MINUTES
Advisory Committee on Model Civil Jury Instructions
March 8, 2010
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

Excused: Honorable William W. Barrett, Jr., John L. Young (chair)

Mr. Carney conducted the meeting in Mr. Young's absence.

1. *Minutes*. Mr. Summerill noted that he is not replacing Jeff Eisenberg as chair of the premises liability subcommittee, as reported in the minutes of January 11, 2010. The minutes were otherwise approved.

2. *Special Verdict Forms*. Mr. Carney proposed using the special verdict form from the medical malpractice instructions as a template for special verdict forms in other areas. He reported that an issue with special verdict forms arose in a recent case. The defendant objected to the special verdict form's use of the term "fault" for "negligence" because "fault," as defined in CV201, includes both the concept of a wrongful act and causation. So by asking the jury, Was the defendant at fault? and Was the defendant's fault a cause of the plaintiff's injuries? the jury was being asked to determine causation twice. Mr. Ferguson thought the same problem would arise if "negligence" were substituted for "fault" because the elements of a claim for negligence include proximate causation. He suggested asking, Did the defendant breach the standard of care? and Was the defendant's breach of the standard of care a cause of the plaintiff's injuries? Mr. Carney suggested asking, Did the defendant act as a reasonable person under the circumstances? The committee thought these alternatives would be too cumbersome. Mr. Simmons noted that "negligence" is used in two different senses--as a cause of action (with all its elements, including causation) and as shorthand for breach of the duty to use reasonable care. The definition of "negligence" in CV202A does not include causation as part of the definition. Dr. Di Paolo suggested asking, "Was the defendant negligent in . . . ," and specifying the particular act or acts of negligence alleged, such as breaking the motor vehicle code. Mr. Carney suggested replacing "fault" with "negligence." Mr. Simmons noted that "fault" would only be necessary where different forms of "fault" are alleged in the same case (such as strict liability, breach of warranty, and negligence in a products liability case) or where different forms of fault need to be apportioned among the parties. Mr. West suggested, as an alternative, to take the causation element out of the definition of "fault." Mr. Fowler noted that "fault" is defined by statute to include causation. Mr. West then suggested asking just one question--"Was the defendant at fault?"--where the question of causation would be subsumed in the question of fault. Mr. Carney suggested adding a note to the effect that the court should specify the type of fault involved in the case, and that it may take more than one question to ask about different forms of fault. Mr. West did not think it was a

big problem, that juries would not interpret the special verdict form to require them to determine the question of causation twice. Mr. Summerill noted that using the term "fault" in the special verdict form could invite the jury to speculate about whether the defendant was guilty of other forms of fault besides negligence or the specific form alleged in the complaint. Mr. Simmons noted that the instruction defining "fault" says that "the fault alleged in this case is . . ." (with the court specifying the form of fault). Mr. Carney noted that he had successfully resisted attempts by plaintiffs to ask, Was the defendant negligent in any of the following respects alleged by the plaintiff? (followed by a laundry list of ways the plaintiff alleges that the defendant was negligent). Mr. Shea thought there is a problem using "fault" and "negligence" interchangeably in the special verdict form because they are defined differently. Mr. Simmons thought that, if the only form of "fault" involved in the case was negligence, the special verdict form could use "negligence" or "negligent" throughout. Mr. Carney suggested adding a note to the effect that the court does not have to list each allegation of negligence or other fault in the verdict form. Mr. Simmons thought that the issue was covered by the instruction setting forth the parties' contentions. Mr. Carney thought that that instruction, MUJI 1st 3.1, was not included in MUJI 2d. Mr. Summerill noted that CV103 allows the court to describe the parties' contentions. Mr. Carney noted that CV103 is a preliminary instruction, given at the beginning of the case, but Mr. Simmons noted that the court is encouraged to repeat the preliminary instructions as necessary at the end of the case. Mr. Carney noted that CV301B allows the court to set out the plaintiff's specific claims in medical malpractice cases and suggested there should be a similar instruction in the general negligence instructions.

Dr. Di Paolo thought there should be another question between the fault/negligence question (question 1) and the causation question (question 2), namely, Was the plaintiff harmed? She noted that the question, Did the defendant's [fault/negligence] harm the plaintiff? assumes that the plaintiff suffered harm. Mr. Carney suggested saying, Did the defendant's negligence cause any harm to the plaintiff? (adding the word *any).* Ms. Blanch preferred the phrase "harm, if any." Messrs. Ferguson and Summerill suggested "the harm alleged by the plaintiff." Mr. Shea noted that the phrase "as alleged by the plaintiff" could modify all of the questions, in which case it would be better to place it in the introduction and not in the questions themselves. The committee approved Mr. Carney's suggestion to add "any" to question 2.

Mr. Ferguson suggested cross-referencing the questions on the special verdict form with the jury instructions, for example, "1. Was the defendant negligent? (*See* instructions nos. 10-12.)" Mr. Carney noted the practical problem of getting the right instruction numbers, since the instructions are often being revised and renumbered up to the time that they are read to the jury. Mr. Summerill noted that it would lead to disputes over which instructions to cross-reference in the verdict form. Mr. Carney

noted that it would also be contrary to the instruction that says no one instruction is to be singled out, that no instruction is more important than another, and that the instructions are to be considered together. Mr. West noted that the attorneys will direct the jury's attention to the instructions they think are important in their closing arguments. The committee decided against cross-referencing instructions in the verdict form.

