

AGENDA  
ADVISORY COMMITTEE  
ON MODEL CIVIL JURY INSTRUCTIONS

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

December 12, 2005  
4:00 TO 6:00 P.M.

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

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

January 9, 2006  
February 13, 2006  
March 13, 2006  
April 10, 2006  
May 8, 2006  
June 12, 2006  
July 10, 2006  
August 14, 2006  
September 11, 2006  
October 9, 2006  
November 13, 2006  
December 11, 2006

Committee Web Page: <http://www.utcourts.gov/committees/muji/>

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

November 14, 2005

4:00 p.m.

Present: Honorable William W. Barrett, Jr., Paul M. Belnap, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, Tracy H. Fowler

Mr. Young called the meeting to order.

*Damage Instructions.* Mr. Young discussed with the committee the idea of including a definition of economic and non-economic damages in the first instruction on damages as a way of introducing the concepts. He observed that the instructions contain a series of examples of economic and non-economic damages, but not a definition. The committee agreed that defining the terms is a good idea. Mr. Shea will provide a draft at the next meeting.

The committee reviewed the following damage instructions:

1. *15.119. Personal injury damages. Present cash value.* The committee debated whether to add a sentence to the committee note stating that there must be expert testimony to support giving the instruction. Mr. Carney noted that the California instruction states that expert testimony is usually required, unless there are tables. Mr. Young questioned what table or tables could be used and how they would get into evidence. Mr. Young thought that the issue was one of evidence and was beyond the scope of the instructions and comments. Mr. Carney asked whose burden it is to put on evidence of present value. Mr. King joined the meeting. Mr. Humpherys noted that the committee cannot resolve these issues but should alert attorneys to them. He suggested adding to the advisory committee note a statement to the effect that there is no Utah law on whether expert testimony, government tables or other competent evidence is required before the instruction can be given. Mr. Carney volunteered to research the issue. Mr. Carney also reviewed the cases cited in the advisory committee note and concluded that they were not controlling or helpful, so the committee decided to strike the case discussions. *Bennett v. Denver & Rio Grande Western R. Co.*, 213 P.2d 325 (Utah 1950) is more on point. Mr. Ferguson suggested that *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322, 110 P.3d 710, *cert. denied* (Utah 2005), might also be relevant. Mr. Jemming suggested striking “and frugally” from the last paragraph. The committee decided to replace references to frugality with references to safety. The committee also deleted the phrase “not necessarily risk free.” Mr. Young thought the last phrase referring to the effects of inflation was confusing. The committee struck it. The last paragraph now reads:

To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely

invested, will provide [name of plaintiff] with the amount of money needed to compensate [name of plaintiff] for future economic losses. In making your determination, you should consider the earnings from a reasonably safe investment.

**Mr. Shea will revise the advisory committee note. Mr. Carney will research further what evidence is required before the instruction should be given.**

2. *15.120. Introduction to tort damages. Liability established.* Mr. King noted that, more often than not, when liability is established at trial it is by stipulation and not by the court. Mr. West suggested revising the introductory phrase to read, "It has been determined . . ." Mr. Young suggested putting alternative openings in brackets, which could be used depending on whether liability was established by a directed verdict, a pretrial ruling or stipulation. The committee agreed that the instruction should follow 15.101 ("Introduction to tort damages. Liability contested").

3. *15.121. Loss of use of personal property. Economic damage.* Mr. Humpherys suggested taking out the bracketed sentence before the numbered subparagraphs. Mr. Young and others noted that subparagraph (1) really covered two different items--rental value and lost income. The committee agreed to separate them into two subparagraphs and to revise the last sentence of the first paragraph to read, "You may consider the following factors [as applicable]:" At Mr. Shea's suggestion, the phrase "under all the circumstances" was deleted from the first paragraph. Mr. Ferguson noted that general damages are not allowed for loss of use of personal property.

