MINUTES
Advisory Committee on Model Civil Jury Instructions
May 8, 2006
1:00 p.m.

Present: Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jathan Janove (chair of the employment law subcommittee), Colin P. King, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr.

Mr. Young called the meeting to order.

Draft Instructions

The committee reviewed the following instructions.

1. *210. Superseding cause.* The committee note says that whether negligent conduct can be a superseding cause is an open issue. Mr. Young suggested revising the second paragraph of the instruction to make the alternatives clearer. Mr. Simmons suggested changing "negative conduct" to "fault." He also noted that the phrase "his conduct" at the end of the second paragraph was ambiguous, because it could refer to the defendant or the third party. Mr. King and Mr. Humpherys thought that the question of whether the harm was within the scope of the risk created was a question for the court and not the jury. Mr. King also suggested deleting "particular" before "harm." He noted that it came from Restatement (Second) of Torts § 442B. Dr. Di Paolo asked what "particular" meant in the context of the instruction. Mr. Shea and Mr. Ferguson said it referred to the injury the plaintiff suffered. Mr. King thought that the law should be that the third party's act must create an increased risk of the same harm. Mr. Belnap questioned whether the last paragraph of the instruction and the first paragraph of the advisory committee note were accurate. Mr. Carney noted that the "extraordinary" requirement of the last paragraph came from Restatement (Second) of Torts § 442. Mr. Ferguson read the former instruction (MUJI 3.16). Mr. West suggested returning to MUJI 3.16 but adding a committee note saying that some members of the committee think the instruction should not be used at all in light of the Utah Liability Reform Act (LRA). Mr. Carney read the California instruction on superseding cause (CACI 432). Ms. Blanch and Dr. Di Paolo thought the structure of the California instruction was easier to follow. Mr. Humpherys, however, thought the California instruction's definition of foreseeability in the third paragraph (that the defendant "did not know and had no reason to expect") created a subjective standard and was too restrictive. Mr. Dewsnup thought the instruction should read that the defendant "did not and could not foresee." Dr. Di Paolo noted that "did not foresee" was unnecessary. She also suggested keeping the extraordinary and foreseeable requirements separate, as they are in the California instruction. Mr. King thought that the latter standard should be an objective one (i.e., that the actor knew or had reason to know). On further reflection, Mr. Humphery approved of the California instruction, noting that the issue is not the liability of the third party but whether the third party's

conduct should relieve the defendant from liability. Mr. Young suggested adding a reference to *Harris v. UTA,* 671 P.2d 217 (Utah 1983). Mr. Shea questioned whether *Mitchell,* a pre-LRA case, should be cited as authority. Mr. Simmons suggested deleting the phrase "rather than allocating his fault under the LRA" from the last paragraph of the committee note. The instruction was ultimately revised to read as follows:

> [Name of defendant] claims that he is not liable for [name of plaintiff]'s harm because of the later fault of [name of third party]. To avoid liability for the harm, [name of defendant] must prove all of the following:
>
> (1) that [name of third party]'s conduct occurred after [name of defendant]'s conduct;
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> (2) that a reasonable person would consider [name of third party]'s conduct extraordinary;
>
> (3) that [name of defendant] could not foresee that [name of third party] would act in
> [Alternative A: an intentional]
> [Alternative B: a negligent]
> manner; and
>
> (4) that the harm resulting from [name of third party]'s conduct was different from the kind of harm that could have been reasonably expected from [name of defendant]'s conduct.

2. *2012. Noneconomic damages. Loss of consortium.* Mr. Simmons noted that loss of "financial support" is not part of loss of consortium. Dr. Di Paolo suggested making the last sentence of the first paragraph the second sentence, since it defines loss of consortium. Mr. West reviewed the history of loss of consortium under Utah law. Some committee members thought that the last paragraph of the instruction was covered by other instructions. Others thought the last paragraph was necessary so that the jury would not award damages for loss of consortium where it found the spouse less than 50% at fault but the injured party (or the injured party and spouse combined) more than 50% at fault. Mr. Shea thought that, if that was the intent, the last paragraph could say so more clearly. Mr. Humpherys noted that the statute does not clearly require that the fault of both spouses be combined. Mr. Ferguson and Mr. Fowler thought that that was the clear intent of the statute; otherwise, the statute would be redundant to the LRA. Mr. King noted, however, that if the spouses' fault is combined, the injured spouse could recover, but the other spouse could not, which, he felt, was nonsensical. Mr. Ferguson and Ms. Blanch thought this result was fair because a spouse's claim for loss of consortium only arises because of the claimant's marital status, and that status can fairly limit his or her claim as well.

