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

April 10, 2005
4:00 TO 6:00 P.M.

Employer and employee rights.	Bob Wilde
Superseding cause.	Frank Carney
Loss of consortium.	Tim Shea
Damages final edits.	Tim Shea

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00, Education Room as available. Otherwise Judicial Council Room

May 8, 2006
June 12, 2006
July 10, 2006
August 14, 2006
September 11, 2006
October 9, 2006
November 13, 2006
December 11, 2006

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

MINUTES

Advisory Committee on Model Civil Jury Instructions
March 13, 2006
4:00 p.m.

Present: Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Tracy H. Fowler, Colin P. King, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Phillip S. Ferguson, Jathan Janove (chair of the employment instruction subcommittee)

Mr. Young called the meeting to order. Because Mr. Janove could not be present, the committee deferred further discussion of the employment law instructions.

1. *Web Demonstration and General Comments.* Mr. Shea circulated with the meeting materials a memorandum explaining the process for approval and publication of the jury instructions. He demonstrated the proposed website that will contain the jury instructions. The goal is for it to be up and running before the district court judges' conference in May 2006. The instructions will not be in .pdf format, so attorneys can cut, paste and edit the instructions to suit their needs. Mr. Shea noted that attorneys will be able to designate the instructions they want for their particular case and then cut and paste them as a group into a new document, in the order in which they appear online. Mr. Carney suggested including on the website the jury instructions actually used in trials. The committee asked whether some of the instructions should be designated for use before trial. Mr. Shea pointed out that the introduction to the instructions says that they should be given when they would do the most good. Mr. Carney asked how instructions would be revised or corrected. Mr. Shea noted that the instructions would be published without a comment period. Mr. Young noted that it would be the committee's responsibility to review any comments or suggestions for changes to the instructions and modify the instructions accordingly. By publishing them electronically, it will be easier to amend them. Mr. Dewsnup suggested that there be a citation to controlling law for each instruction.

Committee members were encouraged to review the instructions posted on the committee website and propose references or comments for them.

Mr. Carney asked how the bar would be advised of the new instructions. Mr. Shea noted that they could be the topic of CLE classes. Mr. Young asked how attorneys can tell which instructions are available, since they will be published before the committee has completed its work. Mr. King suggested printing the links to completed instructions in boldface. Mr. Carney asked how attorneys will be able to tell when an instruction that was in MUJI 1st has been deliberately omitted. Mr. King suggested including an introduction to each section that says, "The committee has omitted the following instructions that were found in MUJI 1st for the following reasons: . . ." Mr. Dewsnup suggested including a history such as appears in the Utah Code Annotated, showing which instructions have been effectively repealed. Mr. Shea pointed out that that would only work if the same numbering system were kept, and a new numbering

system has been proposed for MUJI 2d. Mr. Fowler suggested a table cross-referencing instructions from MUJI 1st to MUJI 2d. The committee questioned whether the instructions should be available to the public generally. If they are, jurors may look up instructions before the case is submitted to them, and they may be influenced by instructions that do not apply to the particular case. Mr. Shea thought that the instructions could not be confined to just attorneys and judges. Mr. Carney noted that special verdicts will need to be included with the instructions. Mr. Shea was not sure whether case captions could be included. Mr. Young noted that the instructions will be sent to the Utah Supreme Court piecemeal, in packages. He hopes to submit the first package after the committee completes its review of the negligence and damage instructions. They will be followed by the employment, products liability and medical malpractice instructions.

Dr. Di Paolo and Mr. Jemming joined the meeting.

2. *Superseding Cause Instruction.* The committee considered a proposed instruction on superseding cause. Mr. Dewsnup felt that it needed a lot of work. The committee discussed whether the doctrine of superseding causation survived the enactment of the Utah Liability Reform Act, whether intentional acts can be superseding causes and whether negligent acts can be superseding causes. Mr. King thought that the Liability Reform Act superseded the doctrine of superseding cause and questioned whether intentional misconduct can be a superseding cause. He noted that the Utah Supreme Court suggested in *Jedrziewski v. Smith,* 2005 UT 85, that the Liability Reform Act may not cover intentional torts, and the Utah legislature recently rejected a bill that would have made it clear that intentional acts can be compared with negligent acts under the Liability Reform Act. Mr. Dewsnup noted that the Utah Court of Appeals quoted section 442B of the Restatement (Second) of Torts with approval in *Bansanine v. Bodell,* 927 P.2d 675 (1996). That section states that a later act does not relieve an earlier actor of liability for negligence unless the harm is intentionally caused by a third person and is outside the scope of the risk created by the defendant's conduct. From this, Mr. Dewsnup concluded that the doctrine of superseding cause may only apply to intervening acts where the intervening actor intended to cause harm and that negligent intervening acts are governed by the Liability Reform Act. Mr. Jemming, who drafted the proposed instruction, noted that the language "relieved from liability" was taken from *Mitchell v. Pearson Enterprises,* 697 P.2d 240 (Utah 1985). Mr. Dewsnup noted that *Mitchell* preceded the Liability Reform Act. Mr. Dewsnup thought that the instruction should define "superseding cause." Ms. Blanch noted that, because superseding cause relieves a defendant from liability, the jury must decide the issue of superseding cause before it apportions fault. Mr. King thought that absolute defenses like contributory negligence, last clear chance and superseding cause are no longer valid in light of the Liability Reform Act. Mr. Young noted that the Liability Reform Act keeps the doctrine of proximate causation, and the traditional definition of proximate cause includes the language "unbroken by an efficient intervening cause," suggesting that superseding causation may still be a viable doctrine under the Liability Reform Act. Mr. Young and Mr. Carney suggested that, if the committee could not agree on the effect of

the Liability Reform Act on the doctrine of superseding causation, perhaps it should include alternative instructions, with a committee note explaining the disagreement. Mr. Belnap and Ms. Blanch noted that they had not requested superseding causation instructions and thought the issue may not arise much but asked for more time to review the issue. The committee continued its discussion of superseding causation until the next meeting.