4. *15.122. Damage to personal property. Economic damage.* Mr. Jemming suggested that 15.122 precede 15.121. Mr. Shea suggested adding "reasonably" before "restore." Mr. King noted that "reasonably" may not place the plaintiff in the position he was in before the damage. Mr. Jemming suggested "restore to the extent possible." The committee had the same objection to "to the extent possible." The committee decided not to modify "restore." Mr. Ferguson noted that the instruction uses "damage" and "damages" interchangeably. The instruction was revised to use "damage" to refer to injury to property and "damages" to refer to money damages awarded for injury to property. Mr. King and Mr. West suggested revising the second sentence of the second paragraph to read: "If the property can be repaired to its condition before the damage, then the measure of damages is the difference in fair market value immediately before and immediately after the damage or the cost of repair, whichever is less."

**Mr. Shea will revise the instruction in light of the committee's discussion.**

5. *15.123. Collateral source payments.* At Mr. Ferguson's suggestion, the reference to the medical malpractice statute (section 78-14-4.5) was deleted. Mr. King hoped that the

instruction would not preclude a plaintiff from raising the issue of collateral sources with the jury and from informing the jury of the plaintiff's responsibility to repay from any damages awarded such collateral source payments as workers' compensation. The committee agreed that that issue was beyond the scope of the instruction. The instruction was approved.

6. 15.124. "*Fair market value*" defined. Mr. Ferguson and Mr. Carney noted that the relevant market is an issue of fact. Mr. Simmons suggested moving the instruction to follow 15.122 ("Damage to personal property. Economic damage").

7. 15.117. *Arguments of counsel not evidence of damages*. Mr. Shea questioned whether the instruction was necessary, since it is also covered in the preliminary instructions on what is evidence. The committee agreed that it would be good to repeat the idea in the damage instructions.

Mr. Humpherys asked what damage instructions remain. He suggested instructions on loss of consortium and real property but wondered if the real property instructions would be covered by another subcommittee.

**Mr. West volunteered to draft an instruction on damage to real property.**

Mr. Belnap noted that the committee also needs to review punitive damage instructions. Mr. Carney suggested an instruction on loss of chance but withdrew his suggestion, noting that it would be covered in the medical malpractice instructions.

The meeting concluded at 6:00 p.m.

*Next Meeting.* The next meeting will be Monday, December 12, 2005, at 4:00 p.m. The items to be covered at the next meeting include a review of damage instructions 15.103, 15.104, 15.114, 15.115 and 15.118 and the employment law instructions.

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Second Edition  
Working Draft: December 6, 2005  
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**15.101. Introduction to tort damages. Economic and non-economic damages introduced.**

[I have decided] [The parties have stipulated] [If you decide] that [name of defendant's] fault caused [name of plaintiff]'s harm[.][.] You must decide how much money will fairly and adequately compensate [name of plaintiff] for that harm. To compensate [name of plaintiff] you may award the amount of money that you determine will restore [name of plaintiff] to the same position had there been no harm. There are two kinds of damages: economic damages and non-economic damages.

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

27.01.

**References.**

**Advisory Committee Notes.**

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

The Advisory Committee recommends that the terms "special" and "general" damages not be used and that the terms "economic" and "non-economic" damages are more descriptive, but are intended to describe the same things.

**Staff Notes.**

**Status.** Contested liability merged with stipulated liability. Sentence 3 moved from 15.109. Otherwise approved November 14, 2005

**15.102. Economic damages defined.**

Economic damages is the amount of money that will adequately compensate [name of plaintiff] for measurable pecuniary losses caused by [name of defendant]'s fault. Economic damages arise from the special circumstances of the case.

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

**References.**

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

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

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

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

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

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

You may consider whether the consequences of these injuries will, by a preponderance of the evidence, be likely to continue in the future and for how long. If so, you should award such damages as will fairly and adequately compensate [name of plaintiff].

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

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

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

27.02.

**References.**

**Advisory Committee Notes.**

**Staff Notes.**

**Status.** Renumbered and Paragraph 1 added. Otherwise approved June 13, 2005

**15.104. Proof of damages.**

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

First, he must prove that damages occurred. The evidence must do more than raise speculation that damages actually occurred; there must be a reasonable probability that [name of plaintiff] suffered damages from [name of defendant]'s fault.