Mr. Humpherys and Mr. King suggested noting a difference of opinion on this issue in the advisory committee note. They also thought that the instruction should explain to the jury the effect of its allocation of fault, as the last paragraph attempted to do. Mr. Fowler thought the instruction should also make clear who has the burden of proof. Mr. King objected to the use of the term "loss" in the first paragraph; he thought it implied a complete loss. The committee, however, noted that a "loss" of benefits can be a partial loss. Mr. Dewsnup suggested deleting the last paragraph of the advisory committee note, relating to filial consortium. The instruction was revised to read:

> Noneconomic damages include loss of consortium. Loss of consortium is loss of the benefits that one spouse expects to receive from the other, such as companionship, cooperation, affection, aid and sexual relations.
>
> To award damages for loss of consortium, it must be proven that [name of plaintiff] has suffered
>
> (a) a significant permanent injury that substantially changes his lifestyle and
>
> (b) one or more of the following:
>
> (1) a partial or complete paralysis of one or more of the extremities;
>
> (2) significant disfigurement; or
>
> (3) incapability of performing the types of jobs he performed before the injury.
>
> [You must decide whether [name of spouse] was [name of plaintiff]'s spouse at the time of [name of plaintiff]'s injury. "Spouse" means the legal relationship established between a man and a woman as recognized by the laws of Utah.]
>
> You must allocate fault as I have instructed you in Instruction 211 including [name of spouse] in your allocation. If you decide that the [combined] fault of [name of plaintiff] and [name of spouse] is 50% or greater, [name of spouse] will recover nothing for loss of consortium. If you decide that [name of plaintiff] has no claim against [name of defendant], then [name of spouse] also has no claim. As with other damages, do not reduce the award by [name of plaintiff]'s and [name of spouse]'s percentage of fault. I will make that calculation later.

3. *Employment Instructions.* Jathan Janove, the chair of the employment law subcommittee, joined the meeting.

a. *1911. Breach of employment contract. Just cause.* Dr. Di Paolo questioned whether "pretextual" was plain English. Others also questioned "capricious." Suggested synonyms included "phony," "sham," "untrue," "without basis," "contrived," and "bad faith." Mr. Humpherys thought that "bad faith" was misleading because it suggests a malicious motive, which the law does not require. Mr. Janove thought the concept was covered by the requirement that the termination be "fair and honest" and by a prior instruction stating that the plaintiff claims he was fired for a certain reason and further claims the reason was a pretext. The instruction was revised to read:

> Termination is for just cause if it is for a fair and honest cause or reason, made in good faith, as opposed to one that is trivial, unrelated to business needs or goals, or is a pretext for a capricious, illegal or bad-faith termination.

Ms. Blanch was excused.

b. *1913. Fiduciary duty.* Mr. Ferguson questioned whether the instruction belonged in the employment instructions or should be included in another section. Mr. Carney suggested keeping the instruction at least until a more general instruction is approved. Mr. Young suggested making the third paragraph the first paragraph. Mr. Simmons questioned whether the existence of a fiduciary duty was a question of law or a question of fact or a mixed question of law and fact. Mr. Ferguson and Mr. King thought that the instruction failed to spell out the elements of a claim and the consequences of the jury's finding. Mr. Ferguson moved (Mr. King seconding the motion) that the instruction be tabled until a later meeting. The motion passed without opposition.

c. *1914. Damages. Express and implied contract claim.* Mr. Young thought that the instruction was covered by the general damage instructions on economic and noneconomic damages. Mr. Ferguson pointed out that "general" damages has a different meaning in contract law than it does in tort law. Mr. Humpherys questioned whether the tort damage instructions included in the general damage instruction fit in an employment case. Mr. Ferguson suggested having two categories of damages for employment cases--contract damages, and non-contract or tort damages. Mr. Young asked whether instructions 1914 through 1916 should be combined to make it clear that they are all contract damages? Mr. Shea suggested changing the titles of the instructions to draw the necessary distinctions. Mr. Young suggested deleting the second paragraph of the instruction. Instruction 1914 was revised to read:

> **1914. Contract damages. Introduction.**
>
> If an employer has wrongfully terminated the employee in breach

of a contract, you may award the employee damages. Damages recoverable for breach of contract include general damages and consequential damages.

