

AGENDA  
ADVISORY COMMITTEE  
ON MODEL CIVIL JURY INSTRUCTIONS

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

September 13, 2004  
4:00 to 6:00 p.m.

Welcome and approval of minutes	John Young
Preliminary and General Instructions	Phil Ferguson, Ch.
Damages Instructions	Rich Humpherys, Ch
Proximate Cause	Jonathan Jemming

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

October 18 (3<sup>rd</sup> Monday)  
November 8  
December 13

## *MINUTES*

Advisory Committee on Model Civil Jury Instructions

August 9, 2004

4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Francis J. Carney, Ralph L. Dewsnup, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Stephen B. Nebeker, Paul M. Simmons, David E. West, Jonathan Jemming

Excused: Timothy M. Shea

1. *Minutes*. The committee approved the minutes of the June 14, 2004, meeting.
2. *Draft Preliminary and General Instructions*. The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee:

- a. *02.21, Multiple Plaintiffs, and 02.22, Multiple Defendants*. Mr. Carney questioned the need for the instructions. Mr. Fowler pointed out that an instruction on multiple parties may be necessary because the treatment of multiple parties may vary, depending, for example, on whether or not one is vicariously liable for another. Mr. Young and Mr. West suggested that any needed instructions could be covered in the instructions on the special verdict form and in the form itself. Mr. Jemming suggested the instruction should be a preliminary instruction. At Mr. Dewsnup's suggestion, the committee decided to rewrite the instruction as follows and make it part of the preliminary instructions:

“Although there are multiple parties involved in this case, each party is entitled to have its claims and defenses considered on their own merits.”

- b. *02.23. Discontinuance as to Some Defendants*. Mr. Carney thought the tone of the instruction was condescending and that the instruction would only pique the jurors' interest. After some discussion, the committee decided to instruct the court and counsel to craft an instruction telling the jury that a party is no longer involved in the case and giving the reason. A general instruction could be included as a guide, perhaps with several alternative explanations as examples.

- c. *02.24. Settling Defendants in Multi-party Cases*. Mr. Dewsnup felt that the last two sentences of the proposed instruction were argumentative. Mr. Young felt that the instruction needed to be more specific about what portions of the settlement should be disclosed to the jury. Mr. Humpherys stated that the instruction should tell the jury both what it can and cannot do with information about a partial settlement. Mr. Dewsnup offered a suggested rewrite of the instruction. Mr. Carney reviewed the equivalent California instruction, CACI 217.

**Mr. Ferguson will rewrite the instruction in light of Mr. Dewsnup's suggested revisions and CACI 217, after making sure that CACI 217 is consistent with *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989).**

d. *02.25. Jurors to Deliberate and Agree If Possible.* Mr. Carney noted that the instruction overlaps instruction 2.7.

**Mr. Ferguson will combine instructions 2.7 and 02.25.**

e. *2.5. Duty of Lawyers.* The subcommittee had previously rejected former MUJI 2.5 in favor of revised MUJI 1.1. Mr. Carney suggested that former MUJI 2.5 was not adequately covered in revised MUJI 1.1 and was needed.

f. *02.26. Resort to Chance.* The committee simplified the instruction by dropping "speculate, draw lots, or" in line 28 and rewriting the last paragraph as follows:

If you decide that a party is entitled to recover, you must then decide the amount of money to be awarded to that party. Each of you should express your own independent judgment as to what the amount should be. It is your duty to thoughtfully consider the amounts suggested, evaluate them according to these instructions and the evidence and, after due consideration, come to an agreement on the amount, if any, to be awarded. It is unlawful for you to agree in advance to average the independent estimate of each juror.

f. *02.27. Agreement on Special Interrogatories.* Judge Barrett and Mr. Humpherys suggested dropping the last two lines of the first paragraph. Mr. Dewsnup suggested dropping the second paragraph as well. After some discussion, the committee agreed that it needed to revisit the placement of the instructions on burden of proof.

3. *Next Meeting.* The next meeting will be Monday, September 13, 2004, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

1 Preliminary and General Instructions

2  
3 REVISED MUJI 1.10  
4 MULTIPLE PARTIES  
5

6 Although there are multiple parties in this case, each party is entitled to have its claims and  
7 defenses considered on their own merits.

8  
9 Comment:

10  
11 This instruction is a combination of MUJI 2.21 and 2.22. It has been removed from the  
12 general instructions and placed into the preliminary instructions.  
13

14  
15  
16 02.13. Statement of opinion.  
17

18 Under limited circumstances, I will allow a witness to express an opinion. You do not have  
19 to believe an opinion, whether it comes from an expert witness or not. Consider opinion  
20 testimony as you would any other evidence, and give it the weight you think it deserves.  
21

22  
23  
24 02.16. Burden of proof.  
25

26 When these instructions say that a party has the burden of proof, it means that the party must  
27 produce evidence that meets the following requirements:  
28

29 [Here list the elements of the claim]  
30  
31  
32

33 02.17. Direct and circumstantial evidence.  
34

35 A fact may be proved by direct or circumstantial evidence. Circumstantial evidence consists  
36 of facts or circumstances that allow someone to reasonably infer the truth of the facts to be  
37 proved. For example, if the fact to be proved is whether Johnny ate the cherry pie, and a witness  
38 testifies that she saw Johnny take a bite of the cherry pie, that is direct evidence of the fact. If  
39 the witness testifies that she saw Johnny with cherries smeared on his face and an empty pie  
40 plate in his hand, that is circumstantial evidence of the fact.  
41

42  
43  
44 02.19. Clear and convincing evidence.  
45

1 There are 3 levels of proof in the law, (1) proof by a preponderance of the evidence, (2) proof  
2 by clear and convincing evidence, and (3) proof beyond a reasonable doubt. The usual level of  
3 proof used in a civil case is proof by a preponderance of the evidence, that is, proof that a fact is  
4 more likely than not. Another way of saying this is proof by the greater weight of the evidence.  
5