Any committee member who wants to may propose an alternative instruction on superseding causation to be considered at the next meeting.

3. *Damage Instructions.* Mr. Shea noted that he had edited some of the damage instructions to try to make the wording consistent. The instructions variously read, "you may award," "you should award," "you must award," "you shall award," and "the plaintiff must prove." Mr. Shea revised the instructions to read, "To recover damages for . . . , [name of plaintiff] must prove . . ." Mr. Dewsnup thought the revised instructions unduly emphasized the plaintiff's burden; the jury might think that the plaintiff must be the one who introduced the evidence, whereas the evidence that meets the plaintiff's burden may be introduced by any party. Mr. Young and Mr. Shea noted that the instruction on burden of proof says that the jury may consider all the evidence, regardless of who presented it. Mr. Dewsnup suggested revising the instructions to put them in the passive voice (e.g., "the value of the expenses must be proved"). He noted that such a construction would also eliminate the third-person pronoun ("he" or "she"). Mr. Fowler and Mr. King noted that the committee has preferred the active voice to passive voice throughout. Mr. Young and Mr. Simmons noted that putting the sentences in passive voice does not clearly show who has the burden of proof. Dr. Di Paolo questioned whether the jury would understand what it was supposed to do if the instruction just reads, "The plaintiff must prove . . ." Mr. King suggested simply listing and defining the different elements of damage. Mr. Young suggested dealing with the burden of proof in the opening instruction and rephrasing the other instructions so as not to overemphasize the burden of proof. At Mr. King's suggestion, instruction 2002 was revised to read:

> Before you may award damages, [name of plaintiff] must prove two points:
>
> First, that damages occurred. . . .
>
> Second, the amount of damages. . . .

Mr. Shea noted that he had deleted the fourth paragraph of instruction 2004 and incorporated it into instruction 2002, where it seemed to fit better, since it does not apply exclusively to non-economic damages. Mr. Fowler thought that, because of the nature of non-economic damages, the concept should be retained in instruction 2004.

Mr. Carney was excused.

Mr. Fowler thought that if the instructions simply say, "award the plaintiff . . . ," the jury may think that it should award damages even if they have not been adequately proved. Mr. Young suggested addressing this concern as well in the opening damage instruction.

Mr. Shea will revise the damage instructions to address the committee's concerns.

4. *Loss of Consortium Instruction.* Mr. Belnap moved to defer discussion of the proposed loss of consortium instruction till the next meeting. Mr. Humpherys, the subcommittee chair who circulated the proposed instruction, was not present to comment on it, and Mr. Belnap had concerns with the opening paragraph and the definition of "consortium." Mr. Dewsnup suggested reviewing Justice Durham's dissent in *Hackford v. UP&L* for a definition of consortium. Mr. West suggested looking at JIFU for a definition. He noted that early Utah cases seemed to recognize a claim for loss of consortium, and JIFU included an instruction on the claim. But Judge A. Sherman Christensen distinguished those cases, and later Utah decisions held that the claim did not exist in Utah. The committee deferred further discussion of the issue until the next meeting.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, April 10, 2006, at 4:00 p.m.

Model Utah Jury Instructions
Second Edition
Working Draft
April 4, 2006

1900. Employer and employee rights.

MUJI 1st References.

References.

Advisory Committee Notes.

Staff Notes.

Status. Approved

1901. Definition of employment contract.

A contract of employment is an agreement, express or implied, by which one person, called the employer, engages another person, called the employee, to do something for the benefit of the employer or a third person for which the employee is to receive compensation. The contract may be written or oral. An oral contract is as valid and enforceable as a written contract.

MUJI 1st References.

18.1.

References.

Cook v. Zion's First National Bank, 919 P.2d 56 (Utah App. 1996).

Advisory Committee Notes.

Staff Notes.

Status. Approved 1/9/2006

1902. Creation of express employment contract. Burden of proof.

An express employment contract is created when the employer and employee agree with one another that they are entering into a contract setting forth the terms on which the employer will employ the employee. The party seeking to establish the existence of an express contract has the burden of proving its terms.

MUJI 1st References.

18.2.

References.

Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989).
Cook v. Zion's First National Bank, 919 P.2d 56, 59-60 (Utah App. 1996).

Advisory Committee Notes.

Staff Notes.

Status. Approved 1/9/2006

1903. Creation of implied employment contract. Elements of proof.

An implied employment contract is created when:

(1) the employer intended that the employee's employment would include [describe terms in dispute]; and

(2) the employer communicated its intent to the employee; and

(3) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment would include [describe terms in dispute].

