MINUTES
Advisory Committee on Model Civil Jury Instructions
April 14, 2008
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Colin P. King, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill. Also present: Curtis Drake, Elliott Williams

1. *Products Liability Instructions*. The committee considered CV 1056, "The manufacturer is not an insurer," and CV 1057, "Safety risks." Mr. Young noted that the issue is whether these are the kinds of instructions the Utah Supreme Court has said should not be given. He proposed an amendment to CV 117, "Preponderance of the evidence," to say that, if the jury finds that the evidence regarding a fact is evenly balanced or preponderates against the fact, then the jury must find that the fact has not been proved "and the party has therefore failed to meet its burden of proof to establish that fact." **The committee approved this amendment to CV 117.** Mr. Young asked whether this change satisfied the need for CV 1056 and 1057. Mr. Fowler thought that CV 1057 was still needed. It addresses an issue that arose in *Slisze v. Stanley-Bostitch,* 1999 UT 20, which held that a product is not necessarily defective just because a safer model is available. Mr. Fowler did not think that the issue should be left to argument because of the danger that jurors will think that, because a safer alternative is available, the product must be defective. Mr. Carney questioned how CV 1056 and 1057 were different from the instructions disapproved in *Green v. Louder* and *Randle v. Allen*. Mr. Fowler noted that those cases were negligence cases and dealt with matters of common knowledge, whereas products liability is an area of the law not familiar to most jurors. He suggested that the instructions be left in with a committee note saying that the committee did not agree on whether the instructions should be used. Mr. Humpherys thought that CV 1057 was misleading. He read it to say that a product that may present some safety risks is not defective as a matter of law, which he did not think was an accurate statement of the law. Mr. Carney thought that the instructions should tell the jury what the law is and not what it is not. He and Mr. Summerill thought the instructions merely restated the converse of the burden of proof. Mr. Shea thought that the first clause of CV 1057 was such a negative statement of the elements a plaintiff must prove and suggested limiting the instruction to the second clause, which is taken from *Slisze*. Mr. Young concluded that the instruction needed more work and deferred further discussion on it.

2. *Medical Malpractice Instructions*. The committee continued its review of the medical malpractice instructions.

a. *Advisory committee note*. At Mr. Summerill's suggestion, the fourth paragraph (explaining what instructions were omitted because there is no Utah appellate authority for them) was deleted. Mr. Carney asked how specific

instructions must be under *Mikkelsen v. Haslam,* 764 P.2d 1384 (Utah Ct. App. 1988), which said that the mere giving of abstract instructions on negligence without adapting them to the specific duties in the case may be error. Mr. Humpherys and Mr. Drake thought that the specific duties alleged in the case could best be handled by instructions on the parties' contentions. Mr. Humpherys thought that detailed statements of the duties involved (*e.g.,* "The defendant had a duty to tie off the cystic duct.") were not statements of the law but application of the law (*viz.,* that the defendant had a duty to use reasonable care under the circumstances) to the facts of the case and the medicine involved.

Mr. King joined the meeting.

b. *CV 301. "Standard of care" defined. "Medical malpractice" defined. Elements of claim for medical malpractice.* Mr. Shea noted that he has deleted all references to "nurses" in CV 301. Nurses are covered in CV 302. Dr. DiPaolo suggested striking the phrase "a form of fault known as." Other committee members pointed out that the phrase was needed so that the jury could relate the medical malpractice instructions to other instructions that are phrased in terms of "fault." Mr. Drake questioned the use of the phrase "a cause." He thought it cut out part of the definition of proximate cause, namely, legal causation, and shortened proximate cause to cause in fact. Messrs. Fowler and Carney pointed out that "cause" is defined in other instructions (including CV 310) to mean what was formerly called "proximate cause."

c. *CV 304. Duty to disclose material medical information.* Dr. DiPaolo thought that the last sentence defining "material" was unnecessary because materiality was built into the definition of duty in this instruction. At her suggestion, the instruction was revised to read:

> [Name of defendant] had a duty to disclose to [name of plaintiff] information concerning [name of plaintiff]'s condition that was unknown to [name of plaintiff], if the information would be important to a reasonable person in making decisions about health care, and if disclosure of the information would not be expected to make [name of plaintiff]'s health worse.

The instruction was approved as revised.

