

AGENDA
ADVISORY COMMITTEE
ON MODEL CIVIL JURY INSTRUCTIONS

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

October 17, 2005
4:00 TO 6:00 P.M.

| | |
|---|-------------------------------|
| Loss of earnings. Loss of earning capacity. | Rich Humphries Paul Belnap |
| Remainder of damages instructions | Rich Humphries Paul Belnap |

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

November 14, 2005
December 12, 2005
January 9, 2006
February 13, 2006
March 13, 2006
April 10, 2006
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

September 12, 2005

4:00 p.m.

Present: Honorable William W. Barrett, Jr., 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, Timothy M. Shea, Paul M. Simmons and David E. West

Excused: John L. Young (chair)

Mr. Carney conducted the meeting in Mr. Young's absence.

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.103. Personal injury--economic damage. Loss of earnings.* Mr. Shea will try to split the instruction into two instructions, one covering lost earnings and one covering loss of earning capacity.

2. *15.108. Personal injury damages. Aggravation of pre-existing conditions.* Mr. Shea suggested using the term "harm" in place of "disability, impairment, pain, suffering or other damage" in the second and third paragraphs. Judge Barrett and Mr. Humpherys questioned whether "harm" conveyed the same meaning. Judge Barrett suggested that the court specify the type of harm involved in the particular case. On Mr. Carney's suggestion, the phrase was replaced with "[specific injury]." Mr. Shea also suggested changing the first sentence of the second paragraph to read "you must first try to" rather than "it is your duty, if possible." Mr. Dewsnup suggested that the sentence read, "it is your duty to determine to the fullest extent possible." The committee discussed whether the sentence should be restated in terms of the burden of proof. After further discussion, the phrase was amended to read, "it is your duty to try to determine . . ." Mr. Dewsnup also pointed out that the word "that" needed to be inserted in the fourth line ("any aggravation of the pre-existing condition *that* was caused"). At Mr. Shea's suggestion, the phrase "or not" in the last line of the advisory committee note was replaced with "if any." The instruction was approved as amended.

Dr. Di Paolo joined the meeting.

3. *15.109. Personal injury damages. Aggravation of dormant pre-existing condition.* At Mr. Shea's suggestion, the phrase "pain, disability or other problems" was replaced with "[specific injury]." Mr. Shea asked whether 15.109 could be consolidated with 15.108 into one instruction. The former deals with asymptomatic pre-existing conditions, while the latter deals with symptomatic pre-existing conditions. The committee chose to keep them separate. Mr. Jemming noted that *Biswell*, one of the cases cited as authority for instruction 15.109, referred to a "lighting up" of an asymptomatic condition. The committee added the

phrase “or a lighting up” after “aggravation” in the second paragraph. Mr. Dewsnup questioned whether the instruction was stated in sufficiently plain English.

Mr. King joined the meeting.

4. *15.110. Personal injury damages. Mitigation of damages.* Mr. Ferguson, citing *American Jurisprudence 2d* as authority, noted that “damage,” “damages” and “harm” are distinct concepts. “Damage” is physical injury; “harm” is an invasion of a legal right; and “damages” are money awarded for harm. He asked whether the duty to mitigate is a duty to mitigate harm, damages or both. The committee decided not to change “damages” to “harm.” Dr. Di Paolo asked whether “damages” needs to be defined in this instruction. The committee thought it is adequately explained in other instructions that will be fresh in jurors’ minds. Mr. Dewsnup noted that the word “damages” was used six times in the instruction. Mr. Carney changed the second sentence to read, “Any damages awarded . . . should not include those that [name of plaintiff] could have avoided . . .” and changed the last sentence to read, “. . . your award should include the amounts that he reasonably incurred to minimize them.” The committee approved the instruction as amended.

