MINUTES
Advisory Committee on Model Civil Jury Instructions
June 14, 2010
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, John R. Lund, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

1. *CV201, "Fault" defined; CV209, "Cause" defined.* Mr. Shea revised CV201 and CV209 to remove causation from the definition of "fault," as discussed at the last meeting. Mr. Lund asked how the revised definition complies with the statutory definition of "fault." Messrs. Carney and Shea responded that it complies with the statutory definition, but in two instructions instead of one. At Dr. Di Paolo's suggestion, the second sentence of CV209 was revised to read, "You must also determine whether a person's fault caused the harm." The committee also considered the revised committee note to CV209. Mr. Simmons added a discussion of the foreseeability requirement and an explanation of why the committee rejected the "substantial factor" alternative instruction from MUJI 1st (MUJI 3.14). Mr. Summerill suggested putting the discussion of "substantial factor" before the discussion of "foreseeability," but the committee was satisfied with the note as written. The committee approved CV201 and CV209 as revised.

2. *CV211, Allocation of fault.* Mr. Lund asked what the jury was supposed to allocate if the definition of "fault" does not include causation. Mr. Ferguson noted that the question is whether the Liability Reform Act is a comparative fault statute or a comparative causation statute, a question the Utah Supreme Court has never squarely addressed. Mr. Lund thought the jury was to allocate overall "fault," as defined by the statute, and the statute includes an element of causation in its definition of fault. Mr. Summerill noted that the statute defines "fault" as any actionable breach of legal duty "causing *or contributing* to injury or damages" (Utah Code Ann. § 78B-5-817(2)) (emphasis added). He thought this language was broader than simply causation. Mr. Simmons noted, however, that, if a defendant's fault was not a "cause" of the plaintiff's harm, there could be no liability, and the jury would never reach the allocation question. Mr. Lund thought that "or contributing" may have been included to cover cases of contributory negligence. He thought that, if causation is removed from the jury instruction's definition of "fault," CV211 should tell the jury that it needs to allocate "the fault that caused the harm" and not just "fault." Mr. Lund thought that the instructions should allow a defendant to admit negligence but argue that no fault should be apportioned to him because his fault did not cause the plaintiff's harm. Mr. West thought the third sentence, which read, "Each person's percentage should be based upon how much that person's fault caused the harm," was misleading, because the jury must allocate fault, not causation. He noted that a defendant who may be 90% at fault may have caused only 1% of the damages. He thought that if the defendant's fault is a cause of the plaintiff's harm, the jury can apportion fault to the defendant in accordance with the egregiousness of the defendant's conduct and is not required to allocate fault based

solely on how much the defendant's fault contributed to the harm. Mr. West thought that the allocation should be based on negligence, not on causation. Messrs. Lund and Nebeker noted that it is ultimately a question of who should be responsible for the plaintiff's damages and to what extent. But Mr. Lund thought that the instruction should clearly tell the jury what it is they should base their allocation on. Mr. Ferguson questioned whether the instructions were consistent, since, in CV201, the jury is told that "fault" does not include causation, but in CV211 it is told that "fault" does include causation. After much discussion, the committee revised CV211 to read:

> [Name of party] claims that more than one person's fault was a cause of the harm. If you decide that more than one person is at fault, you must decide each person's percentage of fault that caused the harm. This allocation must total 100%.
>
> You may also decide to allocate a percentage to the plaintiff. [Name of plaintiff]'s total recovery will be reduced by the percentage that you attribute to [him]. If you decide that [name of plaintiff]'s percentage is 50% or greater, [name of plaintiff] will recover nothing.
>
> When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage. I will make that calculation later.

The committee approved the instruction as revised.

3. *CV299B. Special Verdict--One Defendant (Comparative Fault).* Mr. Shea replaced "negligence" with "fault that caused the harm" in the first paragraph of Question 5 and replaced "negligence" with "fault" in other questions as well.

4. *CV1015, Negligence. Definition of "negligence"; and CV1050, Comparative fault.* Mr. Shea noted that the problems the committee had considered with the instructions on "fault" and "comparative fault" in the negligence instructions also apply to the products liability instructions on negligence and comparative negligence, CV1015 and CV1050. Mr. Young suggested sending the revisions to CV201, CV209, and CV211 to the Products Liability Subcommittee to consider whether similar revisions need to be made to the products liability negligence and comparative fault instructions.

5. *Post-trial Surveys.* Mr. Shea noted that he had not yet received the report on civil jury trials for the month of May 2010. Mr. Carney said that he had contacted the attorneys in the jury trials he knew about. Only Rob Jeffs and Eric Schoonveld responded.

6. *CV2012, Noneconomic damages. Loss of consortium.* Based on Rob Jeffs' e-mails to Mr. Carney, the committee considered a proposal to modify CV2012. Mr. Jeffs did not think the current instruction adequately addressed the situation of a housewife who is not able to do her "job" as a housewife or homemaker. The instruction he had proposed in his case said that, to award damages for loss of consortium, the plaintiff must prove that she has suffered

> (1) a significant permanent injury that substantially changes her lifestyle and
>
> (2) one or more of the following:
>
> (a) incapability of performing the types of jobs she performed before the injury; or
>
> (b) inability to provide the companionship, cooperation, affection, aid or sexual relations she provided before the injury.

Mr. Simmons thought the statute is ambiguous. It allows the spouse of an "injured" person to maintain an action for loss of consortium and defines "injured" or "injury" as

> a significant permanent injury to a person that substantially changes that person's lifestyle and includes the following:
>
> (i) a partial or complete paralysis of one or more of the extremities;
>
> (ii) significant disfigurement; or
>
> (iii) incapability of the person of performing the types of jobs the person performed before the injury . . . .

Mr. Simmons thought the phrase "and includes the following" was ambiguous. It could mean "includes but is not limited to the following," that is, that subparagraphs (i) through (iii) are only illustrative of the type of injuries that are sufficiently significant and permanent to give rise to a claim for loss of consortium, or it could mean that one of the types of injury set out in subparagraphs (i) through (iii) must exist for the plaintiff to have a claim for loss of consortium. Dr. Di Paolo thought it meant the latter but acknowledged that the statute could be better drafted. Mr. Simmons said that his firm was researching the issue but did not have an answer yet. The committee saw no reason to change CV2012 at this time but thought that a housewife's inability to do her job as a housewife would be covered under subparagraph (iii) of the statute (subparagraph (2)(c) of the current instruction).

7. *Next Meeting*. There will be no committee meeting in July or August 2010. The next meeting will be Monday, September 13, 2010, at 4:00 p.m.

The meeting concluded at 5:40 p.m.