

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

January 9, 2005  
4:00 TO 6:00 P.M.

Remainder of damages instructions	Rich Humphries Paul Belnap
Employer and employee rights instructions	Jathan Janove
Civil Conspiracy	John Young

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

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

December 12, 2005

4:00 p.m.

Present: Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jathan Janove (chair of the employment instruction subcommittee), Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Ralph L. Dewsnup, Tracy H. Fowler, Jonathan G. Jemming, Colin P. King, Stephen B. Nebeker

Mr. Young called the meeting to order.

*Damage Instructions.* The committee reviewed the following damage instructions:

1. *15.101. Introduction to tort damages. Economic and non-economic damages.*

Mr. Simmons thought the construction of the first sentence was awkward. The committee thought the advisory committee note that says to modify the instruction to fit the situation is sufficient and deleted the first two bracketed phrases. Mr. Humpherys noted that the sentence telling the jury to restore the plaintiff to the position he was in before the harm applies only in some property damage cases and not to personal injury cases or cases involving unique property. The committee deleted the sentence. The instruction was revised to read:

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.

The instruction was approved as modified.

2. *15.102. Economic damages defined.* Mr. Carney questioned whether the instruction should read "damages is" or "damages are." The consensus was "damages are." Mr. Humpherys questioned whether jurors would understand "pecuniary." At Mr. Shea's suggestion, "pecuniary losses" was changed to "losses of money or property." Mr. Young and Mr. Carney questioned whether the last sentence of the draft instruction was necessary. The committee decided to drop it, so that the instruction now reads:

Economic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for measurable losses of money or property caused by [name of defendant]'s fault.

The instruction was approved as modified.

3. *15.103. Non-economic damages defined.* “Is” was changed to “are” in the first line. At Mr. Simmons’s suggestion, the fourth paragraph was revised and made subparagraph (6), so the third and fourth paragraphs now read:

In awarding non-economic damages, among the things that you may consider are:

...

(6) whether the consequences of these injuries are likely to continue in the future and for how long.

The last sentence of the former fourth paragraph was deleted.

At Dr. Di Paolo’s suggestion, the last phrase of the following paragraph was revised to read “but does not require a mathematical certainty.” The instruction was approved as modified.

4. *15.104. Proof of damages.* Mr. Carney questioned whether the substance of instruction 15.104 was covered in 15.103. The committee decided it was not. Mr. Belnap questioned whether the first sentence of the last paragraph was accurate and necessary. He thought the concept was covered better in the following sentence. The committee debated whether the burden of proof shifted once the plaintiff established the fact of damage. At Dr. Di Paolo’s suggestion, the last sentence (“While the standard . . .”) was moved to the end of the third paragraph. The sentence was revised to read:

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.

At Mr. Young’s suggestion (as modified by other committee members), the last paragraph was then replaced with the following language:

In other words, if you find [name of 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.

The instruction was approved as modified.

Ms. Blanch and Mr. West were excused. When it became apparent that the committee would not get to the employment instructions, Mr. Janove was also excused.

5. *15.106 & 15.107. Economic damages. Lost earnings. [Lost earning capacity.]* Mr. Simmons questioned whether two instructions on lost earnings were necessary. The second and third paragraphs of both instructions were identical. The jury needs to be instructed to make separate findings for past and future lost earnings (and earning capacity), but they do not have to understand the reason for doing so (namely, so that the court can award prejudgment interest on past lost earnings). Mr. Shea suggested that the jury needs to be told what lost earnings are recoverable and needs to be given an ending date for future lost earnings. Mr. Belnap questioned whether the jury needs to be told to award lost benefits, since former MUJI 27.4 and 27.5 did not refer to benefits. The committee thought that the jury needed to be told that lost earnings includes lost benefits or it may think it cannot award anything for lost benefits. After further discussion, instructions 15.106 and 15.107 were combined into a single instruction that reads:

Economic damages also include past and future lost earnings, including lost benefits [and lost earning capacity], for the work [name of plaintiff] was not able to do [and/or will not be able to do].

Past lost earnings are calculated from the time of the harm until the trial.

Future lost earnings are calculated from the time 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 employment.]