Mr. Ferguson joined the meeting.

d. *CV 307. Duties of hospitals to patients.* Mr. Simmons asked whether the existence of an employment relationship between a hospital and a

physician would ever be a jury question. The instruction presupposes that the court has already decided whether or not an employment relationship exists. Mr. Carney thought the issue generally did not present a jury question except in cases of apparent authority. Mr. Williams thought the last sentence of the note was ambiguous; he read it as referring to subparagraph (6). The phrase "last paragraph" in the last sentence of the note was changed to "bracketed paragraph." Mr. Carney questioned whether the instruction on hospital duties should more closely track the instructions for other health-care providers rather than spelling out all of the duties a hospital could breach. He will draft a more general instruction on hospitals' duties.

e. *CV 310. "Cause" defined.* Mr. Fowler noted that the instruction should be broader than just the defendant's fault; it should also apply to the fault of the plaintiff and third parties. Mr. Carney considered listing in this instruction all the ways a plaintiff could be at fault but decided against it. He will revise the instruction and present it to the committee at a later meeting.

f. *CV 311. Elements of an informed consent claim;* and *CV 312. Duty to obtain informed consent. "Informed consent" defined.* At Mr. Simmons's suggestion, the order of CV 311 and 312 was reversed.

g. *CV 314. Standard for judging patient's consent.* Mr. Young thought the phrase "you must use the viewpoint" was awkward. At Dr. DiPaolo's suggesting, "use" was replaced with "take." Mr. King thought the instruction was backwards, that it should read, "To determine whether a patient would have consented . . . , you must take the viewpoint of a reasonable person in the plaintiff's position . . . ." Other committee members thought the instruction was fine as written. Dr. DiPaolo noted that the reference to "patient" in the main clause was confusing since the only "patient" all the jurors know is the plaintiff. Mr. Carney noted that the statute refers to the "viewpoint of *the* patient." At Dr. DiPaolo's suggestion, the instruction was revised to read:

> To determine whether a reasonable person would have consented to the care, you must take the viewpoint of a reasonable person in [name of plaintiff]'s position before the care was provided and before any harm occurred.

At Mr. Simmons's suggestion, the first line was revised to say, "would not have consented," to track the language of CV 311. The instruction was approved as amended.

h. *CV 315. Oral consent valid.* Mr. Humpherys asked why "refusal of treatment" was included. Mr. Ferguson noted that the plaintiff's claim may be that the defendant was negligent for *not* treating him. The title of the instruction was changed to "Consent or refusal of treatment." The instruction was revised to read:

> A [consent to/refusal of] treatment is binding even if it is not in writing.

The instruction was approved as modified.

i. *CV 316. Consent is presumed.* Mr. Young suggested moving the phrase "unless proven otherwise" to the end of the instruction. Mr. Humpherys asked why the phrase was needed at all. The committee thought we needed a general instruction on presumptions. Messrs. Humpherys and Ferguson thought the instruction should read, "There is a presumption that, when a person submits to health care, the care was authorized." The effect of the presumption could then be explained in a general instruction on rebuttable presumptions. Dr. DiPaolo thought that one term ("presumption" or "presumed") should be used consistently throughout the instructions and recommended that the committee use "presumption." Mr. Humpherys thought that if the jury is instructed on the presumption, it should also be instructed on how the presumption can be rebutted. Mr. Williams thought that the presumption was a presumption of actual consent, which would be a defense to a claim of battery, and not a presumption of informed consent, so the committee note should be struck. Others, however, thought that the statute is not clear as to whether the presumption also covers informed consent. Mr. Carney struck the committee note. Mr. Summerill noted that the committee was getting bogged down in debates about the law and recommended that the instruction be sent back to the subcommittee for further review.