Dr. Di Paolo thought that the first paragraph of the special verdict form was problematic. Rather than saying, "If you . . . cannot determine a preponderance of the evidence," it should read, "If you . . . cannot determine *the issue based on* a preponderance of the evidence." Mr. Shea thought the phrase "so equally" was also problematic. The first paragraph was revised to read:

> Please answer the following questions *in the order they are presented*. If you find that the issue has been proved by a preponderance of the evidence, answer "Yes." If you find that the evidence is equally balanced, or if you find that the greater weight of evidence is against the issue, answer "No."

Mr. Shea suggested using boxes for the jury to check either Yes or No.

At Mr. Shea's suggestion, the phrase, "sign and return the verdict" was changed to "sign the verdict form, and advise the bailiff."

At Mr. Shea's suggestion, the phrase "do you find" was deleted from question 3 (and from question 6 in the comparative fault special verdict form).

The committee considered the proposed special verdict form for comparative fault. Mr. Fowler noted that question 5 uses both "negligence" and "fault" in the same sentence. Question 5 was revised to read: "Assuming the negligence totals 100%, what percentage is attributable to . . . ," and "fault" was replaced with "negligence" throughout the special verdict form.

Mr. West suggested adding the following sentence after the jury apportions fault: "Stop here if the plaintiff's negligence is 50% or more." Messrs. Ferguson and Carney said that they have seen judges require the jury to complete the damage section of the form even if they find the plaintiff 50% or more at fault, to avoid a retrial if the jury's apportionment of damages is reversed on appeal. Mr. West noted that, by the same reasoning, the jury could be required to answer every question on the verdict form, regardless of its answer to any other question. Mr. Summerill suggested adding a note to say that, if the jury's finding of comparative fault may be thrown out on appeal, it may be appropriate to ask the jury to find damages. Mr. West thought that, if the jury is

asked to complete the damage section, it will think it is awarding damages. Other committee members thought that the jury's findings on damages might be skewed if the jury thinks the plaintiff will not receive the amount of damages it finds. Mr. Simmons noted that, if the jury's apportionment of fault is reversed on appeal, any re-trial could be limited to apportionment (if necessary) and damages. Mr. Summerill thought that the sentence "Stop here . . ." should also say, "If you decide that [name of plaintiff]'s fault is 50% or greater, [name of plaintiff] will recover nothing." Other committee members thought that concept was adequately covered in CV211 and that the jury would realize that the plaintiff will recover nothing if they are not asked to complete the damage section of the verdict form.

Mr. Carney noted that the instructions at the end of question 5 were meant to avoid the "net verdict" problem, where the jury awards only the net amount of the plaintiff's damages, after first applying the percentage of the plaintiff's comparative fault. This leads to a double reduction, because the court then applies the jury's finding of comparative fault to the jury's award of damages.

Question 6 was revised to read, "What amount, if any, would fairly compensate [name of plaintiff] for [his] harm?" Mr. Simmons asked whether that would invite the jury to conclude that no amount of money could fairly compensate the plaintiff for his harm and therefore award nothing.

Mr. Carney noted that some defense attorneys object to having multiple lines for damages because they think juries award more if there are multiple lines, but the committee did not see a way to avoid listing past and future economic damages separately and breaking out economic damages into medical expenses, lost wages, and other economic damages, since prejudgment interest is only awarded on past economic damages, and one must know the amount awarded for medical expenses in determining subrogation interests. Mr. West asked about adding loss of earning capacity and loss of household services as other items of damage. Mr. Carney suggested adding a note to say that only those items should be listed for which there is evidence, and there may be other items supported by the evidence that should also be listed. Ms. Blanch asked whether "Noneconomic Damages" should be followed by "(i.e., pain and suffering)." The committee thought not and noted that "noneconomic damages" are defined in CV2004.

Mr. Carney asked Mr. Fowler's subcommittee to propose a special verdict form for a products liability case.

Mr. Summerill suggested that the instructions also include a proposed special verdict form for a wrongful death and survival case in which there are multiple heirs and issues of comparative fault of the decedent and one or more heirs.

Mr. Summerill will draft a proposed special verdict form for a complex wrongful death case.

3. *Feedback*. Dr. Di Paolo noted that the best feedback the committee could receive would come from jurors themselves. She volunteered to write a question or short survey that could be used in interviewing jurors after the trial. Mr. Carney suggested adding a closing jury instruction, to be given after the verdict is returned, thanking the jurors for their time and reminding them that they can now talk to the attorneys if they would like to but that they do not have to talk to anyone about the case. Mr. West suggested that the instruction should also say that the attorneys should honor the jurors' wishes.

Mr. Shea will draft an advisory committee note regarding post-verdict communications with jurors.

4. *CV202B. Gross negligence*. Mr. Carney introduced a proposed instruction on gross negligence, based on recent case law holding that a release does not release the releasee from claims of gross negligence and defining "gross negligence." At Mr. Shea's suggestion, the phrase "that may result" was deleted from the end of the instruction so that it reads, "it is carelessness or recklessness to a degree that shows utter indifference to the consequences." Mr. Summerill suggested replacing "utter" with "complete," but the committee thought that "complete" imposed a higher burden and decided to stay with "utter."

5. *Products Liability Instructions*. Mr. Fowler noted that the product liability instructions probably need to be revised in light of recent cases, including *Egbert v. Nissan,* 2010 UT 8.

6. *Causation Instructions*. Mr. Carney noted that Curt Drake and Scott Dubois of Snell & Wilmer have complained that the MUJI 2d causation instructions omit the "substantial factor" or "substantial role" language of MUJI 3.14 and 6.35. Mr. Carney suggested that they be invited to the next committee meeting to explain their concerns.

7. *Next Meeting*. The next meeting will be Monday, April 12, 2010, at 4:00 p.m.

The meeting concluded at 6:00 p.m.