The party seeking to establish the existence of an implied contract has the burden of proving these things. Evidence may be derived from the employment manuals, oral statements, the conduct of the parties, announced personnel policies, practices of a particular trade or industry, and other circumstances. However, an implied contract cannot contradict a written contract term.

MUJI 1st References.

18.5; 18.6; 18.7.

References.

Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992).
Sanderson v. First Security Leasing Co., 844 P.2d 303 (Utah 1992).
Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991).
Arnold v. B.J. Titan Services Co., 783 P.2d 541 (Utah 1989).
Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044, 1044-45 (Utah 1989).
Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980).
Gilmore v. Community Action Program, 775 P.2d 940, 942 (Utah App. 1989).
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah 2000).

Advisory Committee Notes.

Staff Notes.

Status. Approved 1/9/2006

1904. Breach of employment contract.

An employment contract is breached if a party does not comply with a provision of the contract.

MUJI 1st References.

18.9.

References.

Lowe v. Sorensen Research Co., 779 P.2d 668, 670 (Utah 1989).
Sanderson v. First Security Leasing Co., 844 P.2d 303, 306-07 (Utah 1992).
Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044-45 (Utah 1989).
Cook v. Zion's First National Bank 919 P.2d 56, 59-60 (Utah App. 1996).

Advisory Committee Notes.

Staff Notes.

Status. Approved 1/9/2006

1905. Employment contract may be terminated "at-will."

You must decide whether the employment was an "at-will" relationship. An employment relationship is presumed to be "at-will" if the employment is for an unspecified time and without other restrictions on either the employer's or the employee's ability to terminate the relationship. When the employment relationship is "at will" there does not have to be any reason for the termination other than the employer's or the employee's desire to discontinue the employment relationship. It may be terminated at any time, for any reason or for no reason, with or without cause. [However, it may not be terminated for an illegal reason.]

MUJI 1st References.

18.3.

References.

Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 400 (Utah 1998).
Fox v. MCI, 931 P.2d 857, 859 (Utah 1997).
Johnson v. Morton Thiokol, 818 P.2d 997 (Utah 1991).
Brehany v. Nordstrom, 812 P.2d 49 (Utah 1991).
Hodges v. Gibson Product Co., 811 P.2d 151 (Utah 1991).
Caldwell v. Ford, Bacon & Davis Utah, Inc., 777 P.2d 43 (Utah 1989).
Berube v. Fashion Centre Ltd., 771 P.2d 1033 (Utah 1989).
Rose v. Allied Development Co., 719 P.2d 83 (Utah 1986).
Bihlmaier v. Carson, 603 P.2d 790 (Utah 1972).
Held v. American Linen Supply Co., 307 P.2d 210 (Utah 1957).
Rackley v. Fairview Care Centers, Inc., 970 P.2d 277, 280 (Utah App. 1998).

Advisory Committee Notes.

The bracketed sentence should be used only if there is evidence to support a claim for termination for an illegal reason.

Staff Notes.

Status. Approved 1/9/2006

1906. Rebutting the "at-will" presumption.

An employee may defeat the presumption that his employment may be terminated at will by establishing that:

(1) there is an express or implied agreement that the employment relationship may be terminated only for cause or upon satisfaction of another agreed-upon condition; or

(2) the termination violated clear and substantial public policy; or

(3) a statute limits the employer's right to terminate the employee.

MUJI 1st References.

18.4.

References.

Burton v. Exam Center Industrial & General Medical Clinic, Inc., 994 P.2d 1261, 1264 (Utah 2000).
Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 400 (Utah 1998).
Fox v. MCI Communications, Corp., 931 P.2d 857, 859 (Utah 1997).
Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992).
Sanderson v. First Security Leasing Co., 844 P.2d 303 (Utah 1992).
Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991).

Advisory Committee Notes.

Staff Notes.

Status. Approved 2/13/2006

1907. Rebutting the "at-will" presumption. Express or implied agreement.

To prove that the employment relationship was other than at-will, the employee must show that the parties expressly or impliedly intended to alter the at-will relationship.

This requires the employee to establish that:

(1) the employer communicated its intent to the employee that the employee's employment would not be terminated

(a) except for certain conduct,
(b) until after a certain time period, or
(c) unless applicable procedures were followed;

and

(2) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment could not be terminated "at-will."

MUJI 1st References.

18.5; 18.6.

References.

Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992).
Sanderson v. First Security Leasing Co., 844 P.2d 303 (Utah 1992).
Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991).
Arnold v. B.J. Titan Services Co., 783 P.2d 541, 543-44 (Utah 1989).
Gilmore v. Community Action Program, 775 P.2d 940, 942 (Utah App. 1989).
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah 2000).

Advisory Committee Notes.

Staff Notes.

Status. Approved 2/13/2006

1908. Rebutting the "at-will" presumption. Intent of the parties.

In deciding whether the parties intended to create an employment contract that could not be terminated at will, you must consider all of the circumstances of the employment. [Evidence may be derived from the employment manuals, oral statements, the conduct of the parties, announced personnel policies, practices of a particular trade or industry, and other circumstances.]

MUJI 1st References.

18.5; 18.6.

References.