6 This case involves [certain or some] issues that must be proven to a standard higher than the  
7 usual standard. This next level of proof is proof by clear and convincing evidence. This level of  
8 proof is not as high as the standard used in criminal cases, that is, proof beyond a reasonable  
9 doubt. However, in order for something to be proven by clear and convincing evidence, it must  
10 be more than merely probable. You must be firmly convinced of the fact at issue.  
11

12 To satisfy the clear and convincing level of proof, the evidence as to the fact in issue should  
13 be compelling. It must at least have reached the point where there remains no substantial doubt  
14 as to the truth or correctness of the conclusion.  
15  
16  
17

18 REVISED MUJI 2.23  
19 DISCONTINUANCE AS TO SOME DEFENDANTS  
20

21 Defendants \_\_\_\_\_ and \_\_\_\_\_ are no longer involved in this case  
22 because [they were dismissed due to the expiration of the statute of limitations] [they were  
23 granted a directed verdict] [their conduct, and any liability properly attributed to them, is the  
24 responsibility of \_\_\_\_\_, which remains as a party in this case] [of tactical decisions made by  
25 the remaining parties]. You must still decide whether fault should be allocated to each of them.  
26

27 Comment:

28 The court should explain the reasons why the defendants have been dismissed to the extent  
29 possible.  
30  
31  
32

33 REVISED MUJI 2.24  
34 SETTLING DEFENDANTS IN MULTI-PARTY CASES  
35

36 The plaintiff(s) and [settling defendant(s)] have reached a settlement agreement in this  
37 matter.  
38

39 There are many reasons why parties settle during the course of a lawsuit. Settlement does  
40 not mean that either party has conceded anything. You must still decide which party or parties,  
41 including [the settling defendant(s)] were at fault, and how much fault each party should bear. In  
42 deciding how much fault should be allocated to each party you must not consider the settlement  
43 agreement as a reflection of the strengths or weaknesses of either side.  
44

45 You may, however, consider the settlement agreement when you weigh the believability of  
46 the testimony of the witnesses because the plaintiff and [the settling defendant(s)] are no longer

1 adversary parties in the lawsuit. You must decide whether the change in adversary status has any  
2 significance to you.

3  
4 Comment:

5 The Court and the parties must decide whether and to what extent the terms of the settlement  
6 will be revealed to the jury in accordance with the principles set forth in *Slusher v. Ospital*, 777  
7 P.2d 437 (Utah 1989).

8  
9  
10  
11 REVISÉD MUJI 2.25  
12 JURORS TO DELIBERATE AND AGREE IF POSSIBLE

13  
14 After you enter the jury room, and before discussing the case, you must select one of your  
15 jury members to serve as foreperson.

16  
17 After you select the foreperson it becomes your duty to consult with one another—to  
18 deliberate—with a view to reaching an agreement.

19  
20 Your attitude and conduct during discussions are important. As you begin your discussions,  
21 it is not productive or beneficial to say that your mind is made up. You each must decide the  
22 case for yourself, but only after discussing the case with your fellow jurors. You should not  
23 hesitate to change an opinion when convinced that it is wrong. However, you should not  
24 surrender your honest convictions just to end the deliberations or to agree with other jurors.

25  
26 Comment:

27  
28 This instruction is a combination of MUJI 2.7 and 2.25. It should be given at the end of the  
29 trial.

30  
31  
32  
33 REVISÉD MUJI 2.26  
34 RESORT TO CHANCE

35  
36 Your duty as a juror is to evaluate the evidence presented by the parties and to come to a  
37 decision that is supported by the evidence. You are not to flip a coin, for example. Likewise, the  
38 law forbids you to decide any issue in this case by speculating or choosing one juror's opinions  
39 at random.

40  
41 If you decide that a party is entitled to recover, you must then decide the amount of money to  
42 be awarded to that party. Each of you should express your own independent judgment as to what  
43 the amount should be. It is your duty to thoughtfully consider the amounts suggested, evaluate  
44 them according to these instructions and the evidence and, after due consideration, come to an  
45 agreement on the amount to be awarded. It is unlawful for you to agree in advance to average  
46 the independent estimates of each juror.

1  
2  
3  
4 REVISED MUJI 2.27  
5 AGREEMENT ON SPECIAL INTERROGATORIES  
6

7 I am going to give you a form called the Special Verdict. Your duty is to answer the  
8 questions, based upon the evidence you have seen and heard during this trial.  
9

10 Because this is a civil action, at least six jurors must agree on the answer to each question,  
11 but they need not be the same six on each question. As soon as six or more of you have agreed  
12 on the answer to each question, have the verdict signed and dated by your foreperson and tell the  
13 bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring  
14 the completed Special Verdict with you.  
15  
16

17  
18 REVISED MUJI 2.28  
19 SELECTION OF JURY FOREPERSON AND RETURN OF VERDICT  
20

21 When you leave the courtroom in a few moments and go to the jury room, your first  
22 responsibility is to select a foreperson. The foreperson will preside over your deliberations and  
23 sign the verdict form to which you agree.  
24

25 The foreperson should not dominate the jury or the discussions. The foreperson's opinions  
26 should be given the same weight as the opinions of each of the other members of the jury.  
27

28 After you select the foreperson it becomes your duty to consult with one another—to  
29 deliberate—with a view to reaching an agreement.  
30

31 Your attitude and conduct during discussions are important. As you begin your discussions,  
32 it is not productive or beneficial to say that your mind is made up. You each must decide the  
33 case for yourself, but only after discussing the case with your fellow jurors. You should not  
34 hesitate to change an opinion when convinced that it is wrong. However, you should not  
35 surrender your honest convictions just to end the deliberations or to agree with other jurors.  
36

37 Comment:

38  
39 This instruction is a combination of MUJI 2.7, 2.25 and 2.28. It should be given at the end of  
40 the trial.  
41  
42

1 Damages Instructions

2  
3 27.01. Damages; Introductory.