The first sentence of the advisory committee note was revised to read:

The special verdict form should include separate findings for lost earnings and lost earning capacity before and after the trial.

The instruction was approved as modified.

6. *15.110. Economic damages. Injury to real property.* The committee deferred discussion of instruction 15.110 until Mr. West, its author, could be present.

7. *15.115. Survival claim.* Mr. Humpherys thought that the instruction carried some implication that the jury should not award anything in certain death cases. Dr. Di Paolo suggested starting the instruction with, "You should award the decedent's economic and non-economic damages if you find (1) . . . and (2) . . ." Mr. Belnap suggested eliminating the numerical designations. At Mr. Young's suggestion, the instruction was revised to read:

If [name of decedent] died from injuries caused by [name of defendant]'s fault, then you should award economic and non-economic damages for the period of time that he lived after the injuries.

The committee approved the revised instruction.

8. *15.116. Survival claim. Disputed cause of death.* The committee revised this instruction to read:

If [name of decedent]'s death was not caused by [name of defendant]'s fault, you may award only the economic damages caused by that fault. You may not award non-economic damages.

Mr. Simmons noted that the instruction applies not only where the cause of death is disputed but also where it is undisputed that the defendant's fault did not cause the death. The advisory committee note was therefore revised to read:

This instruction applies only to a claim made under Utah Code Section 78-11-12(1)(b).

9. *15.121. Present cash value.* Mr. Ferguson and Mr. Humpherys noted that the issue of present value came up recently in a case tried by their partner, Mark Anderson, in which Judge Fratto initially was not going to allow the jury to consider the cost of future surgery because no economist had testified as to present value but later reversed his ruling because the evidence showed that the plaintiff needed the surgery immediately. The case highlighted some of the issues involved, namely, whether an economist is necessary to establish present value in every case, or may the jury use tables or accept lay testimony (such as the testimony of the plaintiff) as to the value of future losses; how remote must the future losses be before their present value must be established by expert testimony; and who has the burden of proof on the issue of present value. The committee deferred further discussion of the instruction until the next meeting.

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The meeting concluded at 6:00 p.m.

*Next Meeting.* The next meeting will be Monday, January 9, 2006, at 4:00 p.m.

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Second Edition  
Working Draft: December 27, 2005  
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**15.101. Introduction to tort damages. Economic and non-economic damages introduced.**

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.

**MUJI 1<sup>st</sup> References.**

27.01.

**References.**

**Advisory Committee Notes.**

This instruction should be given as a preliminary instruction to all personal injury damage instructions and should be modified to fit the particular situation. The case may be submitted to the jury on special verdict, general verdict, or stipulated liability.

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.**

**Status.** Approved December 12, 2005



**15.102. Economic damages defined.**

Economic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for measurable losses of money or property caused by [name of defendant]'s fault.

**MUJI 1<sup>st</sup> References.**

15.15.

**References.**

**Advisory Committee Notes.**

**Staff Notes.**

**Status.** Approved December 12, 2005

**15.103. Non-economic damages defined.**

Non-economic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for losses other than economic losses.

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

In awarding non-economic damages, among the things that you may consider are:

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

and

- (6) whether the consequences of these injuries are likely to continue and for how long.

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

I will now instruct you on particular items of economic and non-economic damages presented in this case.

**MUJI 1<sup>st</sup> References.**

15.15; 27.02.

**References.**

**Advisory Committee Notes.**

**Staff Notes.**

**Status.** Approved December 12, 2005

**15.104. 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, 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.

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.

**MUJI 1<sup>st</sup> 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.** Approved December 12, 2005

**15.106. Economic damages. Lost earnings. [Lost earning capacity.]**

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

Past lost earnings are calculated from the date of the harm until the trial. [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 employment.]

**MUJI 1<sup>st</sup> References.**

27.04; 27.05.

**References.**

Dalebout v. Union Pacific R. Co., 980 P.2d 1194, 1200 (Utah Ct. App. 1999)  
Corbett v. Seamons dba Big O Tire, 904 P.2d 232, N.2 (Utah Ct. 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 verdict form should distinguish between lost earnings and lost earning capacity before and after the trial. The former accrue interest from the date of the injury. The latter do not.

