MINUTES

Advisory Committee on Model Civil Jury Instructions
June 1, 2005
12:15 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King (joined the meeting in progress), Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kelly Thacker (typist)

1. *Schedule.* Mr. Young announced that the July 5, 2005, meeting was canceled because it conflicts with the Utah State Bar annual meeting. He noted that once the committee finishes the damage instructions, it will next review the employment, medical malpractice and products liability instructions.

2. *Format.* Mr. Carney showed the committee the Alaska civil pattern instructions online, to give the committee an example of what the revised MUJI instructions may look like when they are finished. Mr. Humpherys questioned whether cross-references to the first edition of MUJI should be included. Several committee members thought they were helpful to show the history of a given instruction.

3. *Preliminary Instructions.* The committee discussed the following draft preliminary instructions:

a. *1.101: General Admonitions.* Mr. Shea proposed this instruction as a new instruction. Mr. Simmons noted that the instruction is largely repeated in instruction 1.112 (rules applicable to recesses). A majority of the committee thought that it was okay to repeat some concepts, since they will be new to jurors. The committee decided to leave both instructions (1.101 and 1.112) as they are.

b. *1.103: Nature of the Case.* The committee approved Mr. Shea's suggestion to delete the last paragraph, since it is covered by other instructions.

c. *1.106: Jurors Must Follow the Instructions.* At Mr. Shea's and Dr. Di Paolo's suggestion, the instruction was revised to read: "The instructions that I give you are the law, and your oath requires you to follow my instructions even if you disagree with them."

d. *1.107: Jurors Must Decide the Facts Based on the Evidence.* This is a new instruction. Mr. Carney thought the instruction was too choppy and suggested alternative wording. Mr. Shea suggested deleting the instruction as covered elsewhere. Mr. Fowler proposed amending instruction 1.102 (role of the judge, jury and lawyers) to add that the evidence is the testimony heard and the exhibits received. The committee decided to delete instruction 1.107 and to leave instruction 1.102 unchanged.

e. *1.110: Service Provider for Juror with a Disability; and 1.111: Duty to Abide by Official Translation.* These are new instructions, based on California instructions. Mr. Dewsnup noted that instruction 1.110 was consistent with the work of the committee on jury service, which has tried to make jury service available to a broader range of people, including those with disabilities. Mr. Simmons questioned what the instruction and oath of the service provider meant. Mr. Carney questioned why jurors were required to rely on the translation of an interpreter and not their own knowledge of a language. Mr. West questioned the need for the instructions. None of the committee members knew of a trial in which the instructions would have applied. Some committee members thought the instructions were premature and should not be considered without more guidance in a statute or rule. The committee reserved on the instructions.

Mr. Shea will research the legal bases for instructions 1.110 and 1.111.

f. *1.306: Stipulated Facts.* At Mr. Young's suggestion, the first sentence was deleted. An advisory committee note was added to the effect that the instruction should not be given until a stipulation is entered in the record. "Before the trial" was therefore deleted from the second paragraph. The last paragraph was revised to read: "Since the parties have agreed on these facts, you must accept [not "treat"] them as true for purposes of this case."

g. *1.307: Judicial Notice.* At the suggestion of Mr. Young and others, the instruction was revised to read: "I have taken judicial notice of [fact] for purposes of this trial. This means that you must accept the fact as true." An advisory committee note was added to say that the instruction should not be given until the court takes judicial notice. The staff note was deleted, and a reference to Utah Rule of Evidence 201 was added.

h. *1.401: Preponderance of the Evidence.* The instruction was compared to the new California instruction 200. Mr. Dewsnup, Dr. Di Paolo and Mr. Fowler expressed a preference for the Utah instruction. Mr. Dewsnup, however, expressed some concern that the instruction overemphasized the plaintiff's burden and suggested adding the words, "however slightly." Mr. Carney thought the matter was best left to argument. Mr. Shea suggested reversing the order of the sentences in the fourth paragraph. At Mr. Shea's suggestion, the first sentence of the third paragraph was revised to read: "Another way of saying this is proof by the greater weight of the evidence, however slight." Messrs. Ferguson and Nebeker expressed some reservations about this change.

After a break, Mr. King joined the committee.

4. *Negligence Instructions.* The committee reviewed the following draft negligence instructions:

a. *2.101: "Fault" Defined.* Messrs. Young and Carney presented a revised instruction 2.101 defining "fault." Mr. Ferguson noted that the first paragraph assumes that the plaintiff was harmed, which may be a contested issue of fact. Mr. Belnap suggested deleting the sentence in the third paragraph, "There may be more than one cause of the harm," because it is covered in another instruction and fits better there. Several committee members noted that not every act or omission causing harm is "fault." Therefore, "wrongful" was added to the first sentence of the second paragraph, before "act or failure to act." Mr. West suggested deleting the third paragraph. The committee discussed whether the jury should be directed to the special verdict form at this point in the instructions. The consensus was that the concept should be explained to them, but the court should leave the explanation of the verdict form until later. Mr. Carney noted that the instruction may have to be given in some form at different parts of the trial. After further discussion, the instruction was revised to read:

2.101. "Fault" defined.