4  
5 If you decide that defendant's Fault Legally Caused damages to [name of plaintiff] you must  
6 award the damages, if any, that you decide will fairly and adequately compensate [name of  
7 plaintiff] for these damages. There are two kinds of damages: Special Damages and General  
8 Damages. I will now explain Special and General Damages.  
9

10  
11  
12 Advisory Committee Comments.

13  
14 This instruction should be given as a preliminary instruction to all damage instructions and  
15 may or should be modified to fit the particular situation. The case may be submitted to the jury  
16 on special verdict, general verdict, or stipulated liability. The user may want to refer specifically  
17 to the special verdict question in modifying this form. Each specific damage instruction that  
18 applies to the case should then follow.  
19

20  
21  
22 27.02. Personal injury; Special damage; Medical care.

23  
24 Special Damages include expenses for medically related care which is reasonably required  
25 and legally caused by the accident. You should award the reasonable value of the medically  
26 related care in the past and for the care that more probably than not will be reasonably required  
27 in the future. [The fact, if it be a fact, that any of the foregoing expenses were paid by some  
28 source other than the [name of plaintiff]'s own funds does not affect [name of defendant]'s  
29 responsibility to pay for such expense.]  
30

31  
32  
33 27.03. Personal injury; Special damage; Loss of earnings.

34  
35 Special Damages also include lost earnings and loss of earning capacity. You should award  
36 the reasonable value of the work [name of plaintiff] has been unable to do, and the reasonable  
37 value of his/her future earnings that more probably than not will be lost in the future. In  
38 determining this amount, you should consider evidence of: [name of plaintiff]'s earning capacity;  
39 (2) his/her actual earnings; (3) his/her work before and after the accident; and (4) what he/she  
40 would likely have earned if he/she had not been injured.  
41

42 "Earning Capacity" is not the same as lost earnings. Earning capacity means the potential to  
43 earn income. It is not necessarily determined by the actual loss of earnings. To determine the  
44 reasonable value of the loss of earning capacity, you should consider whether the injury legally  
45 caused: (1) a reduction of [plaintiff's name]'s ability to earn income; and (2) a decreased ability

1 to weather adverse economic circumstances, such as a discharge or lay-off, or a voluntary change  
2 of employment.

3  
4  
5  
6 References.

7  
8 Dalebout v. Union Pacific R. Co., 980 P.2d 1194, 1200 (Ut. App. 1999)  
9 Corbett v. Seamons dba Big O Tire, 904 P.2d 232, N.2 (Ut. App. 1995)

10  
11  
12  
13 27.04. Personal injury; Special damage; Loss of household services.

14  
15 Special Damages also include loss of household services. To recover damages for this loss,  
16 [name of plaintiff] must prove the reasonable value of the household services that [name of  
17 plaintiff] has been unable to do, and the reasonable value of the household services that, more  
18 probably than not, he/she will be unable to do in the future.

19  
20  
21  
22 27.05. General damages.

23  
24 In awarding general damages, you may consider the nature and extent of injuries sustained  
25 by [name of plaintiff], the degree and character of the disfigurement, the pain and suffering  
26 occasioned by the injuries, both mental and physical, their probable duration and severity, the  
27 extent to which [name of plaintiff] has been prevented from pursuing his/her ordinary affairs of  
28 life and the extent he/she has been limited in the enjoyment of life. You may consider whether  
29 the consequences of these injuries will, with reasonable probability, continue in the future and if  
30 so, you should award such damages as will fairly and justly compensate him/her throughout  
31 his/her life expectancy.

32  
33 Pain, suffering, disfigurement and other such general damages are not capable of being  
34 exactly and accurately determined and there is no fixed rule, standard or formula in determining  
35 these general damages. Nevertheless, it is your duty to make this determination. The law does  
36 not require the opinion of any witness to establish the amount of general damages. The  
37 argument of counsel as to the amount of damages is not evidence of reasonable compensation.  
38 In making an award for general damages, you should exercise your authority with calm and  
39 reasonable judgment and the damages you fix shall be just and reasonable in light of the  
40 evidence.

41  
42 You are not precluded from awarding damages because of the difficulty in computing the  
43 damages. While you may not award damages based upon mere speculation, the law requires  
44 only that the evidence provide a reasonable basis for assessing the damages and does not require  
45 a mathematical certainty.

1  
2  
3 27.06. Personal injury; Damage; Susceptible to injury.  
4

5 A person who may be more susceptible to injury than someone else is still entitled to recover  
6 the full amount of damages that were Legally Caused by [name of defendant]'s Fault. In other  
7 words, the amount of damages should not be reduced merely because [name of plaintiff] is more  
8 susceptible to injury than someone else may be.  
9

10  
11  
12 27.07. Personal injury damages; Aggravation of preexisting conditions.  
13 (Alternate A)  
14

15 An injured person who has a condition or disability before the time of an injury is not entitled  
16 to recover damages for that condition or disability. However, the injured person is entitled to  
17 recover damages for any aggravation of the preexisting condition or disability caused from the  
18 injury, even if the person's preexisting condition or disability made the injured person more  
19 susceptible to problems than a healthy person would have been, and even if a healthy person may  
20 not have suffered the additional problems. However, the damages you may award are limited to  
21 the additional damages caused by [defendant's name]'s Fault.  
22  
23  
24

25 Advisory Committee Comments.  
26

27 Alternate Instruction A reflects the holding of the Utah Supreme Court in *Brunson v. Strong*,  
28 (cited below). The Court did not specifically address the issue of dormant and asymptomatic  
29 conditions. Alternate Instruction B reflects the holding of the Utah Court of Appeals in *Biswell*  
30 *v. Duncan* (cited below,) where the plaintiff claimed that the preexisting condition was dormant  
31 or asymptomatic. Modification of the instruction may be necessary based upon the evidence in  
32 any given case.  
33  
34