**Staff Notes.**

**Status.** Approved December 12, 2005

**15.109. 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 is the difference in the fair market value of the land immediately before and immediately after the injury, unless the property can be repaired for a lesser amount. If the property can be repaired for a lesser amount, then the damages would be the reasonable cost of repair.

In addition, you may award stigma damage for any reduction in the value of the property if the evidence establishes that the property will not return to its original value because of a lingering negative public perception that was caused by the injury. [This paragraph to be given only if there is evidence to support a claim of lingering negative public perception.]

**MUJI 1<sup>st</sup> References.**

27.16; 27.17

**References.**

Walker Drug vs. La Sal Oil, 972 P.2d 1238 (Utah 1998)  
Thorsen v. Johnson, 745 P.2d 1243 (Utah 1987)  
Pehrson v. Saderup, 28 Utah 2d 77, 498 P.2d 648 (1972)  
Brereton v. Dixon, 20 Utah 2d 64, 433 P.2d 3 (1967)  
Henderson v. For-Shor Co., 757 P.2d 465 (Utah Ct. App. 1988)  
Ault v. Dubois, 739 P.2d 1117 (Utah Ct. App. 1987)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**15.114. Survival claim.**

If [name of decedent] died from injuries caused by [name of defendant]'s fault, then you should award economic and non-economic damages for the period of time that he lived after the injuries.

**MUJI 1<sup>st</sup> References.**

None.

**References.**

Utah Code Sections 78-11-7 through 78-11-12  
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)

**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.

Under comparative negligence statute, any negligence of decedent is, in effect, imputed to wrongful death plaintiff: thus, if decedent is found to be more than 50% negligent all recovery is denied. Kelson v. Salt Lake County, 784 P.2d 1152 (Utah 1989)

**Staff Notes.**

**Status.** Approved December 12, 2005

**15.115. Survival claim. Disputed cause of death.**

If [name of decedent]'s death was not caused by [name of defendant]'s fault, you may award only [name of decedent]'s economic damages caused by that fault. You may not award non-economic damages.

**MUJI 1<sup>st</sup> References.**

None.

**References.**

Utah Code Section 78-11-12(1)(b)

**Advisory Committee Notes.**

This instruction applies only to a claim made under Utah Code Section 78-11-12(1)(b).

**Staff Notes.**

**Status.** Approved December 12, 2005

### **15.120. 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 safely 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 earnings from a reasonably safe investment.

### **MUJI 1<sup>st</sup> References.**

27.11.

### **References.**

Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc., 2004 UT App 322, 110 P.3d 710, cert. denied (Utah 2005)

Bennett v. Denver & Rio Grande Western R. Co., 213 P.2d 325 (Utah 1950)

### **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 when discounting to present value. See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

Utah law is silent on whether plaintiff or defendant bears the burden of proving present cash value. Other jurisdictions are split. Some courts treat reduction to present value as part of the plaintiff's case in chief. See, e.g., *Abdulghani v. Virgin Islands Seaplane Shuttle, Inc.*, 746 F. Supp. 583 (D. V.I. 1990); *Steppi v. Stromwasser*, 297 A.2d 26 (Del. Super. Ct. 1972). Other courts treat reduction to present value as a reduction of the plaintiff's damages akin to failure to mitigate, on which the defendant bears the burden of proof. See, e.g., *Energy Capital Corp. v. United States*, 47 Fed. Cl. 382 (Fed. Cl. 2000), aff'd in part, rev'd in part on other grounds, 302 F.3d 1314 (Fed. Cir. 2002); *CSX Transp., Inc. v. Casale*, 441 S.E.2d 212 (Va.1994). There is a good discussion of the issue in *Lewin Realty III, Inc. v. Brooks*, 771 A.2d 446 (Md. Ct. Spec. App. 2001), aff'd, 835 A.2d 616 (Md. 2003), holding the burden to be on the defendant. It cites *Miller v. Union P.R. Co.*, 900F.2d 223, 226 (10th Cir.1990), as support.



There are several Utah cases holding that the burden is on the defendant to show that a damage award should be reduced, but they deal with failure to mitigate, not reduction to present value. See *Covey v. Covey*, 2003 UT App 380, 29, 80 P.3d 553; *John Call Eng'g, Inc. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah Ct. App. 1990).