Your goal as jurors is to decide whether [plaintiff] was harmed and, if so, whether anyone was at fault for that harm. If you decide that more than one person is at fault, you must then allocate fault among them.

Fault means any wrongful act or failure to act that causes harm to the person seeking recovery. The wrongful act or failure to act alleged in this case is [negligence, etc.].

Your answers to the questions on the verdict form will determine whether anyone is at fault. We will review the verdict form in a few minutes.

Instruction 2.101a, which tracked instruction 2.101 but used the term "responsibility" for "fault," was deleted.

b. *2.102: Standard of Care Required Generally.* The title of the instruction was revised to read, "Negligence defined." Mr. West thought that the last paragraph could be confusing: jurors might confuse comparing the conduct of a party with that of a hypothetical reasonable person with the comparisons they are required to make to allocate fault. Mr. Carney suggested that the first part of that paragraph ("You must decide whether [names of persons on the verdict form] were negligent") be the first sentence of the instruction and that the rest of the paragraph be omitted. Dr. Di Paolo thought this

sentence fit better as the last sentence of the instruction rather than the first. The committee agreed to make the paragraph regarding physical disabilities a separate instruction.

c. *2.103: Standard of Care Required When Children Are Present; 2.104: Standard of Care Required by Children; 2.105: Standard of Care Required for a Child Participating in an Adult Activity; and 2.107: Standard of Care Required in Controlling Electricity.* The titles of these instructions were all revised to delete the words "Standard of."

d. *2.108: "Cause" Defined.* Mr. Carney noted that the subcommittee had chosen to follow the California approach and use the term "cause" rather than "proximate cause" or "legal cause" because of the confusion the latter terms engender. Mr. Young suggested adding an explanation for the change to the advisory committee note. Mr. Ferguson noted that the first sentence of the instruction presumes that the defendant has done a wrongful act. The first paragraph was revised to read: "Remember, I have instructed you before that the concept of fault includes a wrongful act or failure to act that causes harm. You must decide whether [name of defendant or defendants]'s act or failure to act was a 'cause' of [name of plaintiff's] harm." Dr. Di Paolo suggested putting the word "and" between subparagraphs (1) and (2) on a separate line. Mr. King thought the word should be "or," not "and." Mr. Young noted that subparagraph (1) covered two concepts: (a) a direct cause of the harm, and (b) an indirect cause. Mr. Young thought that the instruction was inaccurate and incomplete because it did not include the concept of "unbroken by an efficient intervening cause." Mr. King and some committee members thought that intervening cause was an affirmative defense and that the plaintiff did not have the burden of proving the absence of a superseding cause. Other committee members disagreed. Mr. Ferguson noted that a "natural and continuous sequence" was equivalent to the lack of an intervening cause. Some questioned whether the concept had to be expressed twice--once in the positive and once in the negative. Dr. Di Paolo questioned what an "efficient" intervening cause was. Superseding causes are covered by another instruction. Ms. Blanch and Dr. Di Paolo suggested adding "unbroken" to the instruction. Mr. Shea and Mr. Jemming thought that the term "continuous" covered the concept. Mr. Carney and Mr. West thought that adding "unbroken" would add confusion, particularly in cases where there may be multiple causes of a person's harm. Mr. Carney indicated that he would define cause as simply an act or failure to act "but for" which the harm would not have occurred. Mr. Young suggested repeating the phrase "the person's act or failure to act" at the beginning of both subparagraph (1) and subparagraph (2) and deleting it from the first part of the sentence. "Remember" was deleted from the last sentence of the instruction.

e. *2.110: Superseding Cause.* Mr. Shea noted that this instruction, which is new, was his effort to restate MUJI 3.16. Mr. Carney noted that the instruction was wrong. If an intervening cause is foreseeable, it is not a superseding cause. Some questioned whether MUJI 3.16 is still good law in light of the Utah Liability Reform Act.

f. *2.111: Allocation of Fault.* The committee discussed alternative introductory sentences. Dr. Di Paolo suggested that the second paragraph also needed an introductory sentence. The instruction was revised to read:

2.111. Allocation of fault.

If you decide that more than one person is at fault, you must decide each person's percentage of fault. This allocation of fault must be done on a percentage basis, and must total 100%. Each person's percentage should be based upon how much that person's fault contributed to the harm.

You may also decide to allocate a percentage of fault to the plaintiff. [Name of plaintiff]'s total recovery will be reduced by the percentage of fault that you attribute to [him/her/it/them]. If you decide that [name of plaintiff]'s fault is 50% or greater, [name of plaintiff] will recover nothing.

When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage of fault. I will make that calculation later.

Mr. Shea's proposed alternative instruction, 2.111a (Allocation of Responsibility) was deleted.