Hodgson v. Bunzl Utah, Inc., 844 P.2d 331 (Utah 1992).
Sanderson v. First Security Leasing Co., 844 P.2d 303 (Utah 1992).
Johnson v. Morton Thiokol, Inc., 818 P.2d 997 (Utah 1991).
Arnold v. B.J. Titan Services Co., 783 P.2d 541, 543-44 (Utah 1989).
Gilmore v. Community Action Program, 775 P.2d 940, 942 (Utah App. 1989).
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah 2000).

Advisory Committee Notes.

The bracketed sentence need not be given if Instruction 1903 is given.

Staff Notes.

Status. Changes from 2/13/2006

1909. Rebutting the "at-will" presumption. Violation of public policy.

To establish that the termination was a violation of public policy, an employee must prove that:

(1) the public policy applies to the employee's conduct [describe conduct]; and

(2) the employment was terminated at least in part because the employee [did something] [did not do something] that brought the public policy into play.

MUJI 1st References.

18.10; 18.11.

References.

Ryan v. Dan's Food Stores, Inc. 972 P.2d 395, 404 (Utah 1998).
Gottling v. P.R. Inc., 61 P.3d 989 (Utah 2002).

Advisory Committee Notes.

Whether a claimed public policy is sufficiently clear and substantial to give rise to a claim is a matter of law to be decided by the court.

Staff Notes.

Status.

1910. Violation of public policy. Shifting burdens.

If the employee establishes the factors listed in Instruction 1909, then the burden shifts to the employer to provide evidence of a legitimate reason for the discharge. If the employer provides evidence of a legitimate reason for the discharge, then the burden shifts back to the employee to prove that the employee's conduct implicating the public policy was a substantial factor in the discharge of the employee.

MUJI 1st References.

References.

Ryan v. Dan's Food Stores, Inc. 972 P.2d 395, 405 (Utah 1998).
Barela v. C.R. England & Sons, 197 F.3d 1313, 1316 (10th Cir. 1999).

Advisory Committee Notes.

Staff Notes.

Status.

1911. Implied employment contract. New terms.

An at-will employment contract may be modified by writings, conduct, or oral statements of the employer. When an employer communicates to the employee new policies, procedures or other terms or conditions of employment and the employee chooses to continue the employment, a new or modified employment contract is formed including the new terms.

MUJI 1st References.

18.8.

References.

Sanderson v. First Security Leasing Co., 844 P.2d 303, 306-07 (Utah 1992).
Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1313 (Utah App. 1994).
Sorenson v. Kennecott-Utah Copper, Corp., 873 P.2d 1141, 1148 (Utah App. 1994).
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1122 (D. Utah 2000).

Advisory Committee Notes.

Staff Notes.

Status. Approved 2/13/2006

1912. Implied covenant of good faith and fair dealing.

The law implies into every contract a promise, also called a covenant, that neither party to the contract will take any action intended to deprive the other party of the benefit of the contract. This promise is implied because the law puts it into all contracts, even though the parties never discussed it. This implied promise is called the "covenant of good faith and fair dealing," which imposes a duty on both parties to a contract to act in good faith toward each other. Good faith means honesty in fact and behavior in such a way as to allow both parties to obtain the benefits for which they contracted.

To comply with the obligation to perform a contract in good faith, a party's expectation must be consistent with the agreed common purpose and the justified expectation of the other party. The purpose, intentions and expectations of the parties should be determined by considering the contract language and the course of dealings between the parties. If one party to a contract has discretion in a contract, that party must exercise that discretion reasonably and in good faith.

A breach of the covenant of good faith and fair dealing occurs whenever one party acts in bad faith toward the other party and deprives the other party of the expected benefits of the contract. Furthermore, a breach of this covenant can occur even though the terms of the contract are not technically violated.

The covenant of good faith and fair dealing does not, without more, limit an employer's right to terminate an at-will employee.

MUJI 1st References.

References.

Brehany v. Nordstroms, Inc., 812 P.2d 49, 55 (Utah 1991).
St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991).
Cook v. Zion's First National Bank, 919 P.2d 56, 60-61 (Utah App. 1996).
Johnson v. Kimberly Clark Worldwide, Inc., 86 F.Supp. 2d 1119, 1122-23 (D. Utah 2000).

Advisory Committee Notes.

Staff Notes.

Delete "covenant" and simply call it a "promise" or as used in 1922 a "duty."

Status.

1913. Breach of employment contract. Just cause.

If under an express or implied contract the employee may only be discharged for just cause, the discharge violates the contract unless the employer shows that it acted with "objective reasonableness." Determining objective reasonableness does not mean second-guessing the employer's business decisions. Instead, it means determining whether the employer acted in good faith by adequately considering the facts it reasonably believed to be true at the time it made the decision to fire the employee.

MUJI 1st References.

References.

Uintah Basin Medical Center v. Hardy, 110 P.3d 168, 174-75 (Utah App. 2005).

Advisory Committee Notes.

Staff Notes.

Status.

1914. Constructive discharge.

The termination of employment by an employer may be either actual or constructive. The termination is actual when the employer notifies the employee, either orally, or in writing or through words or actions sufficient to lead a reasonable person to believe he or she has been discharged. The termination is constructive when an employee [resigns/retires] because an employer creates, or knowingly permits to exist, working conditions that are so intolerable that a reasonable person in the employee's position would be compelled to [resign/retire].