35 References.  
36

37 *Biswell v. Duncan*, 742 P.2d 80 (Utah 19087)  
38 *Brunson v. Strong*, 17 Utah 2d 364, 412 P.2d 451 (1966)  
39 BAJI No. 14.65 (Supp. 1992). Reprinted with permission; copyright 1986 West Publishing  
40 Company  
41  
42  
43

44 27.08. Personal injury damages; Aggravation of preexisting conditions.  
45 (Alternate B)  
46

1  
2 A person who has a preexisting condition which doesn't cause the person any problems, may  
3 recover the full amount of damages legally caused by an aggravation of that condition. In other  
4 words, when a preexisting condition does not cause pain or disability, but that condition plus the  
5 injury brings on pain, disability or other problems, then it is the injury, not the preexisting  
6 condition, that is the legal cause of the pain or other problems.  
7

8  
9  
10 References.

11  
12 Biswell v. Duncan, 742 P.2d 80 (Utah 1987)  
13

14  
15  
16 27.09. Personal injury; Damages; Apportionment for preexisting condition  
17

18 When a pre-existing condition exists which makes the injuries from an accident greater than  
19 they would have been in the absence of such a pre-existing condition, it is your duty, if possible,  
20 to apportion the amount of disability, impairment, pain, suffering, and other damages, between  
21 those caused by the pre-existing condition and those caused by the accident. But if you find that  
22 the evidence does not permit such an apportionment, then you must determine that the entire  
23 disability, impairment, pain, suffering, and other damages, are legally caused by [name of  
24 defendant]'s fault.  
25

26  
27  
28 Reference.

29  
30 Robinson v. All-Star Delivery, Inc., 992 P.2d 969 (Utah 1999)

31 Tingey v. Christensen, 987 P.2d 588, 591-92 (Utah 1999)  
32

33  
34  
35 27.10. Personal injury; Damages; Duty to mitigate.  
36

37 A person who has been injured is supposed to use reasonable diligence in caring for the  
38 injuries and in acting in a way that avoids a worse situation.  
39

40 When an injured person does not use reasonable diligence to care for the injuries, and as a  
41 result the injuries are aggravated, the defendant is not responsible to pay damages for this  
42 aggravation. If [name of plaintiff] made reasonable efforts to avoid an aggravation of his/her  
43 situation, then your award should include the reasonable amounts he/she incurred for this  
44 purpose.  
45

1  
2       References.

3  
4       C.S. v. Nielsen, 767 P.2d 504 (Utah 1988)  
5       Thompson v. Jacobsen, 23 Utah 2d 359, 463, P.2d 801 (1970)  
6       Morrison v. Perry, 104 Utah 151, 140 P.2d 772 (1943)  
7       BAJI No. 14.67 (Supp. 1992). Reprinted with permission; copyright © 1986 West  
8 publishing Company  
9

10  
11  
12       27.11. Personal injury; Damages; Life expectancy.

13  
14       According to the mortality tables, [name of plaintiff] is expected to live \_\_\_\_ more years.  
15 You may consider this fact in arriving at the amount of future damages. A life expectancy is  
16 merely an estimate of the probable average remaining life of all persons in our country of a given  
17 age, with average health and exposure to danger. Some people live longer and others die sooner.  
18 You may consider all other evidence bearing on the expected life of the [name of plaintiff],  
19 including his/her occupation, health, habits, life style, and other activities.  
20

21  
22  
23       References.

24  
25       JIFU No. 90.36 (1957)  
26       BAJI No. 14.69 (Supp. 1992). Reprinted with permission; copyright © 1986 West  
27 publishing Company  
28

29  
30  
31       27.12. Personal injury; Damages; Wrongful death; Adult.

32  
33       In determining damages for the death of [decedent], you will award an amount that will be  
34 just compensation for the loss that [name of plaintiff] has suffered from the death of [decedent].  
35

36       You shall determine the loss based upon the circumstances that existed at the time of the  
37 decedent's death, including the following past and future items:  
38

39       1) The loss of financial support or the right to receive financial support, if any, that [name of  
40 plaintiff] would have received from the decedent. In this regard, you should consider the  
41 disposition of the decedent to financially support [name of plaintiff] and the earning capacity of  
42 the decedent.  
43

44       2) The loss of love, companionship, society, comfort, care, protection and affection which  
45 [name of plaintiff] has lost.  
46

1 3) The age and health of the decedent and [name of plaintiff] immediately prior to the death.

2  
3 4) Whether the deceased was kind, affectionate or otherwise.

4  
5 5) The expenses for medical care incident to the death.

6  
7 6) The reasonable expenses that were incurred for the funeral and burial.

8  
9 7) The life expectancy of the decedent and [name of plaintiff]. [Name of plaintiff] could  
10 have only received benefits from the decedent as long as both were alive.

11  
12 8) Any other evidence indicating the benefits that [name of plaintiff] might have reasonably  
13 received had the decedent lived.

14  
15 [In determining this award, you are not to consider any pain or suffering of the decedent; any  
16 grief or sorrow of the plaintiff; or the poverty or wealth of the plaintiff] [You may also consider  
17 the pain, anguish and mental suffering of the decedent before his/her death]? \_\_\_\_\_.]

18  
19  
20  
21 References.