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

It is [name of defendant], rather than [name of plaintiff], who bears the burden of some uncertainty in the amount of damages. While the standard for determining the amount of damages is not so exacting as the standard for proving that damages actually occurred, there still must be evidence that rises above speculation and provides a reasonable, even though not necessarily precise, estimate of the amount of damages.

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

None.

**References.**

Atkin Wright & Miles v. Mountain States Telephone & Telegraph Co., et al., 709 P.2d 330, 336 (Utah 1985)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.** Changes from October 17, 2005

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

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

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

[Lost earning capacity is not the same as lost earnings. Lost earning capacity means the lost potential to earn increased income. In determining lost earning capacity, you should consider: (1) [name of plaintiff]'s actual earnings; (2) his work before and after [describe event]; (3) what he was capable of earning had he not been injured; and (4) any other facts that relate to employment.]

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

27.04; 27.05.

**References.**

Dalebout v. Union Pacific R. Co., 980 P.2d 1194, 1200 (Ut. App. 1999)  
Corbett v. Seamons dba Big O Tire, 904 P.2d 232, N.2 (Ut. App. 1995)  
Utah Code Section 78-27-44

**Advisory Committee Notes.**

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

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

**Staff Notes.**

**Status.** Changes from November 14, 2005

**15.107. Non-economic damages. Lost earnings. [Lost earning capacity.]**

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

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

[Lost earning capacity is not the same as lost earnings. Lost earning capacity means the lost potential to earn increased income. In determining lost earning capacity, you should consider: (1) [name of plaintiff]'s actual earnings; (2) his work before and after [describe event]; (3) what he was capable of earning had he not been injured; and (4) any other facts that relate to employment.]

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

27.04; 27.05.

**References.**

Dalebout v. Union Pacific R. Co., 980 P.2d 1194, 1200 (Ut. App. 1999)  
Corbett v. Seamons dba Big O Tire, 904 P.2d 232, N.2 (Ut. App. 1995)  
Utah Code Section 78-27-44

**Advisory Committee Notes.**

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

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

**Staff Notes.**

**Status.** Changes from November 14, 2005

**15.109. Economic damages. Injury to personal property.**

Economic damages include injury to or destruction of [name of plaintiff]'s [item of personal property].

The damages to be awarded for injury to personal property is the difference in the fair market value of the item immediately before and immediately after the injury, unless the property can be repaired for a lesser amount. If the property can be repaired for a lesser amount, then the damages would be the reasonable cost of repair.

If you find that the repairs do not restore the item to the same value as before the injury, you may award the difference between its fair market value before the injury and its fair market value after the repairs, plus the reasonable cost of making the repairs. The total amount awarded must not exceed the [item of personal property]'s fair market value before the injury occurred.

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

27.13; 27.14.

**References.**

Ault v. Dubois, 739 P.2d 1117 (Utah Ct. App. 1987)  
Winters v. Charles Anthony, Inc., 586 P.2d 453 (Utah 1978)

**Advisory Committee Notes.**

If the property has no fair market value, use the first paragraph only.

**Staff Notes.**

Second sentence of Para 1 moved to 15.101. I have replaced "damage" to the property with "injury" to the property.

**Status.** Approved November 14, 2005

**15.110. Economic damages. Injury to real property.**

Economic damages include injury to [name of plaintiff]'s real property.

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

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

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

27.16; 27.17

**References.**

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

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**15.111. "Fair market value" defined.**

Fair market value is the highest price that a willing buyer would have paid to a willing seller, assuming that there was no pressure on either one to buy or sell; and that the buyer and seller were fully informed of the condition and quality of the [item of personal property].

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

27.19.