To prove a constructive discharge, the plaintiff must show that his working conditions were so intolerable at the time he [resigned/retired] that a reasonable person would have been compelled to [resign/retire].

Whether a reasonable person in the plaintiff's position would have been compelled to [resign/retire] is determined by an objective standard based on whether a person of ordinary intelligence and sensitivity in the same circumstances would have [resigned/retired]. The law recognizes that a forced [resignation/retirement] is the same as being fired.

MUJI 1st References.

References.

Sheikh v. Department of Pub. Safety, 904 P.2d 1103, 1007 (Utah App. 1995).

Advisory Committee Notes.

Staff Notes.

Cite to CACI.

Status.

1915. Scope of employment.

In order to find that an employer is liable for the act or omission of an employee, you must find that the employee was acting within the scope of the employee's employment authority at the time of the act or omission. An employee was acting within the scope of the employee's employment authority if each of the following are true:

(1) the employee was engaged in conduct of the general kind the employee was employed to perform; in other words, the employee was engaged in carrying out the duties assigned by the employer, as opposed to being wholly involved in a personal endeavor; and

(2) the employee's conduct occurred within working hours, and within the normal work place; and

(3) the employee's conduct was motivated, at least in part, by the purpose of serving the employer's interest.

MUJI 1st References.

25.6.

References.

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040 (Utah 1991).
Birkner v. Salt Lake County, 771 P.2d 1053, 1056-57 (Utah 1989).

Advisory Committee Notes.

Staff Notes.

Is this an employment instruction or a vicarious liability instruction?

Status.

1916. Fiduciary duty.

A fiduciary relationship is a relationship in which one, or both, of the parties is required to act solely for the benefit of the other, within the scope of the relationship, with the highest duty of care. The relationship created by a contract is generally not a fiduciary relationship. Similarly, an employer-employee relationship is generally not a fiduciary relationship.

The party claiming the existence of a fiduciary relationship has the burden of proof to show that the relationship is a fiduciary relationship.

To establish a fiduciary relationship the party claiming that relationship must show that the claimed fiduciary owed the other fidelity, confidentiality, honor, trust and dependability above and beyond that of the parties to the average contract.

When the relationship which created the fiduciary duty ends, the fiduciary duty ends as well.

MUJI 1st References.

References.

Semenov v. Hill, 982 P.2d 578 (Utah 1999).
Margulies ex rel. Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985).
Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981).
Renshaw v. Tracy Loan & Trust Co., 87 Utah 364, 49 P2.d 403, 404 (Utah 1935).
C&Y Corp. v. General Biometrics, 896 P.2d 47, 54 (Utah App. 1995).
Envirotech Corporation v. Callahan, 872 P.2d 487 (Utah App. 1994).
Black's Law Dictionary 640 (7th Ed. 1999).

Advisory Committee Notes.

Staff Notes.

Status.

1917. Damages. Express and implied contract claim.

If an employer has [terminated the employee in breach of] [breached] an express or implied contract, you may award the employee damages. Damages recoverable for breach of contract include both general damages, i.e., those flowing naturally from the breach, and consequential damages, i.e., those reasonably foreseeable by the parties at the time the contract was made.

General damages can be awarded even if no consequential damages are proven; likewise, consequential damages can be awarded even if no general damages are proven.

MUJI 1st References.

18.12.

References.

Mahmood v. Ross, 1999 UT 104, 19, 990 P.2d 933, 937.
Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985).
Erickson v. PI, 73 Cal. App. 3d 850 (1977).
Parker v. Twentieth Century Fox Film Corp., 3 Cal. 3d 176 (1970).

Advisory Committee Notes.

Staff Notes.

Use "economic" and "noneconomic" damages.

Second paragraph is not a point of law that the jury needs to know.

Status.

1918. Damages. General damages.

General damages are those which flow naturally from the employer's breach. In other words, they are those which, from common sense and experience, would naturally be expected to result from the employer's breach of employment contract. They can include [the amount of compensation and benefits that the employee would have received from the employer during the period you find the employment was reasonably certain to have continued, less any amounts that the employer proves the employee received or could have received with reasonable effort from other employment during the same period] [list other items of damage in evidence].

MUJI 1st References.

18.12.

References.

Mahmood v. Ross, 1999 UT 104, 19, 990 P.2d 933, 937 (Utah 1999).
Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985).
Prince v. Peterson, 538 P.2d 1325, 1328 (Utah 1975).
Erickson v. PI, 73 Cal. App. 3d 850 (1977).
Parker v. Twentieth Century Fox Film Corp., 3 Cal. 3d 176 (1970).

Advisory Committee Notes.

Staff Notes.

Status.

1919. Damages. Consequential damages.

Consequential damages are those damages that were within the contemplation of the parties or were reasonably foreseeable by the parties at the time the contract was made. That is, consequential damages are damages, other than lost compensation and benefits, that directly flow from the employer's breach of the employment contract. Although they are designed to place the employee in the same economic position he would have had if the employer had not breached the employment contract, they may reach beyond the bare contract terms.

To recover consequential damages, the employee must prove:

(1) that the consequential damages were caused by the contract breach;

(2) that the consequential damages ought to be allowed because they were foreseeable at the time the parties contracted; and

(3) the amount of the consequential damages within a reasonable certainty.