5. *Damage Instructions.* The committee reviewed the following draft damage instructions. (A revised set of draft instructions was circulated at the meeting. The instruction numbers are the numbers of this revised set, and not necessarily the numbers of the set circulated before the meeting. The committee reviewed yet another revised set of instructions at the meeting, which were shown on a screen and used a different numbering system. The numbers of the instructions the committee actually reviewed are indicated in brackets.)

a. *15.101[1]: Introduction to Personal Injury Damage. Liability Contested.* Mr. Humpherys noted that the subcommittee had decided to use the terms "economic damages" and "non-economic damages" instead of "special damages" and "general damages." Mr. Carney added an advisory committee note to that effect. At Dr. Di

Paolo's suggestion, the first phrase was revised to read, "If you decide that [defendant's] fault" instead of "the fault of [name of defendant]." At Mr. West's suggestion, "legal" was deleted before "cause." At Mr. West's and Mr. King's suggestion, "you must award the damages, if any . . ." was revised to read, "you must decide how much money will fairly and adequately compensate [name of plaintiff] for his harm." At Mr. Fowler's and Mr. Young's suggestion, the word "damages" in the first sentence was replaced with "harm," to link the instruction to the prior, liability instructions, which talk about "harm" rather than "damages."

b. *15.125 [25]: Introduction to Personal Injury Damage. Liability Decided.*

Mr. Shea will revise the instruction to mirror the changes to instruction 15.101.

c. *15.102 [2]: Personal Injury--Economic Damage. Medical Care.* At Mr. Ferguson's suggestion, "medically related care" was replaced with "medical care and other related expenses." "Legally" was deleted from before "caused." The committee debated the meaning of "necessary" or "necessarily incurred." The instruction was revised to read:

15.102. Personal Injury--Economic Damage. Medical Care.

Economic damages include reasonable and necessary expenses for medical care and other related expenses. You should award the value of those expenses incurred in the past and for those that will probably be incurred in the future.

d. *15.102.5 [2A]: Personal Injury--Economic Damage. Medical Care.* Mr. Belnap did not think such an instruction should be given. Mr. Dewsnup noted that the introductory phrase ("The fact, if it be a fact") was stilted and archaic. Mr. Carney thought that the instruction should specify what the unnamed sources of payment were: "If any of the plaintiff's expenses were paid by health insurance, workers' compensation or other sources, this does not diminish [name of defendant's] responsibility to pay for them." At Mr. Humpherys suggestion, the committee decided to drop this instruction in favor of a more generic instruction, instruction 15.136.

e. *15.103 [3]: Personal Injury--Economic Damage. Loss of Earnings.* The committee noted that the instruction was confusing. A clearer distinction needs to be made between past and future damages and between lost earnings (and benefits) and lost future earning capacity. The committee reserved on the instruction.

Mr. Humpherys will review the law on lost earnings and loss of earning capacity and revise the instruction.

f. *15.104 [4]: Personal Injury--Economic Damage. Loss of Household Services.* Mr. Ferguson asked whether household services needed to be defined. The consensus of the committee was that they did not have to be defined in the instruction. Jurors should understand what they are, and they will generally be identified in the damage expert's economic report. Mr. Shea thought the second sentence was confusing; it implies that the plaintiff must prove both the reasonable value of the household services the plaintiff has been unable to do and the reasonable value of the services that he will likely be unable to do in the future to recover either past or future damages. Dr. Di Paolo thought that the difference between past and future should be explained, that is, that the jury should be told that "past" means between the time of the injury and the time of trial. The instruction was revised to read:

> 15.104. Personal Injury--Economic Damage. Loss of Household Services.
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> Economic damages also include loss of household services. To recover damages for this loss, [name of plaintiff] must prove the reasonable value of the household services that he has been or will be unable to do since the harm.

g. *15.105 [5]: Non-economic Damages.* The committee thought that the instruction was confusing. Mr. Ferguson suggested making bullet points for each factor the jury may consider in assessing non-economic damages. Mr. Fowler asked whether there was authority for awarding damages for "loss of enjoyment of life" and reserved the right to research the issue further. The committee decided to use "determine" for "award." Mr. Shea suggested dropping the phrase "and the damages you fix shall be just and reasonable in light of the evidence" from the end of the second paragraph. Mr. Fowler and Ms. Blanch thought that the instruction went too far, that the jury has no duty to award non-economic damages in every case but only to consider them. Mr. King suggested that the committee needed more research on whether the jury must award non-economic damages if it finds that a defendant was at fault. The committee tentatively revised the instruction to read:

> 15.105. Non-economic Damages.
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> 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 he has been limited in the enjoyment of life.

You may consider whether the consequences of these injuries will, with reasonable probability, continue in the future. If so, you should award such damages as will fairly and adequately compensate him throughout his life expectancy.

Non-economic damages are not capable of being exactly determined, and there is no fixed rule, standard or formula for them. Even though they may be difficult to compute, non-economic damages must still be awarded where sustained. 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.

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

Next Meeting. The next meeting will be Monday, June 13, 2005, at 4:00 p.m. The committee will continue its review of the damage instructions. There will be no meeting in July.

The meeting concluded at 5:35 p.m.