**References.**

**Advisory Committee Notes.**

**Staff Notes.**

**Status.** Approved November 14, 2005

**15.112. Economic damages. Loss of use of personal property.**

To compensate [name of plaintiff] for loss of use of [item of personal property], you may award [name of plaintiff] the amount you determine will restore [name of plaintiff] to the same position [name of plaintiff] was in prior to the damage. You may consider the following factors [as applicable]:

(1) The rental value of the [item of personal property].

(2) The lost income, meaning the income [name of plaintiff] would likely have earned through using the [item of personal property].

(3) What [name of plaintiff] reasonably spent to decrease the damage.

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

27.15.

**References.**

Castillo v. Atlanta Casualty Co., 939 P.2d 1204, 1209 (Utah Ct. App. 1997)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.** Approved November 14, 2005

**15.115. Survival claim.**

If you find that:

- (1) [name of decedent] died from injuries caused by [name of defendant]'s fault, and
  - (2) [name of decedent] lived for a period of time after the [circumstances of claim];
- then you should award [name of decedent]'s economic and non-economic damages.

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

None.

**References.**

Utah Code Sections 78-11-7 through 78-11-12  
In re Behm's Estate, 117 Utah 151, 213 657 (1950)  
Allen v. United States, 558 F. Supp. 247 (D. Utah 1984)  
Platis v. United States, 288 F. Supp 254 (D. Utah 1968), aff'd, 409 F.2d 1009 (10th Cir. 1969)

**Advisory Committee Notes.**

There is no Utah law at the time this was drafted regarding the meaning of "survival," and whether the decedent must be conscious to bring a survival action.

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

**Staff Notes.**

**Status.**

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

Even if you find that [name of defendant]'s fault caused [name of decedent]'s injuries, if you also find that [name of decedent]'s death was from a cause other than [name of defendant]'s fault, you may not award [name of decedent]'s non-economic damages. You may award only [name of decedent]'s economic damages that were caused by [name of defendant]'s fault.

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

None.

**References.**

Utah Code Section 78-11-12

**Advisory Committee Notes.**

This instruction applies only to a claim made under Utah Code Section 78-11-12, in which the cause of death is contested.

**Staff Notes.**

**Status.**

### **15.121. Present cash value.**

If you decide that [name of plaintiff] is entitled to damages for future economic losses, then the amount of those damages must be reduced to present cash value. This is because any damages awarded would be paid now, even though the plaintiff would not suffer the economic losses until some time in the future. Money received today would be invested and earn a return or yield.

To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely invested, will provide [name of plaintiff] with the amount of money needed to compensate [name of plaintiff] for future economic losses. In making your determination, you should consider the earnings from a reasonably safe investment.

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

27.11.

### **References.**

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

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

### **Advisory Committee Notes.**

Utah law is silent on whether inflation should be taken into account in discounting an award for future damages to present value. The United States Supreme Court, however, has ruled that inflation should be taken into account in discounting to present value. See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983).

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

There are several Utah cases holding that the burden is on the defendant to show that a damage award should be reduced, but they deal with failure to mitigate, not

reduction to present value. See *Covey v. Covey*, 2003 UT App 380, 29, 80 P.3d 553; *John Call Eng'g, Inc. v. Manti City Corp.*, 795 P.2d 678, 680 (Utah Ct. App. 1990).

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

**Staff Notes.**

**Status.** Changes from November 14, 2005

**15.124. Collateral source payments.**

You shall award damages in an amount that fully compensates [name of plaintiff]. Do not speculate on or consider any other possible sources of benefit [name of plaintiff] may have received. After you have returned your verdict, I will make whatever adjustments may be appropriate.

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

14.16.

**References.**

Mahana v. Onyx Acceptance Corp., 2004 UT 59 P37, P39, 96 P.3d 893, 901

**Advisory Committee Notes.**

**Staff Notes.**

**Status.** Approved November 14, 2005

**18.100. Employer and employee rights.**

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

**References.**

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.101. Definition of employment contract.**

A contract of employment is an agreement by which one person, called the employer, engages another person, called the employee, to do something for the benefit of the employer or a third person for which the employee is to receive compensation. The contract may be written or oral. An oral contract is as valid and enforceable as a written contract.