I will now explain what general damages and consequential damages mean.

d. *1915. Damages. General damages.* Mr. Young suggested that instructions 1915 and 1916 spell out the elements of general and consequential damages, respectively. He also suggested keeping mitigation of damages separate from the instructions on the elements of damage. The instruction was revised to read:

1915. Contract damages. General damages.

General damages are those that flow naturally from the breach of the employment contract. In other words, those damages which, from common sense and experience, would naturally be expected to result from [name of defendant]'s breach.

To recover general damages, [name of plaintiff] must prove:

(1) [the amount of wages or salary that [name of plaintiff] would have received from [name of defendant] during the period you find the employment was reasonably certain to have continued;]
(2) [the amount of benefits during the same period;] and
(3) [other items of damage in evidence].

Dr. Di Paolo was excused.

e. *1916. Damages. Consequential damages.* Mr. Humpherys questioned whether the phrase "within the contemplation of the parties" was clear to average jurors. Mr. Dewsnup suggested "thought about" or "anticipated." Mr. Humpherys also questioned whether the damages had to have been contemplated "at the time the contract was made," or whether that phrase unduly limited damages in cases of contracts that were modified or renewed. Mr. Janove noted that the relevant time is the time the promise that was breached was made. Mr. Shea suggested deleting the last sentence of paragraph 1. Others suggested also deleting the preceding sentence. Mr. West thought the "contemplation" test was outdated and that modern cases use a foreseeability test. Mr. Carney thought that "reasonably anticipated" was better than "contemplation." Mr. Ferguson noted that in litigated cases the damages disputed are almost never contemplated in fact. Mr. Dewsnup suggested that the distinction was not important

because the instruction gives alternative tests: "within the contemplation of the parties *or* were reasonably foreseeable." Mr. Simmons questioned whether the "reasonable certainty" standard for the amount of damages was a higher standard than a preponderance of the evidence. Someone questioned the use of the phrase "absolute precision" and suggested "mathematical precision." The committee agreed to say that the amount of consequential damages must be shown "with reasonable approximation, not with absolute precision." The instruction was revised to read:

1916. Contract damages. Consequential damages.

Consequential damages are those damages that were contemplated by [name of plaintiff] and [name of defendant] or were reasonably foreseeable by them at the time the terms of the employment contract were made.

To recover consequential damages, [name of plaintiff] must prove:

(1) that the consequential damages were caused by the breach;
(2) that the consequential damages were contemplated or reasonably foreseeable at the time the terms of the employment contract were made; and
(3) the amount of the consequential damages with reasonable approximation, not with absolute precision.

f. *1917. Compensatory damages. Public policy wrongful termination.* Mr. Humpherys suggested renaming the instruction "Tort damages." The committee was not clear when the instruction would apply; for example, can there be tort damages in a contract setting? Mr. Young and Mr. Humpherys asked whether the instruction should be renamed "Noneconomic damages." Several committee members suggested deleting the last two paragraphs of the instruction. Mr. Humpherys suggested using some of the language from the general damage instructions. Mr. Young suggested adding a committee note regarding the standard of proof for the different types of damages. The instruction was revised to read:

1917. Damages for wrongful termination in violation of public policy.

If [name of defendant] terminated [name of plaintiff] in violation of public policy, [name of plaintiff] is entitled to recover:

(1) general damages that flow naturally from the breach;
(2) consequential damages that were contemplated or reasonably

foreseeable by [name of plaintiff] and [name of defendant] at the time the terms of the employment contract were made; and

(3) noneconomic damages.

I will now explain what each of these means.