Expert testimony on annuities as relevant to present value of future damages is permitted and even recommended. *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322, 110 P.3d 710, cert. denied (Utah 2005). Annuity tables and their related data also are permitted. See *Schlatter v. McCarthy*, 113 Utah 543, 196 P.2d 968 (1948). But Utah law is silent on whether expert testimony, government tables or other evidence is necessary before a jury is charged to calculate present cash value. Other jurisdictions require evidence before the jury can be instructed to calculate present cash value. See *Schiernbeck v. Haight* 7 Cal.App.4th 869, 877, 9 Cal.Rptr.2d 716 (1992), citing *Wilson v. Gilbert*, 25 Cal.App.3d 607, 614, 102 Cal.Rptr. 31 (1972).

**Staff Notes.**

**Status.** Changes from December 12, 2005

**18.100. Employer and employee rights.**

**MUJI 1<sup>st</sup> References.**

Not Covered: 18.07; 18.10.

**MUJI 18.7 THE PROVISIONS OF AN IMPLIED EMPLOYMENT CONTRACT**

For conduct, writings, or oral statements to be a provision of an implied employment contract, such conduct, writings or statements must be sufficiently definite and clear so that it is possible to determine whether or not the provision has been violated. If an asserted provision is so uncertain that there is no basis to decide whether the provision has been kept or broken, then such provision is not part of an implied employment contract.

**MUJI 18.10 DEFINITION OF PUBLIC POLICY**

Public policy is that principle of law which holds that one should not do something that injures the public, or is against the public good.

Public policy is usually defined by legislative enactments, constitutional standards and court decisions that establish standards for the protection of the public or promotion of the public interest. Such a standard must be clear and substantial to be a public policy under Utah law.

**Staff Notes.**

**Status.**

**18.101. Definition of employment contract.**

A contract of employment is an agreement 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 1<sup>st</sup> References.**

18.01.

**References.**

BAJI 10.00 (1987 New)  
California Jury Instruction 10.57  
Cook v. Zions First National Bank, 919 P.2d 56 (Utah Ct. App. 1996)

**Advisory Committee Notes.**

**Staff Notes.**

Add: "[Name of plaintiff] is the employee. [Name of defendant] is the employer."  
Then use names throughout the instructions, as we have with the others.

Cite to CACI.

**Status.**

**18.102 Corporation as person.**

Person means a natural person or individual, corporation, organization, or other legal entity.

**MUJI 1<sup>st</sup> References.**

02.08.

**References.**

Utah Constitution, Art. 12, Section 4  
Utah Code Section 25-6-2  
Utah Code Section 26-20-2  
Utah Code Section 26-21-2  
Utah Code Section 32A-1-105  
Utah Code Section 34A-5-102

**Advisory Committee Notes.**

**Staff Notes.**

Is this covered by 1-201?

In this case the plaintiff is [identify entity] and the defendant is [identify entity]. This should make no difference to you. You must decide this case as if it were between individuals.

**Status.**

**18.103. Creation of express employment contract. Burden of proof.**

An express employment contract is created when the employer and employee agree with one another orally or in writing 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 1<sup>st</sup> References.**

18.02.

**References.**

Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044 (Utah 1989)

Cook v. Zions First National Bank, 919 P.2d 56, 59-60 (Utah Ct. App. 1996)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.104. Creation of implied employment contract. Elements of proof.**

In order to prove the existence of an implied contract, it must be shown, by a preponderance of the evidence, that:

(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].

Evidence of the employer's intention may be derived from the employment manuals, oral agreements, 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 1<sup>st</sup> References.**

18.05; 18.06.

**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 Ct. App. 1989)  
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah 2000)

**Advisory Committee Notes.**

**Staff Notes.**

Lists the elements of proof, but does not say who has the burden of proof.

**Status.**

**18.105. Breach of employment contract.**

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

**MUJI 1<sup>st</sup> References.**

18.09.