22  
23 Utah Code Ann. §§ 78-11-7 – 12 (1992)

24 In re Behm's Estate, 117 Utah 151, 213 657 (1950)

25 Allen v. United States, 588 F. Supp. 247 (D. Utah 1984)

26 Platis v. United States, 288 F. Supp. 254 (D. Utah 1968), aff'd, 409 F.2d 1009 (10th Cir.  
27 1969)

28 BAJI No. 14.50 (Supp. 1992). Reprinted with permission; copyright © 1986 West  
29 Publishing Company.

30  
31  
32  
33 27.13. Personal injury; Damages; Wrongful death; Adult

34  
35 (Alternate A)

36  
37 In determining damages for the death of [decedent], you should award an amount that will be  
38 just compensation for the loss that [name of plaintiff] has suffered from the death of [decedent].  
39 You shall determine the loss based upon the circumstances that existed at the time of the  
40 decedent's death, including the following:

41  
42 1) The past and future loss of financial support or the right to receive financial support, if  
43 any, that [name of plaintiff] would have received from the decedent. In this regard, you should  
44 consider the earning capacity of the decedent and the disposition of the decedent to financially  
45 support [name of plaintiff].

1           2) The past and future loss of love, companionship, society, comfort, care, protection and  
2 affection from the decedent which [name of plaintiff] has lost.

3  
4           3) The age and health of the decedent and [name of plaintiff] immediately prior to the death.

5  
6           4) Whether the decedent was kind, affectionate or otherwise.

7  
8           5) The reasonable expenses for medically related care incident to the death.

9  
10          6) The reasonable expenses that were incurred for the funeral and burial.

11  
12          7) The life expectancy of the decedent and [name of plaintiff]. [Name of plaintiff] could  
13 have only received benefits from the decedent as long as both were alive.

14  
15          8) Any other evidence indicating the benefits that [name of plaintiff] might have reasonably  
16 received had the decedent lived.

17  
18          In determining this award, you are not to consider any pain or suffering of the decedent; any  
19 grief or sorrow of the plaintiff; or the poverty or wealth of the plaintiff.

20  
21          [If the case involves the wrongful death of a minor, the following paragraphs should be  
22 added at the end of subparagraph (1) above: “This amount should be reduced by the value of the  
23 costs that [name of plaintiff] would likely have incurred to support [decedent] had the child  
24 survived, until the child reached the age of eighteen.”]

25  
26  
27  
28          Advisory Committee Comments.

29  
30          This instruction applies to claims for wrongful death brought under U.C.A. § 78-11-7. If the  
31 cause of action also includes claims under U.C.A. § 78-11-12, Alternate B should be used.

32  
33  
34  
35          References.

36          Utah Code Ann. §§ 78-11-7 – 12 (1992)

37          In re Behm’s Estate, 117 Utah 151, 213 657 (1950)

38          Allen v. United States, 588 F. Supp. 247 (D. Utah 1984)

39          Platis v. United States, 288 F. Supp. 254 (D. Utah 1968), aff’d, 409 F.2d 1009 (10th Cir.  
40 1969)

41          BAJI No. 14.50 (Supp. 1992). Reprinted with permission; copyright © 1986 West  
42 Publishing Company.

1 27.14. Personal injury; Damages; Wrongful death; Adult.

2  
3 (Alternate B)

4  
5 In determining damages for the death of [decedent], you should make two separate awards:

6  
7 (1) An amount that will be just compensation for the loss that [name of plaintiff(s)] has  
8 [have] suffered from the death of [decedent]; and

9  
10 (2) The amount of special and general damages legally caused by [defendant]'s fault which  
11 [decedent] suffered before his/her death.

12  
13 I will now explain how you should determine each of these two awards. First, to determine  
14 for [name of plaintiff(s)] the loss should be determined based upon all the circumstances that  
15 existed at the time of decedent's death. You should consider the following:

16  
17 (a) The past and future loss of financial support or the right to receive financial support, if  
18 any, that [name of plaintiff] would have received from the decedent. In this regard, you should  
19 consider the earning capacity of the decedent and the disposition of the decedent to financially  
20 support [name of plaintiff].

21  
22 (b) The past and future loss of love, companionship, society, comfort, care, protection and  
23 affection from the decedent which [name of plaintiff] has lost.

24  
25 (c) The age and health of the decedent and [name of plaintiff] immediately prior to the death.

26  
27 (d) Whether the decedent was kind, affectionate or otherwise.

28  
29 (e) The reasonable expenses for medically related care incident to the death.

30  
31 (f) The reasonable expenses that were incurred for the funeral and burial.

32  
33 (g) The life expectancy of the decedent and [name of plaintiff]. [Name of plaintiff] could  
34 have only received benefits from the decedent as long as both were alive.

35  
36 (h) Any other evidence indicating the benefits that [name of plaintiff] might have reasonably  
37 received had the decedent lived.

38  
39 (i) In determining this award, you are not to consider any pain or suffering of the decedent;  
40 any grief or sorrow of the plaintiff; or the poverty or wealth of the plaintiff.

41  
42 Second, regarding the special and general damages suffered by [decedent] you should  
43 determine the award based upon the following:

44  
45 (A) Special Damages:

1 (1) The expenses for medically related care which was reasonably required to treat the  
2 injuries legally caused by [defendant]’s fault [the fact, if it be a fact, that any of the foregoing  
3 expenses were paid by some source other than the [name of plaintiff]’s own funds does not affect  
4 [name of defendant]’s responsibility to pay for such expenses.

5  
6 (2) The reasonable value of the lost work [decedent] was unable to do;

7  
8 (3) The reasonable value of the loss of household services that [decedent] was unable to  
9 perform; and

10  
11 (4) Any other reasonable expenses [decedent] incurred.

12  
13 (B) General Damages:

14  
15 In awarding general damages you may consider the nature and extent of the injuries sustained  
16 by [decedent], the degree and character of pain and suffering, both mental and physical and the  
17 extent to which [decedent] was prevented from pursuing his/her ordinary affairs of life. Pain,  
18 suffering, and other such general damages are not capable of being exactly and accurately  
19 determined and there is no fixed rule, standard or formula in determining these general damages.  
20 Nevertheless, it your duty to make this determination. The law does not require the opinion of  
21 any witness to establish the amount of general damages. The argument of counsel is not  
22 evidence of reasonable compensation. The award shall be just and reasonable in light of the  
23 evidence.