[Give Instruction 2002 regarding proof of damages.]
[Give Instruction 1915 regarding general damages.]
[Give Instruction 1916 regarding consequential damages.]
[Give Instruction 2004 regarding noneconomic damages.]

g. *1918. Damages. Breach of the implied covenant of good faith and fair dealing.* Mr. West noted that the instruction does not define the elements of damage. Mr. Janove said there was no specific employment case. The instruction was based on *Beck v. Farmers Insurance Exchange,* an insurance bad-faith case. The case law does not specify the duties that the implied covenant requires in a non-insurance context. Mr. Young and Mr. King thought the instruction could be covered in the contract instructions and that a separate instruction for employment contracts was unnecessary. Mr. Humpherys suggested adapting MUJI 26.30 to an employment setting.

Mr. Humpherys will check with Karra Porter of his office to see if there is any case law applying the duty of good faith in the employment context, and, if there is, he may submit a proposed instruction to replace 1918.

h. *1919. Damages. Employee duty to mitigate damages.* Mr. King thought the instruction misstated the employer's burden and that the third paragraph should say the employee "could reasonably have" obtained comparable employment, not "might" have obtained. Mr. Humpherys suggested replacing "employer" and "employee" with the names of the parties. Several committee members noted that the third and fourth paragraphs were inconsistent on whose burden it is to prove mitigation or lack thereof. Mr. West questioned whether the other work a party must take to mitigate damages must be comparable. Mr. Janove said that it must and suggested factors that the jury should consider. Mr. Humpherys thought that the instruction should clearly explain that the jury, not the judge, should make any reduction in damages for failure to mitigate. The instruction was revised to read:

An employee who has lost wages as a result of termination has a duty to make reasonable efforts to find comparable employment, but the employee is not required to make every effort possible to avoid the damages.

> If [name of plaintiff] found new employment, deduct the amount earned from any damages awarded. If [name of plaintiff] through reasonable efforts could have found comparable employment, deduct the amount that he could have earned from any damages awarded.
>
> [Name of defendant] has the burden of proving that [name of plaintiff] obtained or reasonably could have obtained comparable employment of a similar character.

i. *1920. Special damages. Unemployment compensation.* Mr. Young suggested changing the title to "Collateral sources." Although there is a general instruction on collateral sources, Mr. Humpherys thought that a more specific instruction for employment cases was necessary because evidence of employment benefits may come in at trial. Mr. Ferguson suggested changing "financial" to "economic." Mr. West asked whether there is a general instruction on whether damages are taxable. Some committee members thought that there should be.

4. *Damage Instructions.* Mr. Shea reviewed a number of damage instructions, which he has edited for consistency and style.

a. *2002. Proof of damages.* Mr. Belnap suggested leaving out the last paragraph. Messrs. Ferguson, Fowler and Dewsnup agreed. Mr. Humpherys, Mr. King and Mr. Simmons, however, thought that the last paragraph explained a new concept, namely, that any uncertainty in the amount of damages should be resolved against the defendant.

b. *2008. Economic damages. Injury to personal property.* Mr. Simmons suggested changing "would be" to "are" in this instruction and instruction 2009.

c. *2009. Economic damages. Injury to real property.* Mr. Humpherys suggested using "land" instead of "real property." Others noted, however, that the injury does not necessarily have to be to the land itself but can be to improvements on the land. Mr. Humpherys thought that "real property" needed to be defined. Mr. Simmons suggested adding "as a result of the negative perception" to the end of the instruction.

d. *2013. Wrongful death claim. Minor. Factors for deciding damages.* Mr. Simmons questioned why funeral and burial expenses were listed in instruction 2013 but not in instruction 2012 (for the wrongful death of an adult). Committee members responded that, under Utah law, for the heirs of an adult to recover funeral and burial expenses the estate must be impecunious.

Other Matters.

5. Mr. Shea reported that the instructions that the committee has approved to date will now be available on-line for courts and practitioners to use.

6. Mr. Shea reported that there will be a presentation on May 25, 2006, to the district court judges of the on-line instructions, at which he will ask the judges for feedback on the instructions. Several committee members expressed an interest in attending the presentation. Mr. Shea will see if they can attend.

7. Mr. Young reported that the next areas the committee will cover will be products liability and medical malpractice.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, July 10, 2006, at 4:00 p.m. The committee will not meet in June 2006.