MINUTES

Advisory Committee on Model Civil Jury Instructions
June 13, 2005
4:00 p.m.

Present: John L. Young (chair), Paul M. Belnap, Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, L. Rich Humpherys, Jonathan G. Jemming, Paul M. Simmons and David E. West

Excused: Francis J. Carney, Timothy M. Shea

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.103. Personal injury--economic damage. Medical care collateral source.* The committee noted that this instruction has been dropped in favor of the general collateral source instruction, 15.123.

2. *15.104. Personal injury--economic damage. Loss of earnings.* Mr. Humpherys read from *Clawson v. Walgreen Drug Co.,* 162 P.2d 759, 764 (Utah 1945), regarding the distinction between lost earnings and loss of earning capacity. Mr. Simmons suggested adding a sentence after the first sentence of the third paragraph to say, "A person may have lost earning capacity even if he was not employed at the time of the injury." Mr. Belnap thought the sentence was argument. Messrs. Simmons and Dewsnup and Dr. Di Paolo thought the sentence was helpful because the paragraph's emphasis on actual earnings diminished the reference to the plaintiff's "potential to earn income." Ms. Blanch suggested adding to subpoint (2) of the third paragraph the phrase "and the likelihood that he would have continued in his chosen profession." Mr. Young thought that a transition was needed between the second paragraph (talking about lost earnings) and the third paragraph (talking about loss of earning capacity). Mr. Belnap suggested splitting the instruction into two instructions: one on lost earnings and one on loss of earning capacity. Mr. Young noted that MUJI included separate instructions on each concept. Mr. West pointed out that the concepts are generally combined on the verdict form: There is one line for past lost earnings or loss of earning capacity, and another for future lost earnings or loss of earning capacity. A given case, however, may involve only one or the other (that is, either lost earnings or lost earning capacity but not both). Mr. Belnap suggested that future damages are always damages for loss of earning capacity, whereas past damages may be for loss of actual earnings or loss of earning capacity. Mr. Jemming suggested additional language for the third paragraph, based on *Clawson:* "Lost earnings is the amount a person might reasonably have earned in pursuit of his ordinary occupation." Mr. Belnap expressed a preference for the original MUJI instructions. Mr. Dewsnup noted that lost earnings should also include lost benefits. Mr. Belnap thought that benefits were covered by the term "earnings," but other committee members thought that jurors need to be specifically instructed on lost benefits, or they may think they cannot award them. Mr. Humpherys noted that another case the subcommittee relied on for the instruction, *Dalebout v. Union Pacific Railroad Co.,* 980 P.2d 1194, 1200 (Utah Ct. App. 1999), included the ability to weather economic storms as part of lost earning capacity, but *Dalebout* was a FELA case, and Mr. Humpherys was not sure whether it accurately reflected Utah law on

damages. Messrs. Belnap, Young and West were confident that FELA cases are governed by state damage law. Mr. Simmons asked how other jurisdictions' pattern jury instructions explain lost earnings and earning capacity. After further discussion, the committee decided to separate the two concepts into separate instructions and to defer further discussion until the damages subcommittee has had an opportunity to revise the instructions.

Mr. Jemming will e-mail Mr. Humpherys proposed language for the instructions.

3. *15.105. Personal injury--economic damage. Loss of household services.* The committee approved the draft instruction.

4. *15.106. Non-economic damages.* Mr. Young suggested revising the language in the second full paragraph stating that future damages should be awarded "throughout [the plaintiff's] life expectancy," since some future damages are resolved before death. Ms. Blanch suggested deleting the phrase and adding the phrase "and for how long" to the first sentence of that paragraph. Mr. Simmons asked whether "with reasonable probability" meant something different from "probably" or "more likely than not." Messrs. Young, Belnap and Humpherys suggested using the term "preponderance of the evidence" in the instruction, to reemphasize the standard of proof. After further discussion, the second paragraph was revised to read:

> 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 him.

Mr. Young and Dr. Di Paolo thought the phrase "where sustained" in the third full paragraph was cumbersome and confusing. At Mr. Humpherys' suggestion, the second sentence of that paragraph was revised to read:

> Non-economic damages must still be awarded even though they may be difficult to compute.

At Mr. Young's suggestion, "mere" was deleted from the last paragraph. Dr. Di Paolo noted that she was still not clear how the jury is to compute non-economic damages. Nevertheless, the instruction was approved as revised.

5. *15.107. Personal injury damages. Susceptibility to injury.* Dr. Di Paolo asked how this instruction differed from instruction 15.108 (aggravation of pre-existing conditions). Mr. Simmons suggested that "is" in the last line be replaced with "may be." Mr. Young thought that the jury needed to make a finding as to whether or not the plaintiff is more susceptible to

injury and that "is" was therefore appropriate. Other committee members thought the only issue for the jury to decide was causation and not susceptibility. After further discussion, the committee replaced "is" in the last sentence with "may be."

6. *15.108. Personal injury damages. Aggravation of pre-existing conditions.* The committee deleted "legally" before the word "caused" in the last line, consistent with its approach to the issue of proximate causation. At Mr. Young's suggestion, the committee deleted "from another's fault" from the first line of the last paragraph. The committee revised the first part of the sentence to read, "When a pre-existing condition makes the outcome of the injuries greater than they would have been . . ." Dr. Di Paolo suggested replacing "attributable to" in the next sentence with "a result of," but Ms. Blanch thought that "resulting from" was a different standard than "attributable to" and not an accurate statement of the law. The committee reserved further discussion of the instruction.

Other. At Mr. Dewsnup's suggestion, the committee commended Dr. Di Paolo for her dedicated service and acknowledged her invaluable contributions to the committee's work.

Next Meeting. The next meeting will be Monday, August 8, 2005, at 4:00 p.m. There will be no meeting in July.

The meeting concluded at 5:45 p.m.