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

**References.**

BAJI 10.00 (1987 New)

California Jury Instruction 10.57

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

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.102 Corporation as person.**

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

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

**References.**

Utah Constitution, Art. 12, Section 4

Utah Code Section 25-6-2

Utah Code Section 26-20-2

Utah Code Section 26-21-2

Utah Code Section 32A-1-105

Utah Code Section 34A-5-102

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

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

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

**References.**

Same sources as cited in existing instruction 18.2

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

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

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

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

(1) the employer intended that the employee's employment would include [describe terms in dispute]; and

(2) the employer communicated its intent to the employee; and

(3) the communication was sufficiently clear and definite to create a reasonable belief by the employee that his employment would include [describe terms in dispute].

Evidence of the employer's intention may be derived from the employment manuals, oral agreements, the conduct of the parties, announced personnel policies, practices of a particular trade or industry, and other circumstances. However, an implied contract cannot contradict a written contract term.

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

**References.**

Same as existing instruction 18.5 and 18.6, as modified  
Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980)  
Arnold v. B.J. Titan Services Co., 783 P.2d 541 (Utah 1989)  
Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044, 1044-45 (Utah 1989)  
Gilmore v. Community Action Program, 775 P.2d 940, 942 (Utah App. 1989)  
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah 2000)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.105. Breach of employment contract.**

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

**References.**

Similar to existing instruction 18.9

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

Sanderson v. First Security Leasing Co., 844 P.2d 303, 306-07 (Utah 1992)

Lowe v. Sorensen Research Co., 779 P.2d 668, 670 (Utah 1989)

Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044-45 (Utah 1989)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

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

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

**References.**

Same sources cited in existing instruction 18.3

Fox v. MCI, 931 P.2d 857, 859 (Utah 1997)

Rackley v. Fairview Care Centers, Inc., 970 P.2d 277, 280 (Utah App. 1998)

Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 400 (Utah 1998)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.107. Rebutting the presumption of at-will employment.**

(1) there is an express or implied agreement that the employment relationship may be terminated only for cause or upon satisfaction of another agreed-upon condition; or

(2) the termination violated clear and substantial public policy; or

(3) a statute limits the employer's right to terminate the employee.

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

**References.**

Same Sources cited in existing instruction 18.4

Fox v. MCI Communications, Corp., 931 P.2d 857, 859 (Utah 1997)

Ryan v. Dan's Food Stores, Inc., 972 P.2d 395, 400 (Utah 1998)

Burton v. Exam Center Industrial & General Medical Clinic, Inc., 994 P.2d 1261, 1264 (Utah 2000)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.108. Rebutting the "at-will" presumption through an express or implied agreement.**

This requires the employee to establish that:

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

(2) the employer communicated its intent to the employee; and

(3) the communication was sufficiently clear and definite to create a reasonable belief by the employee that [his/her] the employment could not be terminated "at-will."

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

18.05; 18.06.

**References.**

Same as existing instruction 18.5 and 18.6, as modified  
Arnold v. B.J. Titan Services Co., 783 P.2d 541, 543-44 (Utah 1989)  
Gilmore v. Community Action Program, 775 P.2d 940, 942 (Utah App. 1989)  
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1121 (D. Utah  
2000)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

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

You must consider the intent of the parties to create an employment contract that could not be terminated "at-will" and the circumstances of employment as a whole. Evidence of the employer's intention may be derived from the employment manuals, oral statements, the conduct of the parties, announced personnel policies, practices of a particular trade or industry, and other circumstances.

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

18.05; 18.06.

**References.**

Same as existing instruction 18.5 and 18.6, as modified  
Arnold v. B.J. Titan Services Co., 783 P.2d 541, 543-44 (Utah 1989)  
Gilmore v. Community Action Program, 775 P.2d 940, 942 (Utah App. 1989)  
Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119 (D. Utah 2000)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.110. Public policy wrongful discharge.**

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

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

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

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

**References.**

Ryan v. Dan's Food Stores, Inc. 972 P.2d 395, 404 (Utah 1998)  
Gottling v. P.R. Inc., 61 P.3d 989 (Utah 2002)

**Advisory Committee Notes.**

Whether a claimed public policy is sufficiently clear and substantial enough to give rise to a claim is a matter of law to be decided by the court.