j. *CV 317. Patient's negligence in failing to follow instructions*. and *CV 318. Patient's negligence in giving medical history*. Mr. Carney asked whether an instruction on comparative fault should include a laundry list of all the ways that a patient may be comparatively negligent (as with the draft instruction on hospital negligence, CV 307), or be stated more generally, in a single paragraph. Mr. Humpherys thought that depended on whether the laundry list of duties are really legal duties or applications of the general legal duty (the duty to use reasonable care for one's own health and safety) to the evidence and the facts of the case. Mr. Humpherys also questioned whether expert testimony is required to establish that a patient breached his or her legal duty. Mr. Williams thought not, that what patients are required to do is within

the knowledge of the average juror, whereas what health-care providers are required to do is not. Mr. Young suggested using a general instruction with a contention instruction, for example: "[Name of patient] had a duty to use reasonable care to take care of himself. In this case, [name of defendant] claims that [name of plaintiff] failed to use reasonable care in the following ways: . . ." Mr. Williams noted that, merely because someone makes a claim does not mean that the other side actually had a duty. Mr. Humpherys thought that, in instructing the jury on the duties of health-care providers and patients, we should be consistent and only state as duties those duties defined by statute or case law. CV 317 and 318 were sent back to the subcommittee to reconsider, in light of the committee's discussion.

k. *CV 319. Patient's fault: preexisting conditions.* Messrs. King and Summerill noted that the instruction was an application of the principle that a defendant takes the plaintiff as he finds him. Mr. Johnson questioned whether that principle had been modified by a later decision, *Ortiz v. Geneva Rock Products, Inc.,* 939 P.2d 1213 (Utah Ct. App. 1997). Others thought, however, that *Ortiz* allowed a plaintiff's preexisting condition to be considered only on the issue of causation, not comparative fault. The committee approved the language of CV 319, but, at Mr. Young's suggestion, the subcommittee will revise the committee note.

l. *CV 320. Use of alternative treatment methods.* Mr. Humpherys questioned use of the phrase "it may not be negligence" and suggested substituting "fault," "medical malpractice," or "below the standard of care" for "negligence" to make the instruction consistent with other instructions. Mr. Drake thought the instruction should say "is not" negligence rather than "may not be" and asked why the language of MUJI 6.29 was changed. Mr. Williams agreed. He thought that if the jury finds that the treatment was appropriate in the case and was approved by a respectable portion of the medical community, then the treatment was not negligent as a matter of law. Mr. Humpherys asked how the instruction related to the doctrine of negligence per se. Messrs. Johnson and Drake said that it did not; negligence per se is based on a violation of a statute. Mr. Summerill thought that the instruction should not say that use of an accepted alternative treatment is not negligence because the treatment may be accepted for reasons other than its safety or efficacy, such as to cut costs. He and Mr. Carney pointed out that, just because a particular treatment is "approved by a respectable portion of the medical community," does not mean it is not negligent; advances in medicine may make treatments that were "approved" at one time no longer acceptable. Messrs. Young and King noted that the instruction does not define "approved by a respectable portion of the medical community." It does not answer such questions as, Approved by whom? or By

what percentage of the community? Mr. King thought the instruction would make the standard of care depend on whether a particular treatment is used by a threshold percentage of providers. He thought the standard should be whether a treatment meets the minimum standard of care and not whether it is used by a certain percentage of providers. Dr. DiPaolo thought that the instruction did not tell jurors what they have to decide. Mr. Carney noted that there is no Utah law to support the instruction. The only Utah case cited, *Butler v. Naylor,* 1999 UT 85, 987 P.2d 41, said that it was harmless error to give the instruction, which, Mr. Summerill thought, meant that it was error to give it. Mr. Humpherys thought that the committee should not include the instruction if there was no Utah law to support it. That would not preclude attorneys requesting such an instruction in a given case. Mr. Humpherys also asked about the burden of proof. The instruction seems to put the burden of proof on the defendant to prove he used an "approved" method of treatment. Mr. Humpherys questioned why the burden should not be on the plaintiff to prove that the defendant's choice of treatment was not "approved." Mr. Johnson noted that the instruction sets out an affirmative defense, on which the defendant bears the burden of proof. The plaintiff already has the burden of proving that the defendant's conduct fell below the applicable standard of care. Messrs. Humpherys and Summerill thought the matter should be left for argument and should not be covered by a jury instruction; they thought the instruction went too far without any Utah authority to support it. The instruction was sent back to the subcommittee to see if there is Utah law to support it.

3. *Next Meeting*. The next regularly scheduled meeting is Monday, May 12, 2008, at 4:00 p.m. However, because the committee is behind the schedule that it set for itself in January 2008, Mr. Young called a special meeting for Thursday, May 1, 2008, at 4:00 p.m. to finish its consideration of the medical malpractice instructions and to approve the commercial contract instructions.

The meeting concluded at 6:00 p.m.