MINUTES
Advisory Committee on Model Civil Jury Instructions
May 9, 2011
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Phillip S. Ferguson, Tracy H. Fowler, Honorable Deno Himonas, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey

Excused: Honorable William W. Barrett, Jr., Francis J. Carney, Gary L. Johnson, David E. West

1. *General Jury Instructions*. David Cutt has not finished his proposed instructions on ski injury cases, so the committee continued its review proposed changes to the general instructions.

a. *CV129. Statement of opinion*. The sentence "You do not have to believe an opinion, whether or not it comes from an expert witness" was deleted. The committee approved the instruction as modified.

b. *CV130. Charts and summaries*. The committee revised the second sentence to read, "However, the charts or summaries are not evidence." Mr. Summerill thought that the sentence did not accurately state the law and pointed out that summaries can come into evidence under Utah Rule of Evidence 1006. Mr. Young and Judge Toomey suggested deleting the sentence. Judge Himonas thought that the intent of the instruction was to cover demonstrative evidence and suggested just deleting the phrase "and summaries."

Mr. Ferguson joined the meeting.

Mr. Young asked whether the instruction was necessary. Judge Himonas and others thought the jury needed to be instructed on how to consider demonstrative evidence. Mr. Summerill pointed out that "evidence" may be misleading when used with "demonstrative" and suggested calling the instruction "Demonstrative aids." Judge Toomey suggested revising the instruction along the following lines: "Certain charts will be shown to you to help explain the evidence. Unless the charts are received as evidence, you may only consider them to the extent they correctly reflect facts or figures shown by the evidence."

The committee sent the instruction back to the Gang of Three headed up by Mr. Ferguson to propose a new instruction dealing with demonstrative evidence.

c. *CV131. Spoliation*. The committee reserved discussion of CV131 until Mr. Johnson could be present.

Mr. Humpherys joined the meeting.

d. *CV137. Selection of jury foreperson and deliberation*. The committee approved the instruction as modified.

e. *CV139. Agreement on special verdict*. Mr. Shea proposed changing "each question" to "all questions." Mr. Humpherys noted that both were problematic because sometimes the instructions on the special verdict form tell the jury not to answer certain questions. Mr. Simmons pointed out that this could lead to an inconsistent verdict, such as where the jury finds that defendant A was not negligent but then apportions fault between defendant A and defendant B. Mr. Shea revised the first paragraph to read: "I am going to give you a form called the Special Verdict that contains several questions and instructions. You must answer the questions based upon the instructions and the evidence you have seen and heard during this trial." He also changed the first sentence of the last paragraph to read, "As soon as six or more of you agree on the answer to all of the required questions, . . ." The committee approved the instruction as revised.

Mr. Springer joined the meeting.

2. *CV2012. Loss of consortium*. Mr. Young noted that Mr. Carney had asked that the committee revisit CV2012 in light of the Utah Supreme Court's recent decision in *Boyle v. Christensen,* 2011 UT 20. The instruction is no longer accurate to the extent that it requires the plaintiff to prove paralysis, significant disfigurement, or incapacity to perform the types of jobs performed previously. The court in *Boyle* said that this list was not exhaustive. The committee revised the second paragraph of the instruction to read:

> To award damages for loss of consortium, it must be proven that [name of plaintiff] has suffered a significant permanent injury that substantially changes [his] lifestyle. This may include but is not limited to one or more of the following:
>
> [(a) a partial or complete paralysis of one or more of the extremities;]
>
> [(b) significant disfigurement;]
>
> [(c) incapability of performing the types of jobs [he] performed before the injury;]
>
> [(d) other.]

The court should only include the particular injuries at issue in the case. Mr. Ferguson asked whether "one or more of the extremities" was plain English and suggested replacing the phrase with "an arm or leg." The committee discussed what the proper definition of "extremities" was and concluded that it was not authorized to define the statutory term (for example, to say whether a finger or toe qualifies as an "extremity") but should leave it for the court to decide in a particular case. The committee approved the instruction as modified.

3. *Special Verdict Forms.* Mr. Summerill noted that the special verdict forms included in the negligence instructions do not deal with cases of multiple defendants or cases of wrongful death where there are multiple heirs. He presented a proposed verdict form to address these issues. Judge Toomey noted that the introductory paragraph (which Mr. Summerill took from CV299A and 299B) repeats concepts found in the jury instructions. Mr. Humpherys asked whether the introductory paragraph was necessary. Several committee members thought it was useful to repeat specific instructions that will help the jury complete the special verdict form. Mr. Humpherys thought that the part on the preponderance of the evidence unduly emphasized the defense theory. The committee revised that part to read: "If you find that the issue has been proved by a preponderance of the evidence, answer 'Yes'; if not, answer 'No.'" At Mr. Young's suggestion, the next sentence was revised to read: "At least six jurors must agree on the answer to all of the required questions . . . ," consistent with the committee's revision of CV139. Mr. Summerill asked whether the committee agreed with the structure of the instruction (asking the jury first to determine whether each defendant was at fault and then to determine whether the fault of each defendant was a cause of the plaintiff's injuries). Mr. Ferguson noted that the jury has been told to answer each question, but there is no check box for answering question 1 (just for questions 1(a) and 1(b)). Ms. Blanch suggested changing question 1 into headings rather than a separate question (e.g., *"[Name of defendant]").* She also suggested changing the structure to ask (1) whether defendant A was at fault, (2) whether defendant A's fault was a cause of the plaintiff's harm, (3) whether defendant B was at fault, (4) whether defendant B's fault was a cause of the plaintiff's harm, (5) whether a third party or the plaintiff was at fault, and (6) whether the fault of the third party or plaintiff was a cause of the plaintiff's harm. The committee agreed with her suggestion. The committee noted that the jury should determine the fault of the defendants first, before considering the plaintiff's fault, because that is part of the plaintiff's prima facie case, and if the jury finds that the plaintiff did not make out his or her prima facie case, it does not have to reach the question of the plaintiff's fault, which is in the nature of an affirmative defense. Mr. Simmons asked whether the verdict form should refer to "fault" or to negligence or some other form of fault. Mr. Shea showed that CV201 was revised to eliminate the concept of causation from the definition of "fault," which eliminated the problem of effectively asking the jury to determine causation twice, once as part of the statutory definition of "fault" and again in the causation question.

Mr. Shea will revise the proposed special verdict form in light of the committee's discussion.

4. *Next Meeting*. The next meeting is Monday, June 13, 2011, at 4:00 p.m. The committee will then take July and August off.

The meeting concluded at 4:50 p.m.