**Staff Notes.**

**Status.**

**18.111. Public policy wrongful discharge. Shifting burdens.**

If an employee establishes the four factors listed in Instruction 18.10, then the burden shifts to the employer to provide evidence of a legitimate reason for the discharge. If the employer provides evidence of a legitimate reason for the discharge, then the burden shifts back to the employee to prove that the employee's conduct implicating the public policy was a substantial factor in the discharge of the employee.

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

**References.**

Ryan v. Dan's Food Stores, Inc. 972 P.2d 395, 405 (Utah 1998)  
Barela v. C.R. England & Sons, 197 F.3d 1313, 1316 (10th Cir. 1999)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

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

An at-will employment contract may be modified prospectively by writings, conduct, or oral statements of the employer. When an employer communicates to the employee new policies, procedures or other terms or conditions of employment and the employee chooses to continue the employment, a new or modified employment contract is formed. The new terms of the modified employment contract supersede the prior terms.

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

**References.**

Johnson v. Kimberly Clark Worldwide, Inc., 86 F. Supp. 2d 1119, 1122 (D. Utah 2000)

Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1313 (Utah App. 1994)

Sorenson v. Kennecott-Utah Copper, Corp., 873 P.2d 1141, 1148 (Utah App. 1994)

Sanderson v. First Security Leasing Co., 844 P.2d 303, 306-07 (Utah 1992)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.113. Implied covenant of good faith and fair dealing.**

The law implies into every contract a promise, also called a covenant, that neither party to the contract will take any action intended to deprive the other party of the benefit of the contract. This promise is implied because the law puts it into all contracts, even though the parties never discussed it. This implied promise is called the "covenant of good faith and fair dealing," which imposes a duty on both parties to a contract to act in good faith toward each other. Good faith means honesty in fact and behavior in such a way as to allow both parties to obtain the benefits for which they contracted.

To comply with the obligation to perform a contract in good faith, a party's expectation must be consistent with the agreed common purpose and the justified expectation of the other party. The purpose, intentions and expectations of the parties should be determined by considering the contract language and the course of dealings between the parties. If one party to a contract has discretion in a contract, that party must exercise that discretion reasonably and in good faith.

A breach of the covenant of good faith and fair dealing occurs whenever one party acts in bad faith toward the other party and deprives the other party of the expected benefits of the contract. Furthermore, a breach of this covenant can occur even though the terms of the contract are not technically violated.

The covenant of good faith and fair dealing does not, without more, limit an employer's right to terminate an at-will employee.

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

**References.**

Brehany v. Nordstroms, Inc., 812 P.2d 49, 55 (Utah 1991)  
St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 199 (Utah 1991)  
Cook v. Zions First National Bank, 919 P.2d 56, 60-61 (Utah App. 1996)  
Johnson v. Kimberly Clark Worldwide, Inc., 86 F.Supp. 2d 1119, 1122-23 (D. Utah 2000)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.114. Breach of employment contract. Just cause.**

If under an express or implied contract the employee may only be discharged for just cause, the discharge violates the contract unless the employer shows that it acted with "objective reasonableness." Determining objective reasonableness does not mean second-guessing the employer's business decisions. Instead, it means determining whether the employer acted in good faith by adequately considering the facts it reasonably believed to be true at the time it made the decision to fire the employee.

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

**References.**

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

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.115. Constructive discharge.**

The termination of employment by an employer may be either actual or constructive. The termination is actual when the employer notifies the employee, either orally, or in writing or through words or actions sufficient to lead a reasonable person to believe he or she has been discharged. The termination is constructive when an employee [resigns/retires] because an employer creates, or knowingly permits to exist, working conditions that are so intolerable that a reasonable person in the employee's position would be compelled to [resign/retire].