5. *15.111. Personal injury damages. Life expectancy.* Mr. Humpherys noted that there may be an issue as to the proper date for measuring life expectancy, that is, whether it should be measured from the date of trial or the date of injury. Mr. Simmons noted that life expectancy tables are rarely current, so for a trial held in 2005, for example, the jury may be considering life expectancies from a 2000 table. Mr. King thought that there may be cases (such as failure to diagnose cases) where life expectancy should be measured from the time of the event giving rise to the claim and not the time of trial, since part of the plaintiff’s damages may be the reduction in life expectancy. Judge Barrett noted that in such cases, the life expectancy tables would not apply, and the plaintiff’s life expectancy would become a matter of expert testimony. The committee added the word “race” to the fourth line (“of a given age, *race*, and gender”) and approved the instruction as amended.

6. *15.112. Personal injury damages. Wrongful death claim. Adult.* Dr. Di Paolo suggested adding the last sentence of the advisory committee note to the instruction. Mr. Humpherys noted that it is not clear who has claims for funeral, burial and medical expenses and property damage--that is, whether the claims belong to the decedent’s estate or to the wrongful death beneficiaries. Mr. Shea thought subparagraph (1) was confusing because it mixed fixed items of damage (loss of financial support) with conditional items (loss of the right to receive financial support). Dr. Di Paolo suggested combining the two sentences of subparagraph (1). Mr. Carney compared the equivalent California instruction. After further discussion, subparagraph (1) was revised to read, “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.” The second sentence of subparagraph (1) was deleted. Mr. Simmons asked whether an instruction needed to be included on when someone is “entitled to receive”

support or whether that would be a matter of evidence. The committee thought that a separate instruction was not necessary. Mr. Dewsnup and Mr. Carney thought that subparagraphs (2) and (4) were redundant. Mr. Jemming noted that the case law lists them as separate items of damage. Mr. Humphery thought that subparagraph (4) was more a comment on the evidence. The committee decided to delete subparagraph (4). The committee reviewed the instruction as modified.

Messrs. Jemming and West were excused.

7. *15.113. Wrongful death claim. Minor.* The committee questioned whether another instruction was needed for the wrongful death of an emancipated minor. The committee thought that emancipated minors could best be covered in an advisory committee note. The first sentence of subparagraph (1) was revised to read, "The loss of financial support, past and future, that [name of plaintiff] would likely have received from [name of decedent] had [name of decedent] lived." The second sentence of subparagraph (1) was deleted. The committee also deleted subparagraph (4). The committee also considered whether loss of inheritance should be listed as a separate item of damages. Although loss of inheritance from a minor would be rare, the committee added a subparagraph that reads, "The loss of inheritance from [name of decedent] that [name of plaintiff] is likely to suffer because of [name of decedent]'s death." With these changes, Mr. Humpherys questioned whether we need separate instructions on the wrongful death of an adult and the wrongful death of a minor. Mr. Carney noted that in the latter case, there is a reduction in damages for the cost of supporting the minor. Mr. Shea noted that that difference could be handled by bracketed language in a consolidated instruction. Mr. Humpherys noted that there may also be a difference in funeral, burial and medical expenses as an item of damages. In the case of a minor's death, the parents are responsible for those expenses and may recover them, whereas in the case of an adult, a claim for those expenses may belong to the estate and not to the heirs in their own right. After further reflection, Mr. Humpherys thought that attorneys will expect separate instructions since there are separate statutes governing the two claims. The committee therefore decided to keep instructions 15.112 and 15.113 separate. Instruction 15.113 was approved as modified.

8. *15.114. Personal injury damages. Survival claim.* Mr. Humpherys noted that survival claims raise two issues: How long must the person survive, and what must the quality of his life be during that period of time? For example, if someone survives but is unconscious the whole time, do his heirs have a claim for pain and suffering or just for his medical expenses? Mr. Ferguson noted that there is little Utah case law explaining the parameters of a survival claim. The advisory committee note was amended to read, "There is no Utah case law at the time . . ." Mr. Carney thought that more research was needed on the instruction.

The meeting concluded at 6:00 p.m.

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Next Meeting. The next meeting will be the third Monday in October, October 17, 2005, at 4:00 p.m.

Select Instructions

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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, 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 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.]

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)
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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: Changes from September 12, 2005

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, 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.