24  
25  
26  
27 Advisory Committee Comments.

28  
29 This instruction applies to claims for wrongful death brought under both U.C.A. §§ 78-11-7  
30 and 78-11-12. This instruction assumes that the decedent survived the accident but later died as  
31 a result of the injuries sustained in the accident. If the cause of decedent’s death is contested,  
32 alternate Instruction C should also be given.

33  
34  
35  
36 References.

37  
38 Utah Code Ann. §§ 78-11-7 – 12 (1992)

39 In re Behm’s Estate, 117 Utah 151, 213 657 (1950)

40 Allen v. United States, 588 F. Supp. 247 (D. Utah 1984)

41 Platis v. United States, 288 F. Supp. 254 (D. Utah 1968), aff’d, 409 F.2d 1009 (10th Cir.  
42 1969)

43 BAJI No. 14.50 (Supp. 1992). Reprinted with permission; copyright © 1986 West  
44 Publishing Company.

1  
2 27.15. Personal injury; Damages; Wrongful death; Adult.

3  
4 (Alternate C)

5  
6 You may not award general damages suffered by [decedent] if [decedent]'s death resulted  
7 from a cause other than the injury legally caused by [name of defendant]'s fault. If you decide  
8 that his/her death resulted from some other cause, you may award only those special damages, as  
9 explained above.

10  
11  
12  
13 Advisory Committee Comments.

14  
15 This instruction applies only to a claim made under U.C.A. § 78-11-12, where it is contested  
16 whether the death resulted from a cause other than the injury legally caused by the defendant's  
17 fault.

18  
19  
20  
21 27.16. Wrongful death; Minor.

22  
23 In determining the damages for the death of [decedent] you will award an amount that will be  
24 just compensation for the loss that [name of plaintiff] has suffered from the death of [decedent].

25  
26 You shall determine the award based upon the circumstances that existed at the time of the  
27 decedent's death, including the following past and future items:

28  
29 1. The loss of financial support or the right to receive financial support, if any, that [name of  
30 plaintiff] would have received from the decedent. This amount should be reduced by the value of  
31 the costs that [name of plaintiff] would likely have incurred to support the decedent had the child  
32 survived, until the child reached the age of eighteen.

33  
34 2. The loss of love, companionship, society, comfort, care, protection and affection which  
35 [name of plaintiff] has lost.

36  
37 3. The age and health of the decedent and [name of plaintiff].

38  
39 4. The expenses for medical care incident to the death.

40  
41 5. The reasonable expenses that were incurred for the funeral and burial.

42  
43 6. The life expectancy of the decedent and [name of plaintiff]. [Name of plaintiff] could have  
44 only received benefits from the decedent as long as both were alive.

1 7. Any other evidence indicating the benefits that [name of plaintiff] might have reasonably  
2 received had the decedent lived.

3  
4 8. [In determining this award you are not to consider any pain or suffering of the decedent;  
5 any grief or sorrow of [name of plaintiff]; or the poverty or wealth of [name of plaintiff.]] [You  
6 may also consider the pain, anguish and mental suffering of the decedent before his/her death.]  
7

8  
9  
10 Advisory Committee Comments.

11  
12 The Committee disagreed on whether the jury may consider the pain, anguish, sorrow and  
13 mental suffering of the plaintiff arising from the wrongful death of a minor.  
14

15  
16  
17 References.

18  
19 Utah Code Ann. § 78-11-6, -12 (1992)  
20 Jones v. Carvell, 641 P.2d 105 (Utah 1982)  
21

22  
23  
24 27.17. Mitigation of damages; Property damage.  
25

26 If you decide [name of defendant] is responsible for the damage to [name of plaintiff]'s  
27 property, [name of plaintiff] is not entitled to recovery damages to his/her property that [name of  
28 defendant] proves [name of plaintiff] could have been avoided with reasonable efforts or  
29 expenditures.  
30

31 You should consider the reasonableness of [name of plaintiff]'s efforts in light of the  
32 circumstances facing him/her at the time, including his/her ability to make the efforts or  
33 expenditures without undue risk or hardship.  
34

35 If [name of plaintiff] made reasonable efforts to avoid harm, then your award should include  
36 reasonable amounts that he/she spent for this purpose.  
37

38  
39  
40 27.18. Punitive damages.  
41

42 You must not include in your award any damages to punish or make an example of [name of  
43 defendant]. Such damages would be punitive damages, and they cannot be a part of your verdict.  
44 You must award only the damages that fairly compensate [name of plaintiff] for [his/her/its] loss.  
45  
46

1  
2 27.19. Arguments of counsel not evidence of damages.  
3

4 The arguments of the attorneys are not evidence of damages. Your award must be based on  
5 the testimony of the witnesses and the other evidence that has been admitted during trial.  
6

7  
8  
9 27.20. Proof of damages.  
10

11 Before you may award damages, [name of plaintiff] must prove two points.  
12

13 First, he/she must prove that damages occurred. The evidence must do more than raise  
14 speculation that damages actually occurred; there must be a reasonable probability that [name of  
15 plaintiff] suffered damages from the Fault of [defendant].  
16

17 Second, [name of plaintiff] must prove the amount of damages. The level of evidence  
18 required to establish that damages actually occurred is generally higher than that required to  
19 establish the amount of damage.  
20

21 It is the wrongdoer, rather than the injured party, who should bear the burden of some  
22 uncertainty in the amount of damages. While the standard for determining the amount of  
23 damages is not so exacting as the standard for proving that damages actually occurred, there still  
24 must be evidence that rises above speculation and provides a reasonable, even though not  
25 necessarily precise, estimate of the amount of damages.  
26

27 If damages actually occurred, the amount of damages may be based upon reasonable  
28 approximations, assumptions or projections.  
29  
30

31  
32 Reference.  
33

34 Atkin Wright & Miles v. Mountain States Telephone & Telegraph Co., et al., 709 P.2d (Utah  
35 1985)  
36  
37  
38

39 27.21. Present cash value.  
40

41 If you decide that [name of plaintiff]'s damages includes future special damages, then the  
42 amount of those future damages must be reduced to their present cash value. This is necessary  
43 because money received now will, through investment, grow to a larger amount in the future.  
44

1 To find present cash value, you must determine the amount of money that, if reasonably and  
2 frugally invested today, will provide [name of plaintiff] with the amount of [his/her/its] future  
3 damages.

4  
5 [You may consider expert testimony in determining the present cash value of future  
6 economic damages.]  
7  
8  
9

10 27.22. Loss of consortium; Non-economic damage.

11  
12 [Name of plaintiff] claims that [he/she] has been harmed by the injury to [his/her]  
13 [husband/wife]. If you decide that [name of injured spouse] has proved the Fault of [name of  
14 defendant], you also must decide how much money, if any, will reasonably compensate [name of  
15 plaintiff] for loss of [his/her] [husband/wife]'s companionship and services, including:  
16

17 1. The loss of love, companionship, comfort care, assistance, protection, affection, society,  
18 moral support; and  
19

20 2. The loss of the enjoyment of sexual relations [or the ability to have children].  
21

22 [Name of plaintiff] may recover for harm [he/she] proves [he/she] has suffered and for harm  
23 [he/she] is reasonably likely to suffer in the future. No fixed standard exists for deciding the  
24 amount of these damages. You must use your judgment to decide a reasonable amount based on  
25 the evidence and your common sense.  
26  
27  
28

29 27.23. Settlement deduction.  
30

31 You have heard evidence that [name of plaintiff] has settled [his/her/its] claim against [name  
32 of settled party]. Your award of damages to [name of plaintiff] should be made without  
33 considering any amount that [he/she/it] may have received under this settlement. After you have  
34 returned your verdict, I will make any appropriate adjustment to your award of damages.  
35  
36  
37

38 27.24. Introduction to tort damages; Liability contested.  
39

40 If you decide that [defendant] is at Fault, you also must decide how much money will  
41 reasonably compensate [defendant] for the harm. This compensation is called "damages."  
42

43 The amount of damages must include an award for each item of harm that was caused by  
44 [plaintiff]'s Fault.  
45

1 [The damages claimed by [name of plaintiff] for the harm caused by [name of defendant] fall  
2 into two categories called economic damages and non-economic damages. You will be asked on  
3 the verdict form to state these damages.  
4

5  
6  
7 27.25. Introduction to tort damages; Liability established.  
8

9 [Name of defendant]’s responsibility for [name of plaintiff]’s claimed harm is not an issue  
10 for you to decide. You must only decide how much money will reasonably compensate [name of  
11 plaintiff] for the harm. This compensation is called “damages.”  
12

13 The amount of damages must include an award for each item of harm that was caused by  
14 [name of defendant]’s Fault.  
15

16 [The damages claimed by [name of plaintiff] for the harm caused by [name of defendant] fall  
17 into two categories called economic damages and non-economic damages. You will be asked on  
18 the verdict form to state these damages.  
19

20  
21  
22 27.26. Items of economic damage.  
23

24 The following are the specific items of economic damages claimed by [name of plaintiff]:  
25

26 [Insert applicable instructions on items of economic damage.]  
27  
28  
29

30 27.27. loss of ability to provide household services; Economic damage.  
31

32 The loss of [name of plaintiff]’s ability to provide household services.  
33

34 To recover damages for the loss of the ability to provide household services, [name of  
35 plaintiff] must prove the reasonable value of the services [he/she] would have been reasonably  
36 certain to provide to [his/her] household if the injury had not occurred.  
37  
38  
39

40 27.28. Loss of use of real property; Special damage.  
41

42 The loss of use of [name of plaintiff]’s [insert identification of real property].  
43

44 To recover damages for the loss of use, [name of plaintiff] must prove the reasonable cost to  
45 rent similar property for the reasonable time when [he/she] could not use [his/her/its] own  
46 property.

1  
2  
3  
4 27.29. Loss of use of personal property; Special damage.

5  
6 The loss of use of [name of plaintiff]'s [item of personal property].  
7

8 To recover damages for loss of use, [name of plaintiff] must prove the reasonable cost to rent  
9 a similar [item of personal property] for the amount of time reasonably necessary to repair or  
10 replace the [item of personal property].  
11

12  
13  
14 27.30. Damage to personal property; Special damage.

15  
16 The damage to [name of plaintiff]'s [item of personal property].  
17

18 To recover damages for damage to personal property, [name of plaintiff] must prove the  
19 reduction in the [item of personal property]'s value or the reasonable cost of repairing it,  
20 whichever is less.  
21

22 To determine the reduction in value, you must decide the fair market value of the [item of  
23 personal property] before the harm occurred and then subtract the fair market value of the [item  
24 of personal property] immediately after the harm occurred.  
25

26 "Fair market value" is the highest price that a willing buyer would have paid to a willing  
27 seller, assuming:  
28

29 1. That there is no pressure on either one to buy or sell; and  
30

31 2. That the buyer and seller are fully informed of the condition and quality of the [item of  
32 personal property].  
33

34 [If you find that [name of plaintiff]'s [item of personal property] cannot be completely  
35 repaired, the damages are the difference between its fair market value before the harm and its fair  
36 market value after the repairs have been made, plus the reasonable cost of making the repairs.  
37 The total amount awarded must not exceed the [item of personal property]'s fair market value  
38 before the harm occurred.]  
39  
40  
41

42 27.31. Loss or destruction of personal property; Special damage.

43  
44 The [loss/destruction] of [name of plaintiff]'s [ item of personal property].  
45

1 To recover damages for the [loss/destruction], [name of plaintiff] must prove the fair market  
2 value of the [item of personal property] just before the harm occurred.

3  
4 “Fair market value” is the highest price that a willing buyer would have paid to a willing  
5 seller, assuming,:

6  
7 1. That there is no pressure on either one to buy or sell; and

8  
9 2. That the buyer and seller are fully informed of the condition and quality of the [item of  
10 personal property].

11  
12  
13  
14 27.32. Lost profits; Special damage.

15  
16 To recover damages for lost profits, [name of plaintiff] must prove it is reasonably certain  
17 [he/she] would have earned profits but for [name of defendant]’s Fault.

18  
19 To determine lost profits, you must decide the gross amount [name of plaintiff] would have  
20 received were it not for [name of defendant]’s Fault and then subtract from that amount the  
21 expenses [including the value of the [specify categories of evidence, such as  
22 labor/materials/rents/all expenses/interest of the capital employed]] [name of plaintiff] would  
23 have had if [name of defendant]’s Fault had not occurred.

24  
25 The amount of the lost profits need not be calculated with mathematical precision, but there  
26 must be a reasonable basis for computing the loss.

27  
28  
29  
30 27.33. Present cash value.

31  
32 If you decide that [name of plaintiff]’s damages includes future special damages, then the  
33 amount of those future damages must be reduced to their present cash value. This is necessary  
34 because money received now will, through investment, grow to a larger amount in the future.

35  
36 To find present cash value, you must determine the amount of money that, if reasonably and  
37 frugally invested today, will provide [name of plaintiff] with the amount of [his/her/its] future  
38 damages.

39  
40 [You may consider expert testimony in determining the present cash value of future  
41 economic damages.]

42  
43  
44  
45 27.34. Items of non-economic damage.

1 The following are the specific items of non-economic damages claimed by [name of  
2 plaintiff]:

3  
4 [Insert applicable instructions on items of noneconomic damage.]  
5  
6  
7

8 27.35. Loss of consortium; Non-economic damage.  
9

10 [Name of plaintiff] claims that [he/she] has been harmed by the injury to [his/her]  
11 [husband/wife]. If you decide that [name of injured spouse] has proved the Fault of [name of  
12 defendant], you also must decide how much money, if any, will reasonably compensate [name of  
13 plaintiff] for loss of [his/her] [husband/wife]'s companionship and services, including:  
14

15 1. The loss of love, companionship, comfort care, assistance, protection, affection, society,  
16 moral support; and  
17

18 2. The loss of the enjoyment of sexual relations [or the ability to have children].  
19

20 [Name of plaintiff] may recover for harm [he/she] proves [he/she] has suffered and for harm  
21 [he/she] is reasonably likely to suffer in the future. No fixed standard exists for deciding the  
22 amount of these damages. You must use your judgment to decide a reasonable amount based on  
23 the evidence and your common sense.  
24  
25  
26

27 27.36. Collateral source payments.  
28

29 You shall award damages in an amount that fully compensates plaintiff for damages as I have  
30 instructed you. You shall not speculate or consider any other possible sources of benefit the  
31 plaintiff may have received. [Do not consider whether or not [name of plaintiff] received  
32 workers' compensation benefits for [his/her] injuries.] After you have returned your verdict the  
33 court will make whatever adjustments may be appropriate.  
34  
35  
36  
37

## MEMORANDUM

**TO: Frank Carney**

**FROM: Jonathan G. Jemming**

**SUBJECT: Utah Law of Proximate Cause, etc.**

---

### I. Proximate Cause in Utah

- “Proximate cause is ‘that cause which in the natural and continuous sequence [ ] (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.’” *Mahmood v. Ross*, 990 P.2d 933, 938 (Utah 1999)(quoting *Harline v. Barker*, 912 P.2d 433, 439 (Utah 1996)(citations omitted)).
- See also *Bansanine v. Bodell*, 927 P.2d 675, 676 (Utah App. 1996).

#### A. Foreseeability

- “What is necessary to meet the test of negligence and proximate cause is that it be reasonably foreseeable, not that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature.” *Rees v. Albertson’s, Inc.*, 587 P.2d 130, 133 (Utah 1978).
- See also *Steffensen v. Smith’s*, 862 P.2d 1342, 1346 (Utah 1993).
- In context of the foreseeability of product misuse, see *Allen v. Minnstar, Inc.*, 97 F.3d 1365, 1369 (10<sup>th</sup> Cir. 1996)(using *Harline* to determine how Utah law would fall in products liability context.).

#### B. Intervening, Superseding and Concurrent Causes

- “Utah courts have consistently recognized that ‘a more recent negligent [or criminal/intentional] act may . . . relieve the liability of a prior negligent actor under the proper circumstances.’” *Bansanine v. Bodell*, 927 P.2d 675, 677 (Utah App. 1996)(quoting *Steffensen v. Smith’s*, 820 P.2d 482, 488 (Utah App. 1991), aff’d, 862 P.2d 1342 (Utah 1993). These circumstances arise when the more recent negligent or criminal act was *unforeseeable* to the first negligent actor. *Id.* (emphasis added).
- Under law of superseding causation, a person’s negligence is not superseded by negligence of another if subsequent negligence of another is foreseeable to original actor. *McCorvey v. Utah State Dept. of Transp.*, 868 P.2d 41 (Utah 1993).
- If the subsequent criminal or negligent act was “foreseeable to the prior actor, both acts are *concurring causes* and the prior actor is not absolved of liability.” *Id.*; see also *Mitchell v. Pearson Enters.*, 697 P.2d 240, 246 (Utah 1985).