Although the employee must offer proof within a reasonable certainty of the amount of his loss, he does not need to prove them with absolutely precision.

MUJI 1st References.

18.12.

References.

Kraatz v. Heritage Imports, 2003 UT App 201, 48-49, 53-54, 71 P3d. 188, 199-201.
Mahmood v. Ross, 1999 UT 104, 20, 990 P.2d 933, 937-38.
Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985).
Erickson v. PI, 73 Cal. App. 3d 850 (1977).
Parker v. Twentieth Century Fox Film Corp., 3 Cal. 3d 176 (1970).

Advisory Committee Notes.

Staff Notes.

We have an extensive definition of noneconomic damages in Instruction 2004. Should that be copied here? Or should it and some other damages instructions be considered "general" instructions to be given regardless of the nature of the action?

Status.

1920. Compensatory damages. Public policy wrongful discharge.

An employee terminated in violation of public policy is entitled to recover all damages which flow naturally from the employee's termination. In other words, the employee is entitled to recover [the amount of compensation and benefits that the employee would have received from the employer during the period you find the employment was reasonably certain to have continued, less any amounts that the employer proves the employee received or could have received with reasonable effort from other employment during the same period] [list other items of damage in evidence].

An employee is also entitled to recover damages in an amount which will reasonably compensate the employee for the loss and injury suffered as a result of the employer's unlawful conduct. You may award reasonable compensation for the following:

(1) pain, suffering, and physical or emotional distress;

(2) embarrassment and humiliation; and

(3) loss of enjoyment of life; that is, the employee's loss of the ability to enjoy certain aspects of his life as a result of the employer's actions.

You may consider the testimony and the demeanor of the employee in considering and determining a fair allowance for any damages for emotional distress, humiliation, and loss of enjoyment of life. Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, embarrassment, humiliation, loss of respect, emotional distress, loss of self-esteem, or excessive fatigue. Physical manifestations of emotional harm may also occur, such as ulcers, headaches, skin rashes, gastrointestinal disorders, or hair loss.

In the determination of the amount of the award, it will often be difficult for you to arrive at a precise award. These damages are intangible, and the plaintiff is not required to prove them with precision. It is difficult to arrive at a precise evaluation of actual damage for emotional harm. No opinion of any witness is required as to the amount of such reasonable compensation. Nonetheless, it is necessary to arrive at a reasonable award that is supported by the evidence.

MUJI 1st References.

18.11.

References.

3 Devitt, Blackmar & Wolf, Federal Jury Practice and Instructions, Section 104.6 (4th Ed. 1987).

Block v. R.H. Macy & Co., 712 F.2d 1241, 1245 (8th Cir., 1983).

E.E.O.C. Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act (B.N.A., 1992) at II(A)(2), as modified.

Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985).

Advisory Committee Notes.

Staff Notes.

The first paragraph simply restates 1919.

Status.

1921. Damages. Breach of the implied covenant of good faith and fair dealing.

If you find, by a preponderance of the evidence, that the employer breached its duty of good faith and fair dealing to the employee, you may award the employee both general damages and a broad array of consequential damages. Damages recoverable for the breach of this duty are damages for those injuries or losses flowing naturally from the breach, and those losses or injuries which were reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.

In awarding these damages, you may award an amount in excess of the contract terms specified in the employment contract. In determining the amount of damages to award, you may consider [the employee's loss of income or profit] [the employee's past and future emotional suffering and mental anguish] [any other detriment naturally flowing from the employer's breach]. However, only those factors that were reasonably foreseeable by the parties and that were proximately caused by the employer's breach may be considered.

MUJI 1st References.

References.

Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044, 1050 (Utah 1989).
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801-02 (Utah 1985).
Cook v. Zion's First National Bank 919 P.2d 56 (Utah App. 1996).

Advisory Committee Notes.

Staff Notes.

Status.

1922. Damages. Employee duty to mitigate damages.

An employee who has lost wages as a result of termination has a duty to take steps to minimize the damage by making reasonable efforts to find comparable employment.

If the employee found new employment, the amount earned by the employee must be deducted from any damages awarded to the employee. If the employee, through reasonable efforts, could have found comparable employment, any amount that the employee could have earned in comparable employment must be deducted from the amount of damages awarded to the employee.

The employer has the burden of proving that the employee obtained or might have obtained comparable employment of a similar character.

In order to recover damages suffered due to the employer's actions, the employee is required to show that he or she took reasonable steps to avoid damages. The employee is not required to make every effort possible to avoid the damages.

MUJI 1st References.

18.13.

References.

Angelos v. First Interstate Bank of Utah, 671 P.2d 772 (Utah 1983).
Pratt v. Board of Education of Uintah County School District, 564 P.2d 294 (Utah 1977).

Advisory Committee Notes.

Staff Notes.

Status.

1923. Special damages. Unemployment compensation.

If you decide to award damages to compensate Plaintiff for financial losses, such as lost wages, lost benefits, medical expenses, and other out-of-pocket expenses, you are not to reduce the amount of those damages by the fact that Plaintiff may have received payment from such sources as unemployment insurance, workers' compensation, social security or disability benefits.

MUJI 1st References.

27.3.

References.

