

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

October 18, 2004
4:00 to 6:00 p.m.

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

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

November 8, 2004
December 13, 2004
January 10, 2005
February 14, 2005
March 14, 2005
April 11, 2005
May 9, 2005
June 13, 2005
July 11, 2005
August 8, 2005
September 12, 2005
October 17, 2005 (3rd Wednesday)
November 14, 2005
December 12, 2005

MINUTES

Advisory Committee on Model Civil Jury Instructions

September 13, 2004

4:00 p.m.

Present: John L. Young (chair), Timothy M. Shea, Juli Blanch, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Marianna Di Paolo, Paul M. Simmons, David E. West, Jonathan G. Jemming

Excused: Honorable William W. Barrett, Jr., Ralph L. Dewsnup, Colin P. King

1. *Minutes*. On motion of Mr. Ferguson, seconded by Mr. West, the committee approved the minutes of the August 9, 2004, meeting.

2. *Draft Preliminary and General Instructions*. The committee continued its review of the draft instructions prepared by Mr. Ferguson's subcommittee that Mr. Ferguson revised in light of the discussion at the last meeting:

a. *1.10. Multiple Parties*. The committee approved revised MUJI 1.10.

b. *2.23. Discontinuance as to Some Defendants*. The committee discussed whether to include the last sentence, informing the jury that they must still decide whether fault should be allocated to dismissed defendants. Mr. Humpherys pointed out that the last sentence may not apply if a defendant is dismissed on a directed verdict, for lack of evidence. Mr. Shea suggested that the last sentence be deleted from 2.23 and added in substance to the instruction on allocating fault to nonparties. Mr. Young suggested that 2.23 needs to be given as soon as a defendant is dismissed from the case, so that the jury does not wonder why there is an empty chair at trial, in which case the jury also needs to know that it may still have to allocate fault to the absent defendant. The committee decided to bracket the last sentence and add a statement to the comment informing the court that it should not give the last sentence if an allocation of fault to the dismissed defendant is not appropriate under applicable law.

c. *2.24. Settling Defendants in Multi-party Cases*. The committee changed the last paragraph to read:

Because the plaintiff and [the settling defendant(s)] are no longer adversaries, you may consider the settlement in deciding how believable a witness is. In other words, you may consider whether the change in adversary status has any bearing on the witness's believability.

Mr. Young suggested that, because 2.23 and 2.24 refer to allocation of fault but will be given before the jury is instructed on allocation of fault, there should be a preliminary instruction explaining allocation of fault generally.

Mr. Ferguson will add a paragraph to preliminary instruction 1.3 explaining the jury's role in allocating fault.

d. *2.28. Selection of Jury Foreperson and Return of Verdict.* Mr. Ferguson recommended deleting instructions 2.7 and 2.25 and replacing them with revised 2.28. Mr. Shea suggested changing the title to read "and Deliberation" instead of "and Return of Verdict." Mr. Carney suggested deleting "in a few moments" in the first line. Mr. Young suggested changing "becomes" to "is" in the first line of the third paragraph. Dr. Di Paolo suggested changing "beneficial" to "helpful" in the last paragraph. Mr. Carney asked whether it was an accurate statement of the law to say that jurors had a duty to deliberate. After some discussion, the committee agreed that the instruction was probably an accurate statement of the law. Mr. Carney and other members of the committee would prefer a better term than "foreperson," but no one could come up with a better term. Mr. West and Dr. Di Paolo thought that most jurors would understand the term from watching legal dramas on television. Mr. Carney thought that the last paragraph did not emphasize strongly enough the jurors' responsibility to listen to all opinions before making up their minds. He expressed a preference for JIFU 1.8.

Mr. Ferguson will try to incorporate some of the language from JIFU 1.8 into 2.28.

e. *2.26. Resort to Chance.* The committee changed the second sentence to read, "For example, you are not to flip a coin to make a decision." The committee also added "damages" after "recover" in the first line of the second paragraph and deleted the phrase "after due consideration" from that paragraph.

f. *2.27. Agreement on Special Interrogatories.* The committee changed the first line of the second paragraph to read: "Because this is not a criminal case, your verdict does not have to be unanimous. But at least six jurors must agree on the answer to each question"

3. *Other.* Mr. Carney suggested that when the instructions are completed the committee try them out on focus groups. Dr. Di Paolo suggested that the focus groups could be selected from prospective jurors who are summoned to court but not selected to participate as jurors that day.

4. *Next Meeting.* The next meeting will be Monday, October 18, 2004, at 4:00 p.m. *Note:* This is the third Monday in October, not the second Monday. At the next meeting, the committee will review the provisions regarding allocation of fault that Mr. Ferguson will add to revised instruction 1.3 as well as review the instructions on statements of opinion, burden of proof and clear and convincing evidence. When the preliminary and general instructions are

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completed, Mr. Shea will put them together so that the committee can review the order of the instructions.

The meeting concluded at 5:55 p.m.

