

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

November 14, 2005
4:00 TO 6:00 P.M.

| | |
|---------------------------------------|-------------------------------|
| Lost earnings. Lost 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

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

October 17, 2005

4:00 p.m.

Present: Paul Belnap, Juli Blanch, Phillip S. Ferguson, Tracy H. Fowler, Stephen Nebeker, Timothy M. Shea, John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King, Paul M. Simmons, David E. West

Mr. Young called the meeting to order. Mr. Shea distributed copies of Instruction 15.109. Personal injury damages. Aggravation of dormant pre-existing condition, which was omitted from the advance materials. Mr. Shea distributed new drafts from the Damages Subcommittee on lost earnings and lost earning capacity.

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.109. Personal injury damages. Aggravation of dormant pre-existing condition.* The committee discussed whether a mental condition is covered by the use of the phrase “emotional condition.” The committee decided that a mental condition is different. Although aggravation of a mental condition would be rare, the instruction ought to allow for the possibility. The committee decided to include “mental” along with “physical or emotional” condition in this instruction and in 15.108. The committee inserted “pre-existing” before the phrase “condition or disability” at the end of the first sentence, and in the second sentence changed “but” to “however.”

The committee discussed whether “lighting up” a dormant condition would be understood by jurors. Members thought that the phrase would not be understood, but questioned whether the instruction should omit a phrase used in the case law. After discussion, the committee decided to omit the phrase. The committee agreed to the following wording: “However, if a person has a pre-existing condition that does not cause pain or disability, but [describe the event] causes the person to suffer [describe the specific harm], then he may recover all damages caused by the event.” The instruction was approved as amended.

2. *15.112. Personal injury damages. Wrongful death claim.* The committee discussed whether Paragraph (5) needs to be included as a “catch-all” to be used as the evidence warrants. The committee decided that Paragraph (5) is needed and to include a reference to it in the second paragraph of the committee note. In paragraph (4) the committee decided to insert the phrase “or reduction” after “The loss.” Mr. Shea will draft an additional committee note to the effect that the judge should include only those paragraphs for which there is evidence to support the loss. The instruction was approved as amended.

3. 15.114. *Personal injury damages. Survival claim.*
4. 15.115. *Personal injury damages. Survival claim. Disputed cause of death.* Mr. Jemming will be asked to research the law for these two instructions to try to determine the nature and extent of damages recoverable in a survival claim.
5. 15.104. *Personal injury. Economic damage. Loss of earnings.* Mr. Young suggested inserting “lost” before the word “benefits.” The committee agreed. The instruction was approved as amended.
6. 15.104A. *Personal injury. Economic damage. Past loss of earning capacity.* Ms. Blanch suggested that “fact” in item number (4) be plural. The committee agreed. Mr. Young suggested deleting the third sentence and breaking the second sentence into two. The second sentence would read: “Lost earning capacity means the lost potential to earn increased income.” The committee approved the instruction as amended.
7. 15.105B. *Personal injury. Economic damage. Future loss of earning capacity.* Mr. Young asked whether future earning capacity is the same as future earnings. Mr. Belnap responded that any losses in the future are considered lost earning capacity. Ms. Blanch asked how future lost capacity would be reflected on the verdict form. Mr. Belnap said that the subcommittee had not discussed that. Mr. Nebeker said that future damages reduced to present cash value would be part of general damages. Mr. Ferguson cited Section 78-27-44, which says that pre-judgment interest includes lost earnings and lost earning capacity before trial, but not after trial. Mr. Fowler suggested dividing the instructions between special and general damages using the date of the trial as the line between the two. Mr. Belnap will take the committee’s observations to the subcommittee and prepare another draft.
8. 15.116. *Personal injury damages. Effect of settlement.* Mr. Shea suggested deleting the phrase “You have heard evidence that.” Mr. Young said that an earlier instruction tells the jurors of settlements. Mr. Young suggested replacing the phrase “any amount that he may or may not have” with “what the plaintiff.” The committee approved the following wording: “[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 what he received under this settlement. After you have returned your verdict, I will make the appropriate adjustment to your award of damages.”
9. 15.117. *Arguments of counsel not evidence of damages.* The committee approved the instruction as drafted.
10. 10. 15.118. *Personal injury damages. Proof of damages.* Mr. Young suggested deleting the last paragraph. Mr. Young suggested that the phrase “who should bear” in the fourth paragraph should be “who bears.” The committee agreed. Some members questioned whether the

instruction is needed. It may leave the impression that proving the amount of damages is subject to a lower burden of proof than proving that damages occurred. Mr. Young observed that the requirement to prove the amount of damages necessarily includes proving that damages occurred.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be the November 14, 2005, at 4:00 p.m.

Model Utah Jury Instructions
Second Edition
Working Draft: November 7, 2005

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15.103. Personal injury - economic damage. Lost earnings. [Lost earning capacity.]

Economic damages also include lost earnings [and lost earning capacity] from the time of the harm until the trial.

You should award the lost earnings and lost benefits to [name of plaintiff] for the work he has not been able to do.

[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 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)
Utah Code Section 78-27-44

Advisory Committee Notes.

The judge should instruct on lost earning capacity only if there is evidence to support the loss, such as injury to a student who may not be working at the time of the injury but whose prospects for future employment are proved.

The judge should distinguish between lost earnings and lost earning capacity before the trial (Instruction 15.103) and lost earnings and lost earning capacity after the trial. (Instruction 15.104.) The former are economic (special) damages and accrue interest from the date of the injury. The later are non-economic (general) damages and do not.

Staff Notes.

Status: Changes from October 17, 2005

15.104. Personal injury - non-economic damage. Lost earnings. [Lost earning capacity.]

Non-economic damages also include lost earnings [and lost earning capacity] from the date of the trial until [name of plaintiff] would have retired.

You should award the lost earnings and lost benefits to [name of plaintiff] for the work he will not be able to do.

[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 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)
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Staff Notes.

Status: Changes from October 17, 2005

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

A person who has a [physical, emotional, or mental] condition before the time of [described event] is not entitled to recover damages for that pre-existing condition or disability.

However, if a person has a pre-existing condition that does not cause pain or disability, but [describe the event] causes the person to suffer [describe the specific harm], then he may recover all damages caused by the event.

MUJI 1st References.

27.07.

References.

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

Ortiz v. Geneva Rock Products, Inc., 939 P.2d 1213, (Utah App.,1997)

Turner v. General Adjustment Bureau, Inc., 832 P.2d 62, (Utah App.,1992)

Advisory Committee Notes.

Unlike 15.108, this instruction is designed for asymptomatic conditions that are aggravated by an injury.

Staff Notes.

Status: Approved October 17, 2005

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 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.]

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 in Paragraph (5) 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.

The judge should include only those paragraphs for which is evidence of loss.

Staff Notes.

Status: Approved October 17, 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)
BAJI No. 14.50 (Supp. 1992). Reprinted with permission; copyright © 1986 West Publishing Company.

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:

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:

15.116. Personal injury damages. Effect of settlement.

[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 what he received under this settlement. After you have returned your verdict, I will make the appropriate adjustment to your award of damages.

MUJI 1st References.

None.

References.

Advisory Committee Notes.

Staff Notes.

Status: Approved October 17, 2005

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.

Status: Approved October 17, 2005

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 bears 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.

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: Changes from October 17, 2005

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:

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:

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:

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:

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:

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:

