MINUTES
Advisory Committee on Model Civil Jury Instructions
May 10, 2010
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill

Excused: Honorable William W. Barrett, Juli Blanch, Tracy H. Fowler, David E. West

1. *Proximate Cause and Substantial Factor Revisited.* The committee discussed the request of Curt Drake and Scott Dubois to reconsider the causation instruction, CV209, in light of MUJI 1st 3.14. Mr. Dubois did not have time to draft an argument in favor of their position but submitted a section from a brief arguing for use of the MUJI 1st instruction. The argument, however, focused on the use of the term "proximate cause" and not on "substantial factor." The committee thoroughly considered using "proximate cause" at the time it adopted CV209 and rejected the term in favor of "cause," as defined in CV209. As Mr. Carney pointed out, MUJI 2d does not do away with proximate causation as an element of a negligence claim but only does away with the term "proximate" because jurors did not understand it.

Messrs. Simmons and Summerill submitted a memorandum discussing CV209 and explaining why they thought the committee was right in rejecting the "substantial factor" language of MUJI 1st 3.14 when it considered CV209 the first time, in 2005. Their position is that "substantial factor" is confusing in that it implies that, even if the defendant's conduct was a cause in fact of the plaintiff's harm, the defendant cannot be liable unless his conduct meets some threshold level, whereas the committee thought that, under the Liability Reform Act, the extent to which a defendant's conduct contributed to a plaintiff's harm is properly dealt with under the allocation of fault instruction (CV211) and not as a matter of proximate cause.

Messrs. Carney and Simmons discussed the origin of the "substantial factor" definition of proximate cause. Mr. Simmons noted that the definition was originally meant to avoid unjust results where a strict application of a foreseeability or "but for" test would deny liability. He thought that the instruction might be appropriate in a case where there are two or more causes, each of which would have been sufficient alone to cause the plaintiff's harm. Mr. Carney noted that, according to Professor Dobbs, the substantial factor test was meant to get around situations where two causes combine to cause a result that either cause, acting alone, would have caused.

Mr. Carney thought that foreseeability is the *sine qua non* of proximate causation and needs to be included in the jury instruction. Mr. Carney relied in part on *Raab v. Utah Railway Co.,* 2009 UT 61, 221 P.3d 219. Mr. Simmons noted that that case applied federal common law and not Utah law. Mr. Simmons thought that, under *Normandeau v. Hanson Equipment Inc.,* 2009 UT 44, foreseeability is first decided by the court as a

matter of law in determining whether the defendant owed the plaintiff a duty and did not need to be revisited in the context of proximate causation; if the jury decides it again as part of proximate cause, it can lead to inconsistent conclusions by the court and the jury. Mr. Simmons noted that proximate causation is a legal construct that consists of cause in fact and no good reason to relieve the defendant from liability for the harm he in fact caused. The latter part, in his opinion, should be a question of law for the court to decide.

After discussing other matters (see below) to give Mr. Lund a chance to join the meeting, the committee continued its discussion of proximate cause. Mr. Carney suggested that the committee note to CV209 be expanded to explain the varying positions of committee members on foreseeability and to explain why the committee rejected the "substantial factor" test. Mr. Simmons offered to draft a proposed addition to the comment. Mr. Humpherys asked that the comment also cover the situation he raised in an e-mail to the committee, where the defendant's negligence consists in failing to prevent harm.

Mr. Young noted that the Utah appellate courts have used both the "natural and continuous sequence" definition of proximate cause and the "substantial factor" definition and suggested that MUJI 2d contain alternative instructions, as in MUJI 1st. He noted that *Holmstrom v. C.R. England, Inc.,* 2000 UT App 239, 8 P.3d 281, the most recent Utah appellate court decision discussing the "substantial factor" test, should be cited in the references to CV209. Mr. Summerill suggested leaving CV209 as is and letting someone take up on appeal the issue of "substantial factor." Mr. Young noted that the court has had seventeen years to resolve the question raised by the alternative instructions in MUJI 1st and has not done so. Mr. Humpherys thought that if the case law supports alternative instructions, it is the committee's duty to include alternative instructions. Mr. Carney noted that the *Holmstrom* case, relying on the Restatment (Second) of Torts § 431, seems to be at odds with Dobbs, in that it suggests that negligence cannot be a substantial factor in bringing about harm if the harm would have occurred even if the actor had not been negligent. According to Dobbs, that was the very type of situation the "substantial factor" test was meant to address and provide a basis for liability. Mr. Summerill noted that the Utah cases seem to use the "substantial factor" and "natural and continuous sequence" definitions of proximate cause interchangeably. Mr. Shea noted that subparagraph (1) of CV209 could be taken as a definition of "substantial factor." Mr. Ferguson noted that both "proximate cause" and "substantial factor" are confusing, but for different reasons: jurors do not know what "proximate" means, and "substantial" is so broad and vague as to mean anything. None of the committee members were in favor of throwing out CV209, and none were in favor of adding an alternative instruction using a "substantial factor" test for causation. Dr. Di Paolo suggested that the committee note to CV209 be revised so that if someone

searches the instructions for “substantial factor,” they will be directed to the committee note and so the issue will not have to come up again.

Mr. Shea will circulate revisions to CV209, and Mr. Simmons will propose additions to the committee note to CV209.

2. *Special Verdict Forms and General Tort Instructions*. Mr. Shea prepared draft special verdict forms for negligence cases involving one defendant with no comparative fault and for cases involving one defendant with comparative fault. The forms can be cut and pasted from the courts website into a Word document. The committee discussed the content of the forms. An attorney (Gary Ferguson) sent an e-mail to the committee chair objecting to the medical malpractice verdict form, which asks, “Did the defendant breach the standard of care?” and suggested that it should ask instead, “Was the defendant at fault?” or “Was the defendant negligent?” He thought asking whether the defendant breached the standard of care was not clear or simple enough for lay jurors to understand easily. Some committee members thought that the same language should be used throughout the tort instructions, but Mr. Young thought that different language could be used for medical malpractice cases. Mr. Carney noted that attorneys in a medical malpractice case before Judge Hilder had objected to asking “Was the defendant at fault?” because “fault” is defined in CV201 to include the element of causation, so the jury is, in effect, asked to determine causation twice. Mr. Simmons noted that that is because the statute defines “fault” as any actionable breach of legal duty “proximately causing or contributing to injury or damages,” UTAH CODE ANN. § 78B-5-817(2), and CV201 is taken from the statutory definition. Mr. Ferguson noted that, in one sense, “negligence” also includes proximate causation. He noted that, by using “breach of the standard of care,” the medical malpractice verdict form avoids the problem of conflating fault and causation. Mr. Shea noted that we should go through the instructions and identify all those that link fault to causation (such as CV1050). Mr. Carney suggested redefining “fault” in CV201 to eliminate the causation element, so that the second paragraph of that instruction would read, “Fault means any wrongful act or failure to act. The wrongful act or failure to act alleged in this case is [negligence, etc.].” Mr. Simmons noted that the instruction would also have to be revised to say that the jury still needs to find causation. The committee revised the first paragraph of CV201 to include an instruction that, if the jury finds that anyone was at fault, it must then decide whether that person’s fault was a cause of the harm.

Mr. Young did not think the current jury instructions were hard for jurors to process. Mr. Carney agreed but noted that we do not want to create appealable issues in the instructions. Mr. Ferguson noted that, if we change the definition of “fault” to eliminate the causation element, someone will appeal the instruction on the grounds that it misstates the law as stated in the statutory definition of “fault.” Mr. Humpherys thought that any error would be harmless.

Several committee members thought that the special verdict form should ask, (1) Was the defendant at fault?, and (2) Did the defendant's fault cause the plaintiff's harm?

Mr. Young noted that the committee had agreed at its last meeting to move the comparative fault instruction to the end of the instructions (series 2900), right before the special verdict forms. The committee discussed the placement of the fault, comparative fault, and causation instructions. Since they apply to most, if not all, tort cases, Mr. Shea suggested adding them to the general instructions (the 100 series) or making them a separate section (series 200) and renumbering all the other instructions accordingly. Dr. Di Paolo suggested that, if they are added to the general instructions, they could start as CV150. Mr. Young suggested making them the 1900 series, right before tort damages, and suggested moving CV201, CV209, CV210, CV211, and CV1050 to this new section. Mr. Simmons noted that CV1050 (the products liability comparative fault instruction) may need to stay in the product liability instructions because comparative fault is more limited in a products liability case; it may be limited to product misuse, assumption of risk, and ignoring a warning. Mr. Ferguson thought general instructions on fault and causation were going to go in each section so that one could find all the liability instructions necessary for a given case in one section, but Mr. Young noted that the committee has not always been consistent in doing so. Mr. Simmons noted that the motor vehicle instructions (series 600), for example, do not include any instructions on negligence or causation. Mr. Summerill noted that, whether the general instructions are included in each tort section or in a separate section, they should be separated out for the committee's use, so that the committee can develop a template and be consistent in the language used to explain the same concepts in each tort section.

3. *Other Topics.*

a. *Liability of Design Professionals.* Messrs. Young and Shea noted that the design professionals' liability subcommittee has submitted proposed instructions. Mr. Shea thought they needed a lot of work and offered to meet with the gang of three assigned to review the instructions (Messrs. Carney and Summerill and Ms. Blanch). Mr. Summerill asked how much leeway the gang of three has to revise the instructions. Mr. Young said that it can fix the language of the instructions but should refer substantive legal issues back to the subcommittee.

b. *Condemnation.* Mr. Young reported that Perrin Love should have the remaining condemnation instructions for the committee to review at the next meeting.

c. *Premises Liability*. Mr. Young reported that Jeff Eisenberg's subcommittee is trying to finish the premises liability instructions.

4. *CV202A, "Negligence" defined*. Mr. Shea circulated a proposed revision to CV202A, which includes the parties' contentions regarding how a party was negligent. The committee approved the instruction.

5. *Feedback*. Mr. Shea noted that, so far, the feedback he has received on MUJI 2d has been favorable, but we have to go out and solicit it. Mr. Ferguson noted that he had sent Messrs. Young and Shea five sets of jury instructions from Ruth Shapiro in his office. Mr. Carney reported that he talked to some judges about whether they needed further direction on which instructions to include in the preliminary instructions, at the start of the case, and which ones to include at the end of the case. They did not have any problem distinguishing the preliminary instructions from the final instructions. Mr. Summerill noted, from his recent trial, that the preliminary instructions are very repetitive. Mr. Shea asked whether we should survey judges and attorneys at the end of a case or whether he should copy the instructions used from the court file. The committee thought the latter would be too much work for Mr. Shea and that a survey would be more useful. Dr. Di Paolo noted that the committee needs to decide what it wants to learn from a survey. The committee responded that it wants to learn whether the MUJI 2d instructions are being used and what problems courts and litigants have encountered in using them. The committee suggested additional questions for the survey: Which MUJI 2d instructions were used? Did the court refuse to give any MUJI 2d instruction? If so, why? Which MUJI 1st instructions were used, if any? Did jurors submit questions to the court regarding any instruction? Messrs. Humpherys and Summerill thought it would be useful to get feedback from jurors, but the committee decided against doing so for fear that it would give one side or the other grounds to appeal on the grounds that the jurors did not properly understand or apply a given instruction. Mr. Shea noted that he can pull up a list of trials held each month. Mr. Young suggested that each month we look at the previous month's trials and assign committee members to call the judge or attorneys involved and solicit feedback on the jury instructions. Dr. Di Paolo said that we will have a better idea of what questions to ask after the first time we talk to judges or attorneys about their trials. She also suggested that, if there are a number of trials in a month, we would not have to talk to the attorneys and judge in every case but could take a random, objective sample of the cases.

6. *Next Meeting*. The next meeting is Monday, June 14, 2010, at 4:00 p.m.

The meeting concluded at 6:00 p.m.