REVISED MUJI 1.3

ORDER OF TRIAL

The trial will generally proceed as follows:

1. *Opening statements.* The lawyers will make opening statements outlining what the case is about and what they think the evidence will show.
2. *Presentation of Evidence.* The plaintiff will offer evidence first, followed by the defendant. The parties may offer more evidence, called rebuttal evidence, after hearing the witnesses and seeing the exhibits.
3. *Instructions on the Law.* After the evidence has been fully presented, I will instruct you on the law you must apply. You must obey the instructions. You are not allowed to reach decisions that go against the law.
4. *Closing Arguments.* The lawyers will then summarize and argue the case. They will share with you their views of the evidence, how it relates to the law and how they think you should decide the case.
5. *Jury Deliberations.* The final step is for you to go to the jury room and discuss the case among yourselves until you reach a verdict. I will give you more instructions about that step at a later time.
6. *Allocation of Fault.* In almost every case the plaintiff says that the defendant is 100% at fault and the defendant says that the plaintiff is 100% at fault. Sometimes there are multiple plaintiffs and/or multiple defendants, each one claiming that the others are at fault for [the accident] [the injuries] [the sequence of events] leading to this lawsuit. As an important part of the deliberative process you will be asked to decide how much fault should be allocated to each party. Fault is allocated on a percentage basis. Thus, you may decide that one party should receive 100% of the fault, or that each party should receive a percentage of fault. You alone decide whether a particular party should receive no, some, most or all of the fault. However, the total amount of fault you allocate to all of the parties must equal 100%.

REVISED MUJI 2.23

DISCONTINUANCE AS TO SOME DEFENDANTS

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

Comment:

The court should explain the reasons why the defendants have been dismissed to the extent possible.

If allocation of fault to the dismissed parties is not appropriate under applicable law the final sentence should not be read.

REVISED MUJI 2.24

SETTLING DEFENDANTS IN MULTI-PARTY CASES

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

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

Because the plaintiff and [the settling defendant(s)] are no longer adversaries, you may consider the settlement in deciding how believable a witness is. In other words, you may consider whether the change in adversary status has any bearing on the witness's believability.

Comment:

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

REVISED MUJI 2.25

JURORS TO DELIBERATE AND AGREE IF POSSIBLE

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

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

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

Comment:

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

REVISED MUJI 2.26

RESORT TO CHANCE

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

If you decide that a party is entitled to recover damages, 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 come to an agreement on the amount to be awarded. It is unlawful for you to agree in advance to average the independent estimates of each juror.

REVISED MUJI 2.27

AGREEMENT ON SPECIAL INTERROGATORIES

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

Because this is not a criminal case, your verdict does not have to be unanimous. But at least six jurors must agree on the answer to each question, although they need not be the same six on each question. As soon as six or more of you have agreed on the answer to each question, have the verdict signed and dated by your foreperson and tell the bailiff you have finished. The bailiff will escort you back to this courtroom; you should bring the completed Special Verdict with you.

REVISED MUJI 2.28

SELECTION OF JURY FOREPERSON AND DELIBERATION

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

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

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

Your attitude and conduct during discussions are extremely important. As you begin your discussions, it is not productive or helpful to say that your mind is already made up. Do not announce that you are determined to vote a certain way or that your mind cannot be changed. You each must decide the case for yourself, but only after discussing the case with your fellow jurors. You should not hesitate to change an opinion when convinced that it is wrong. Likewise, you should not surrender your honest convictions just to end the deliberations or to agree with other jurors.

Comment:

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

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.

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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.

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4
5
6 References.

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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
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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.
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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
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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
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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.

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21
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23 References.

24 JIFU No. 90.36 (1957)

25 BAJI No. 14.69 (Supp. 1992). Reprinted with permission; copyright © 1986 West
26 publishing Company

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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.

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)

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29 Publishing Company.

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

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

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

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

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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)

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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 (10th 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).

MEMORANDUM

To: Phillip Ferguson

From: Jonathan Jemming

Re: Clear and Convincing and Preponderance Standards

I was asked by the committee to determine the law underpinning the clear and convincing and preponderance of the evidence standards. In particular, I was asked to determine whether there is any quantitative or numeric allocation of proof behind the standards. I will address the standards in turn:

First, there is not a quantitative formula behind the clear and convincing standard. However, there is a fairly consistent restatement of it in Utah caselaw. Under *Greener v. Greener*, for a matter to be “clear and convincing” to a particular mind it must at least have reached the point where there remains no serious or substantial doubt as to the correctness of the conclusion. 212 P.2d 194 (Utah 1949); *see also Kirchgestner v. Denver & R.G.W.R. Co.*, 233 P.2d 699 (Utah 1951). In *Jardine v. Archibald*, the Utah supreme court articulated that proof is convincing and clear which carries with it not only the power to persuade the mind as to probable truth or correctness of fact it purports to prove, but has element of clinching such truth or correctness, and for a matter to be clear and convincing to a particular mind it must at least have reached a point where there remains no serious or substantial doubt as to the correctness of the conclusion. 279 P.2d 454 (Utah 1955)(*criticized on other grounds by In re Swan’s Estate*, 293 P.2d 682 (Utah 1956)).

Second, there is also no numeric criterion articulated for the preponderance standard. However, its restatement in Utah caselaw is consistent. Under *Alvarado v.*

Tucker, “preponderance of the evidence” means the greater weight of the evidence or such degree of proof that the greater probability of truth lies therein. 268 P.2d 986 (Utah 1954). In *Alvarado*, the Utah supreme court found that a choice of probabilities creates only a basis for conjecture, on which a verdict cannot stand, and does not meet the requirement of a “preponderance of the evidence.” *Id.* Under *Morris v. Farmers Home Mut. Ins. Co.*, the Utah supreme court held that proof by preponderance requires that evidence be such that reasonable minds acting fairly thereon could believe that the existence of fact is more probable or more likely than its nonexistence, so that person of ordinary prudence could believe fact with sufficient assurance to act upon it in relation to matters of serious concern in his own affairs. 500 P.2d 505 (Utah 1972).

Thus, while neither standard carries a quantitative or numeric value, the law in the area has remained consistent over time.