required to establish that damages actually occurred is generally higher than that required to establish the amount of damage.

It is [name of defendant], rather than [name of plaintiff], who should bear the burden of some uncertainty in the amount of damages. While the standard for determining the amount of damages is not so exacting as the standard for proving that damages actually occurred, there still must be evidence that rises above speculation and provides a reasonable, even though not necessarily precise, estimate of the amount of damages.

If damages actually occurred, the amount of damages may be based upon reasonable approximations, assumptions or projections.

MUJI 1st References.

None.

References.

Atkin Wright & Miles v. Mountain States Telephone & Telegraph Co., et al., 709 P.2d 330, 336 (Utah 1985)

Advisory Committee Notes.

Staff Notes.

Status: New.

15.119. Personal injury damages. Present cash value.

If you decide that [name of plaintiff] is entitled to damages for future economic losses, then the amount of those damages must be reduced to present cash value. This is because any damages awarded would be paid now, even though the plaintiff would not suffer the economic losses until some time in the future. Money received today would be invested and earn a return or yield.

To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and frugally invested, will provide [name of plaintiff] with the amount of money needed to compensate [name of plaintiff] for future economic losses. In making your determination, you should consider the earning yields of reasonable and frugal, but not necessary risk free, investment, and the effects of inflation over that time period.

MUJI 1st References.

27.11.

References.

Advisory Committee Notes.

Utah law is silent on whether inflation should be taken into account in discounting an award for future damages to present value. The United States Supreme Court, however, has ruled that inflation should be taken into account in discounting. See Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983). The Committee does not feel that it is appropriate to enact a "rule" on this issue in the context of preparing model instructions. Instead, the parties and the court in any particular case should address and resolve this issue.

See Klinge v. Southern Pac. Co., 57 P.2d 367 (Utah 1936) (Evaluating present cash value under FELA claim, holding that it was error for district court to have instructed the jury to use the legal rate of interest in determining present value - present value determination should be left to the jury, to be inferred from the evidence, using the "reasonably safe" standard cited above).

Gleason v. Kueker, 641 N.W. 2d 553 (Ia. Ct. App. 2001) (summarizing Iowa Supreme Court law on present value, using "reasonably safe" investment by person of "ordinary prudence" standard [the same discussed in Klinge], and stating that it is the jury's province "to make the present value reduction based on all the relevant facts and circumstances shown by the evidence.")

St. Louis S'western Ry. Co. v. Dickerson, 470 U.S. 409 (1985) (FELA case, holding that state court's failure to give present value instruction, which closely coincides with the first paragraph of our proposed instruction above, was error).

Staff Notes.

Status: New.

15.120. Introduction to tort damages. Liability established.

I have decided that [name of defendant's] fault was the cause of [name of plaintiff]'s harm. You must decide how much money will fairly and adequately compensate [name of plaintiff] for his damages. There are two kinds of damages: economic damages and non-economic damages, and I will now explain what each means.

MUJI 1st References.

27.01.

References.

Advisory Committee Notes.

The Advisory Committee recommends that the terms "special" and "general" damages not be used and that the terms "economic" and "non-economic" damages are more descriptive, but are intended to describe the same things.

Staff Notes.

Should immediately follow 15.101, Introduction to tort damages. Liability contested.

Status: New.

15.121. Loss of use of personal property. Economic damage.

To compensate [name of plaintiff] for loss of use of [item of personal property], you may award [name of plaintiff] the amount you determine will, under all the circumstances, restore [name of plaintiff] to the same position [name of plaintiff] was in prior to the damage. You may consider the following factors:

[Include only those factors that are appropriate based on the evidence.]

(1) The rental value of the [item of personal property] or the lost income, meaning the income [name of plaintiff] would likely have earned through using the [item of personal property].

(2) What [name of plaintiff] reasonably spent to decrease the damage.

MUJI 1st References.

27.15.

References.

Castillo v. Atlanta Casualty Co., 939 P.2d 1204, 1209 (Utah Ct. App. 1997)

Advisory Committee Notes.

Staff Notes.

Status: New.

15.122. Damage to personal property. Economic damage.

Economic damages include damage to or destruction of [name of plaintiff]'s [item of personal property]. To compensate [name of plaintiff] for this damage, you may award the amount that you determine will, under all the circumstances, restore [name of plaintiff] to the same position had there been no damage to the item of personal property.

That amount will generally be equal to the difference in the fair market value of the property immediately before and immediately after the damage. If the damages have been repaired, or are capable of repair, so as to restore the [item of personal property] to the same condition as before the damage, at a cost less than the difference in value, then the measure of damage is the cost of the repair rather than the difference in value.

If you find that the repairs do not restore the item to the same value as before the damage, you may award the difference between its fair market value before the harm and its fair market value after the repairs have been made, plus the reasonable cost of making the repairs. The total amount awarded must not exceed the [item of personal property]'s fair market value before the harm occurred.

If the property has no market value, use the first paragraph only.

MUJI 1st References.

27.13; 27.14.

References.

Ault v. Dubois, 739 P.2d 1117 (Utah Ct. App. 1987)
Winters v. Charles Anthony, Inc., 586 P.2d 453 (Utah 1978)
BAJI 14.20

Advisory Committee Notes.

Staff Notes.

Status: New.

15.123. Collateral source payments.

You shall award damages in an amount that fully compensates [name of plaintiff]. Do not speculate on or consider any other possible sources of benefit [name of plaintiff] may have received. After you have returned your verdict, I will make whatever adjustments may be appropriate.

MUJI 1st References.

14.16.

References.

Utah Code Ann. § 78-14-4.5
Mahana v. Onyx Acceptance Corp., 2004 UT 59 P37, P39, 96 P.3d 893, 901

Advisory Committee Notes.

Staff Notes.

Status: New.

15.124. "Fair market value" defined.

Fair market value is the highest price that a willing buyer would have paid to a willing seller, assuming that there was no pressure on either one to buy or sell; and that the buyer and seller were fully informed of the condition and quality of the [item of personal property].

MUJI 1st References.

27.19.

References.

Advisory Committee Notes.

Staff Notes.

Status: New.