To prove a constructive discharge, the plaintiff must show that his working conditions were so intolerable at the time he [resigned/retired] that a reasonable person would have been compelled to [resign/retire].

Whether a reasonable person in the plaintiff's position would have been compelled to [resign/retire] is determined by an objective standard based on whether a person of ordinary intelligence and sensitivity in the same circumstances would have [resigned/retired]. The law recognizes that a forced [resignation/retirement] is the same as being fired.

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

**References.**

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

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.116. Scope of employment.**

In order to find that an employer is liable for the act or omission of an employee, you must find that the employee was acting within the scope of the employee's employment authority at the time of the act or omission. An employee was acting within the scope of the employee's employment authority if each of the following are true:

(1) The employee was engaged in conduct of the general kind the employee was employed to perform; in other words, the employee was engaged in carrying out the duties assigned by the employer, as opposed to being wholly involved in a personal endeavor; and

(2) The employee's conduct occurred within working hours, and within the normal work place; and

(3) The employee's conduct was motivated, at least in part, by the purpose of serving the employer's interest.

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

**References.**

Same as MUJI 25.6

Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1040 (Utah 1991)

Birkner v. Salt Lake County, 771 P.2d 1053, 1056-57 (Utah 1989)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.117. Fiduciary duty.**

A fiduciary relationship is a relationship in which one, or both, of the parties is required to act solely for the benefit of the other, within the scope of the relationship, with the highest duty of care. The relationship created by a contract is generally not a fiduciary relationship. Similarly, an employer-employee relationship is generally not a fiduciary relationship.

The party claiming the existence of a fiduciary relationship has the burden of proof to show that the relationship is a fiduciary relationship.

To establish a fiduciary relationship the party claiming that relationship must show that the claimed fiduciary owed the other fidelity, confidentiality, honor, trust and dependability above and beyond that of the parties to the average contract.

When the relationship which created the fiduciary duty ends, the fiduciary duty ends as well.

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

**References.**

Renshaw v. Tracy Loan & Trust Co., 87 Utah 364, 49 P.2d 403, 404 (Utah 1935)  
Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981)  
Margulies ex rel. Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985)  
Envirotech Corporation v. Callahan, 872 P.2d 487 (Utah App. 1994)  
C&Y Corp. v. General Biometrics, 896 P.2d 47, 54 (Utah App. 1995)  
Semenov v. Hill, 982 P.2d 578 (Utah 1999)  
Black's Law Dictionary 640 (7th Ed. 1999)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.118. Damages. Express and implied contract claim.**

If an employer has [terminated the employee in breach of] [breached] an express or implied contract, you may award the employee damages. Damages recoverable for breach of contract include both general damages, i.e., those flowing naturally from the breach, and consequential damages, i.e., those reasonably foreseeable by the parties at the time the contract was made.

General damages can be awarded even if no consequential damages are proven; likewise, consequential damages can be awarded even if no general damages are proven.

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

**References.**

Same as those cited in existing instruction 18.12

MUJI 15.15

Mahmood v. Ross, 1999 UT 104, 19, 990 P.2d 933, 937

Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.119. Damages. General damages.**

General damages are those which flow naturally from the employer's breach. In other words, they are those which, from common sense and experience, would naturally be expected to result from the employer's breach of employment contract. They can include [the amount of compensation and benefits that the employee would have received from the employer during the period you find the employment was reasonably certain to have continued, less any amounts that the employer proves the employee received or could have received with reasonable effort from other employment during the same period] [list other items of damage in evidence].

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

**References.**

Same as those cited in existing instruction 18.12  
Mahmood v. Ross, 1999 UT 104, 19, 990 P.2d 933, 937  
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985)  
Prince v. Peterson, 538 P.2d 1325, 1328 (Utah 1975)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.120. Damages. Consequential damages.**

Consequential damages are those damages that were within the contemplation of the parties or were reasonably foreseeable by the parties at the time the contract was made. That is, consequential damages are damages, other than lost compensation and benefits, that directly flow from the employer's breach of the employment contract. Although they are designed to place the employee in the same economic position he would have had if the employer had not breached the employment contract, they may reach beyond the bare contract terms.

