MINUTES
Advisory Committee on Model Civil Jury Instructions
August 8, 2005
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King and Paul M. Simmons

Excused: Ralph L. Dewsnup, Tracy H. Fowler, Timothy M. Shea

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.108. Personal injury damages. Aggravation of pre-existing conditions.* Judge Barrett noted that the instruction uses "damages" in two different senses. Mr. Ferguson noted that at least one court has drawn a distinction between "damage" and "damages." He will try to find the case for the next meeting. The committee questioned whether the words "aggravation," "susceptible," "attributable" and "determination" used in the instruction are plain English. Mr. Belnap questioned whether the last sentence was an accurate statement of the law. He thought that if the jury found a pre-existing condition and aggravation of that condition, the jury necessarily must have made an apportionment between the two. Other committee members disagreed. Mr. Carney asked whether the instruction would apply in a failure-to-diagnose case. The committee agreed that failing to diagnose a condition and hence stopping its natural progression was different from the aggravation of a pre-existing condition. The former is covered by the loss of chance doctrine; the latter is covered by this instruction. Mr. Young and Mr. King questioned whether the instruction implied that the jury must make a specific finding on apportionment or whether its apportionment is implicit in its determination of the amount of damages. Mr. King suggested adding an advisory committee note to the effect that it is not intended that the jury be asked to make a specific finding on the verdict form as to the amount of damages attributable to the pre-existing condition and the amount attributable to the aggravation. The instruction was revised to read as follows:

> A person who has a physical [or emotional] condition before the time of [described event] is not entitled to recover damages for that condition or disability. However, the injured person is entitled to recover damages for any aggravation of the pre-existing condition that is caused by another's fault, even if the person's pre-existing condition made him more vulnerable to physical [or emotional] harm than the average person. This is true even if another person may not have suffered any harm from the event at all.
>
> When a pre-existing condition makes the damages from injuries greater than they would have been without the condition, it is your duty, if possible, to determine what portion of the plaintiff's disability, impairment, pain, suffering, or other damage was caused by the pre-existing condition and what portion was caused by the [described event]. If you are not able to make such an

> apportionment, then you must conclude that the entire disability, impairment, pain, suffering or other damage was caused by the defendant's fault.

Mr. Belnap was excused.

2. *15.109. Personal injury damages. Aggravation of dormant pre-existing condition.* Ms. Blanch questioned whether the instruction was an accurate statement of the law. She asked what constitutes a dormant or asymptomatic condition. Must the condition have been asymptomatic at all times before the accident or only at the time of the accident, and if the latter, how long before the accident can the condition have been symptomatic and still be considered "dormant"? Mr. Ferguson suggested that the subcommittee research what "dormant" means. He also pointed out that the last sentence of the instruction was incomplete. Mr. Simmons and Mr. Humpherys asked whether the instruction should be combined with 15.108, as a specific application of 15.108. The committee agreed that, depending on the facts of the case, a court may want to give 15.108, 15.109 or both, particularly if reasonable minds could differ on whether the plaintiff's pre-existing condition was "dormant." Mr. Carney asked whether the instruction should say that the plaintiff cannot recover for any preexisting condition that did not result from the defendant's fault. Mr. Simmons thought the concept was covered in other instructions that tell the jury to award only those damages that were caused by the defendants' fault. At Mr. Humpherys suggestion, the committee agreed to add the first sentence of instruction 15.108 to 15.109 in brackets, to be used whenever 15.109 is given alone. The instruction was revised to read:

> [A person who has a physical [or emotional] condition before the time of [described event] is not entitled to recover damages for that condition or disability.] If a person has a pre-existing condition that does not affect him, he may recover the full amount of damages legally caused by an aggravation of that condition. In other words, when a pre-existing condition does not cause pain or disability, but [describe the event] causes the person to suffer pain, disability or other problems, then the plaintiff may recover all the damages caused by the event.

3. *15.110. Personal injury damages. Mitigation of damages.* Mr. Simmons asked whether the phrase "even if his efforts were unsuccessful" should be added to the end of the instruction. At Mr. Ferguson's suggestion, the instruction was revised to read:

> [Name of plaintiff] has a duty to exercise reasonable diligence and ordinary care to minimize the damages caused by [name of defendant]'s fault. Any damages awarded to [name of plaintiff] should not include damages that [name of plaintiff] could have avoided by taking reasonable steps. It is [name of defendant]'s burden to prove that [name of plaintiff] could have minimized his

> damages, but failed to do so. If [name of plaintiff] made reasonable efforts to minimize his damages, then your award should include the amounts he reasonably incurred to minimize his damages.

Mr. Young asked whether the burden of proof needed to be explained more fully. The committee members thought that it was sufficiently explained in the preliminary instructions.

4. *15.111. Personal injury damages. Life expectancy.* Mr. Humpherys noted that there may be an issue as to the proper date for measuring life expectancy, that is, whether it should be measured from the date of trial or the date of injury. The committee agreed that it should be measured from the date of trial, since it relates to future damages, and future damages are measured from the date of trial, not the date of injury. Mr. Ferguson asked whether this was an issue of law that the Utah Supreme Court has not yet ruled on and whether the committee would be invading the province of the court if it included a note to that effect. A majority of the committee thought the issue was not subject to serious dispute. Mr. Carney added an advisory committee note to explain the purpose of the instruction and from what point life expectancy is to be determined. Mr. Carney noted that California includes the life expectancy tables in its instructions. The committee saw no reason to do so. Mr. Simmons suggested that the first sentence be modified to make it clear that mortality tables do not purport to predict any specific person's life expectancy. The instruction was revised to read:

> According to the mortality tables, an average person of the plaintiff's age, race and sex can expect to live ____ more years. You may consider this fact in deciding the amount of future damages. A life expectancy is merely an estimate of the average remaining life of all persons in our country of a given age and gender, with average health and exposure to danger. Some people live longer and others die sooner. You may consider all other evidence bearing on the expected life of [name of plaintiff], including his occupation, health, habits, life style, and other activities.

Next Meeting. The next meeting will be Monday, September 12, 2005, at 4:00 p.m.

The meeting concluded at 6:00 p.m.