Gibbs M. Smith, Inc. v. US Fidelity, & Guaranty Co., 949 P.2d 337, 345 (Utah 1997).
Suniland Corp. v. Radcliffe, 576 P.2d 847, 849 (Utah 1978).
Green v. Denver & Rio Grande Western R. Co., 59 F.3d 1029, 1032 (10th Cir. 1995).
Whatley v. Skaggs Companies, Inc., 707 F.2d 1129, 1138 (10th Cir. 1983).

Advisory Committee Notes.

Staff Notes.

Cite to CACI.

Status.

210. Superseding cause.

[Name of defendant] claims that he is relieved from liability because the later act of [name of person] caused [name of plaintiff]'s harm.

If [name of defendant]'s negligent conduct creates or increases the risk of a particular harm and is a substantial factor in causing that harm, [name of defendant] remains liable, unless he proves that [name of person] intentionally [negligently] caused the harm and that the harm was not within the scope of the risk created by his conduct.

The fact that the final act that caused [name of plaintiff]'s harm was [name of person]'s act does not relieve [name of defendant] from liability unless [name of person]'s act was unforeseeable and may be described with the benefit of hindsight as extraordinary.

MUJI 1st References.

3.16.

References.

Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985).
Bansanine v. Bodell, 927 P.2d 675 (Utah App. 1996).
Steffensen v. Smith's Management Corp., 820 P.2d 482, 488 (Utah App. 1991), aff'd, 862 P.2d 1342 (Utah 1993).
Restatement 2d Torts, 1965 §442B.

Advisory Committee Notes.

The Committee drafted the second paragraph in the alternative because parts of the law on superceding cause are unclear. What is well established is that for a subsequent act to break the chain of causation and be a superseding cause, the subsequent act must be unforeseeable. Further, to cut off the defendant's liability, the harm must be outside the scope of the risk created by the defendant's conduct. If the "general nature" of the harm is foreseeable, the defendant remains liable. Steffensen v. Smith's Management Corp., 862 P.2d 1342, 1346 (Utah 1993) As a concurrent contributing factor, the third person's acts would be analyzed under the Liability Reform Act, Utah Code section 78-27-37, et seq.

What is not as clear is whether the third person's act must be an intentional act or whether negligence is sufficient. Bansanine v. Bodell, 927 P.2d 675, 677 (Utah App. 1996) adopts the Restatement position, and this is reflected in the first alternative. To relieve the defendant of liability, the third person must not only act intentionally, the actor's intent must be to harm the plaintiff. This position is supported by reasoning that the doctrine of superseding cause has no role after the Liability Reform Act, at least for

analyzing unintentional acts. If the cause of action is based on an unintentional act, the LRA operates to allocate fault. In an appropriate case, the jury might find that a subsequent actor bears 100% of the fault. The applicability of the LRA to intentional acts is an open question. See Jedrziewski v. Smith, 2005 UT 85.

In cases preceding the LRA, the court states that a negligent act, if it meets the other requirements, can be found to be a superceding cause of plaintiff's harm, thereby cutting off the defendant's liability rather than allocating his fault under the LRA. See Godesky v. Provo City Corp., 690 P.2d 541, 544 (Utah 1984), Jensen v. Mountain States Telephone & Telegraph Co., 611 P.2d 363, 365 (Utah 1980), and, subsequent to the LRA, Steffensen v. Smith's Management Corp., 820 P.2d 482, 488 (Utah Ct. App. 1991) aff'd, 862 P.2d 1342 (Utah 1993). The continued validity of this principle is an open question.

Staff Notes.

Should the citation to Mitchell be stricken?

Status.

2012. Loss of consortium.

Noneconomic damages include loss of consortium. When a defendant's negligence causes a significant permanent injury that substantially changes a plaintiff's lifestyle and leaves him incapable of doing the things that he did before the injury, the plaintiff's spouse may separately claim damages for loss of consortium. Loss of consortium is loss of the benefits that one spouse expects to receive from the other, such as companionship, cooperation, affection, aid, financial support and sexual relations.

[You must decide whether [name of spouse] was [name of plaintiff]'s spouse at the time of [name of plaintiff]'s injury. "Spouse" means the legal relationship established between a man and a woman as recognized by the laws of Utah.]

If you decide that [name of plaintiff] has no claim against [name of defendant], then [name of spouse] also has no claim. Otherwise, you must decide whether [name of plaintiff] has suffered a significant permanent injury that substantially changes his lifestyle and how much money will fairly and adequately compensate [name of spouse] for that harm.

Then you must allocate fault as I have instructed you in Instruction 211 including [name of spouse] in your allocation. If you decide that [name of spouse]'s fault of is 50% or greater, [name of spouse] will recover nothing for loss of consortium. As with other damages, do not reduce the award by [name of plaintiff]'s and [name of spouse]'s percentage of fault. I will make that calculation later.

MUJI 1st References.

References.

Utah Code Section 30-2-11.
Black's Law Dictionary, 8th Edition.

Advisory Committee Notes.

Often there is no dispute about whether the plaintiff's spouse is the spouse at the time of the injury. If there is, the jury should be instructed on this issue as well.

The legislature has determined that the following are significant permanent injuries that substantially change a person's lifestyle:
(1) a partial or complete paralysis of one or more of the extremities;
(2) significant disfigurement; or
(3) incapability of the person of performing the types of jobs the person performed before the injury.
There may be others.