To recover consequential damages, the employee must prove:

- (1) That consequential damages were caused by the contract breach;
- (2) That consequential damages ought to be allowed because they were foreseeable at the time the parties contracted; and
- (3) The amount of the consequential damages within a reasonable certainty.

Although the employee must offer proof within a reasonable certainty of the amount of his loss, he does not need to prove them with absolute precision.

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

**References.**

Same as those cited in existing instruction 18.12  
Kraatz v. Heritage Imports, 2003 UT App 201, 48-49, 53-54, 71 P.3d 188, 199-201  
Mahmood v. Ross, 1999 UT 104, 20, 990 P.2d 933, 937-38  
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.121. Compensatory damages. Public policy wrongful discharge.**

An employee terminated in violation of public policy is entitled to recover all damages which flow naturally from the employee's termination. In other words, the employee is entitled to recover [the amount of compensation and benefits that the employee would have received from the employer during the period you find the employment was reasonably certain to have continued, less any amounts that the employer proves the employee received or could have received with reasonable effort from other employment during the same period] [list other items of damage in evidence].

An employee is also entitled to recover damages in an amount which will reasonably compensate the employee for the loss and injury suffered as a result of the employer's unlawful conduct. You may award reasonable compensation for the following:

(1) Pain, suffering, and physical or emotional distress;

(2) Embarrassment and humiliation; and

(3) Loss of enjoyment of life; that is, the employee's loss of the ability to enjoy certain aspects of his/her life as a result of the employer's actions.

You may consider the testimony and the demeanor of the employee in considering and determining a fair allowance for any damages for emotional distress, humiliation, and loss of enjoyment of life. Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, embarrassment, humiliation, loss of respect, emotional distress, loss of self-esteem, or excessive fatigue. Physical manifestations of emotional harm may also occur, such as ulcers, headaches, skin rashes, gastrointestinal disorders, or hair loss.

In the determination of the amount of the award, it will often be difficult for you to arrive at a precise award. These damages are intangible, and the plaintiff is not required to prove them with precision. It is difficult to arrive at a precise evaluation of actual damage for emotional harm. No opinion of any witness is required as to the amount of such reasonable compensation. Nonetheless, it is necessary to arrive at a reasonable award that is supported by the evidence.

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

**References.**

3 Devitt, Blackmar & Wolf, Federal Jury Practice and Instructions, Section 104.6 (4th Ed. 1987)

Block v. R.H. Macy & Co., 712 F.2d 1241, 1245 (8th Cir., 1983)

E.E.O.C. Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act (B.N.A., 1992) at II(A)(2), as modified

Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

**18.122. Damages. Breach of the implied covenant of good faith and fair dealing.**

If you find, by a preponderance of the evidence, that the employer breached its duty of good faith and fair dealing to the employee, you may award the employee both general damages and a broad array of consequential damages. Damages recoverable for the breach of this duty are damages for those injuries or losses flowing naturally from the breach, and those losses or injuries which were reasonably within the contemplation of, or reasonably foreseeable by, the parties at the time the contract was made.

In awarding these damages, you may award an amount in excess of the contract terms specified in the employment contract. In determining the amount of damages to award, you may consider [the employee's loss of income or profit] [the employee's past and future emotional suffering and mental anguish] [any other detriment naturally flowing from the employer's breach]. However, only those factors that were reasonably foreseeable by the parties and that were proximately caused by the employer's breach may be considered.

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

**References.**

Berube v. Fashion Centre, Ltd., 771 P.2d 1033, 1044, 1050 (Utah 1989)  
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801-02 (Utah 1985)  
Cook v. Zions First National Bank 919 P.2d 56 (Utah App. 1996)

**Advisory Committee Notes.**

**Staff Notes.**

**Status.**