**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. Zions First National Bank 919 P.2d 56, 59-60 (Utah Ct. App. 1996)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.106. Employment contract may be terminated "at-will."**

An employment relationship created for an unspecified time and without other restrictions on either the employer's or the employee's ability to terminate the relationship is presumed to be an at-will employment relationship. An at-will employment relationship may be terminated by the employer or the employee at any time, for any reason or for no reason, other than an illegal reason, with or without cause. 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.

**MUJI 1<sup>st</sup> References.**

18.03.

**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 Ct. App. 1998)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**



**18.107. Rebutting the "at-will" presumption.**

An at-will employee may defeat the presumption that his employment is terminable 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 1<sup>st</sup> References.**

18.04.

**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.**

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

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

This requires the employee to establish that:

(1) the parties intended that the employee's employment would not be terminated except for certain conduct, until after a certain time period, or unless pursuant to certain procedures; 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 could not be terminated "at-will."

**MUJI 1<sup>st</sup> References.**

18.05; 18.06.

**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 Ct. App. 1989)  
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah 2000)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.109. Rebutting the "at-will" presumption. Intent of the parties.**

You must consider the intent of the parties to create an employment contract that could not be terminated "at-will" and the circumstances of employment as a whole. Evidence of the employer's intention 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 1<sup>st</sup> References.**

18.05; 18.06.

**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 Ct. App. 1989)  
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah 2000)

**Advisory Committee Notes.**

**Staff Notes.**

Should this be added as the last paragraph of 18.108?

**Status.**

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

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

- (1) the employer terminated him;
- (2) a clear and substantial public policy existed;
- (3) the employee's conduct brought the policy into play; and

(4) the employer discharged him at least in part because he [did something] [did not do something] that brought the public policy into play.

**MUJI 1<sup>st</sup> References.**

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.**

**18.111. Vilation of public policy. Shifting burdens.**

If an employee establishes the four factors listed in Instruction 18.110, 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 1<sup>st</sup> References.**

None.

**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.**

Should this be added as the last paragraph of 18.110?

**Status.**

**18.112. Implied employment contract. New terms.**

An at-will employment contract may be modified prospectively 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. The new terms of the modified employment contract supersede the prior terms.

**MUJI 1<sup>st</sup> References.**

18.08.

**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 Ct. App. 1994)  
Sorenson v. Kennecott-Utah Copper, Corp., 873 P.2d 1141, 1148 (Utah Ct. App. 1994)  
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1122 (D. Utah 2000)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.113. 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 1<sup>st</sup> References.**

None.

**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. Zions First National Bank, 919 P.2d 56, 60-61 (Utah Ct. 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 18.122 a "duty."

**Status.**

**18.114. 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 1<sup>st</sup> References.**

None.

**References.**

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

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**



**18.115. 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 1<sup>st</sup> References.**

None.

**References.**

Sheikh v. Department of Pub. Safety, 904 P.2d 1103, 1007 (Utah Ct. App. 1995)  
California Jury Instruction 10.02

**Advisory Committee Notes.**

**Staff Notes.**

Cite to CACI.

**Status.**

**18.116. 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 1<sup>st</sup> References.**

25.06.

**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.**

**18.117. 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 1<sup>st</sup> References.**

None.

**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 P.2d 403, 404 (Utah 1935)  
C&Y Corp. v. General Biometrics, 896 P.2d 47, 54 (Utah Ct. App. 1995)  
Envirotech Corporation v. Callahan, 872 P.2d 487 (Utah Ct. App. 1994)  
Black's Law Dictionary 640 (7th Ed. 1999)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.118. 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 1<sup>st</sup> References.**

15.15; 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 "non-economic" damages.

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

**Status.**

**18.119. 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 1<sup>st</sup> 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)  
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.**

**18.120. 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 1<sup>st</sup> 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 non-economic damages in Instruction 15.103. 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.**

**18.121. 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 1<sup>st</sup> 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 18.119.

**Status.**



**18.122. 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 1<sup>st</sup> References.**

None.

**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. Zions First National Bank 919 P.2d 56 (Utah Ct. App. 1996)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.123. 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 1<sup>st</sup> 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.**

**18.124. 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 1<sup>st</sup> References.**

27.03.

**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)  
BAJI No. 14.10 (Supp. 1992)

**Advisory Committee Notes.**

**Staff Notes.**

Cite to CACI.

**Status.**