Utah does not recognize a cause of action for loss of filial consortium. Boucher v. Dixie Medical Ctr., 850 P.2d 1179, 1182 (Utah 1992).

Staff Notes.

Status.

Model Utah Jury Instructions
Second Edition
Working Draft
March 23, 2006

2001 Introduction to tort damages. Economic and non-economic damages introduced.

I wll now instruct you about damages. My instructions are given as a guide for calculating what damages should be if you find that [name of plaintiff] is entitled to them. However, if you decide that [name of plaintiff] is not entitled to recover damages, then you must disregard these instructions about them.

If you decide that [name of defendant]'s fault caused [name of plaintiff]'s harm, you must decide how much money will fairly and adequately compensate [name of plaintiff] for that harm. There are two kinds of damages: economic and non-economic.

2002 Proof of damages.

~~Before you may award~~ To be entitled to 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; t~~There must be a reasonable probability, not just speculation, that [name of plaintiff] suffered damages from [name of defendant]'s fault.

Second, ~~he 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~~ prove the *amount* of damages is not as high as what is required to prove the *occrence* of damages. There still must be evidence, not just speculation, that gives a reasonable estimate of the amount of damages, but the law does not require a mathematical certainty.

~~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, not just speculation, that provides a reasonable, even though not precise, estimate of the amount of damages.~~

In other words, if [name plaintiff] has proved that he has been damaged and has established a reasonable estimate of those damages, [name of defendant] may not escape liability because of some uncertainty in the amount of damages.

2005 Economic damages. Medical care and related expenses.

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 of those that will probably be incurred in the future.

2006 Economic damages. Lost earnings. [Lost earning capacity.]

Economic damages include past and future lost earnings, including lost benefits, [and lost earning capacity].

Calculate ~~P~~past lost earnings ~~are calculated~~ from the date of the harm until the trial. [Calculate ~~F~~future lost earnings ~~are calculated~~ from the date of trial forward.]

[Lost earning capacity is not the same as lost earnings. Lost earning capacity means the lost potential to earn ~~increased~~ income. In determining lost earning capacity, you should consider:

(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 facts that relate to [name of plaintiff]'s employment.]

2008 Economic damages. Injury to personal property.

Economic damages include injury to or destruction of [name of plaintiff]'s [item of personal property].

The damages to be awarded for injury to personal property are the difference in the [item of personal property]'s fair market value ~~of the item~~ immediately before and immediately after the injury, unless ~~the property~~ it can be repaired for a lesser amount. If the [item of personal property] can be repaired for a lesser amount, then the damages would be the reasonable cost of repair.

If you find that the repairs do not restore the [item of personal property] to the same value as before the injury, ~~you may award~~ the damages are the difference between its fair market value before the injury and its fair market value after the repairs, 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 injury occurred.

2009 Economic damages. Injury to real property.

Economic damages include injury to [name of plaintiff]'s real property.

The damages to be awarded for injury to real property are the difference in the fair market value of the ~~land~~ real property immediately before and immediately after the injury, unless the property can be repaired or restored for a lesser amount. If the property can be repaired or restored for a lesser amount, then the damages would be the reasonable cost of repair or restoration.

If you find that repair or restoration does not return the real property to the same value as before the injury, the damages to be awarded are the difference between the real property's fair market value before the injury and its fair market value after the repair or restoration, plus the reasonable cost of making the repair or restoration.

[In addition, if the evidence establishes that the ~~repaired property will not return to its original value because of~~ injury to the real property has created a lingering negative public perception ~~that was caused by the injury, you may award stigma damages for~~ of it, then the damages would include any reduction in the value of the property.]

2011 Economic damages. Loss of use of personal property.

To compensate [name of plaintiff] for the loss of use of [item of personal property], ~~you may award [name of plaintiff]~~ calculate the amount that you determine will restore ~~him~~ [name of plaintiff] to the same position he was in prior to the damage. You may consider the following factors [as applicable]:

(1) The rental value of the [item of personal property].
(2) The lost income, meaning the income [name of plaintiff] would likely have earned through using the [item of personal property].
(3) What [name of plaintiff] reasonably spent to decrease the damage.

2012 Wrongful death claim. Adult. Factors for deciding damages.

~~In determining damages, you shall award~~ Damages include an amount ~~which~~ that will compensate [name of plaintiff] for the loss suffered due to [name of decedent]'s death. ~~You shall base~~ Calculate the amount ~~of your award~~ based 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, past and future, that [name of plaintiff] would likely have received, or been entitled to receive, from [name of decedent] had [name of decedent] lived.

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

(5) 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.]

2013 Wrongful death claim. Minor. Factors for deciding damages.

~~In determining damages, you shall award~~ Damages include an amount ~~which~~ that will compensate [name of plaintiff] for the loss suffered due to [name of decedent]'s death. ~~You shall base~~ Calculate the amount ~~of your award~~ based 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, past and future, that [name of plaintiff] would likely have received, or been entitled to receive, from [name of decedent] had [name of decedent] lived. 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) The loss of inheritance from [name of decedent] [name of plaintiff] is likely to suffer because of [name of decedent]'s death.

(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.]