

## MINUTES

### Advisory Committee on Model Civil Jury Instructions

November 14, 2011

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, Tracy H. Fowler, John R. Lund, Timothy M. Shea, Ryan M. Springer, Peter W. Summerill, Honorable Kate A. Toomey,. Also present: Kevin Simon

**Excused:** Honorable Deno Himonas, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons, David E. West

#### **Assistance/Membership from Litigation Section.**

Mr. Young suggested that if a defense attorney were added to the committee, a plaintiff's lawyer also would need to be added. He does not think the committee needs to expand by two members at this time. He asked for the committee's input, and the consensus was not to expand the committee.

#### **Instructions on ski resort injuries.**

Mr. Shea summarized the status of the draft instructions. The committee had tentatively approved the draft, but had asked Mr. Cutt to review it with defense counsel. Mr. Cutt is not able to attend the meeting. Mr. Young confirmed that all of the members had received the email from Mr. Gainer Waldbillig. Mr. Simon said that he concurs with Mr. Waldbillig's opinion.

Mr. Simon said that because the statute was amended after *Clover v. Snowbird* and *White v Deseelhorst*, the statute should be given the effect of changing the law of those cases, which was to establish two categories of inherent risks of skiing, risks the skier wants to encounter and those the skier does not want to encounter. Mr. Simon said that the amended statute eliminates that distinction. Mr. Summerill asked whether there is anything in the amendment that is contrary to the earlier caselaw. Mr. Simon said there is nothing express in the statute, but the fact that the amendment came after the cases argues for the result. Mr. Simon said that the amendments added categories to the list of inherent risks.

Mr. Ferguson said that we simply do not know the status of the law of *Clover v. Snowbird* and *White v Deseelhorst* after the amended statute.

Mr. Young asked whether a statute can eliminate the ordinary standard of care. Mr. Simons said the statute does not do that. If a risk can be eliminated by exercising reasonable care, then there is a duty to do so.

Mr. Summerill suggested including CV 1112 on the two types of risks, but with a note explaining that the status of the law is uncertain after the amended statute. Mr. Simon

said that including the instruction would imply the committee's conclusion that the distinction remains part of Utah law. Mr. Simon suggested being silent on the topic and let MUJI 1 be used. Mr. Shea said that if the committee is uncertain about whether the distinction in types of risks is part of Utah law, they should nevertheless include an instruction that conforms to the statute because we are trying the move away from MUJI 1. Mr. Shea suggested adopting Instructions 1110 and 1111 and writing a committee note that the distinction in risks might survive the statutory amendment because the two do not conflict.

**Mr. Carney suggested that Mr. Cutt, Mr. Simon and Mr. Waldbillig write a committee note for the committee to consider at the next meeting. Mr. Simon agreed.**

The committee discussed whether the statute was an affirmative defense on which the defendant has the burden of proof. MUJI 1 is silent on the issue as are the two cases. The committee decided to omit Instruction 1113 on the burden of proof. The judge will have to decide and can give a burden of proof instruction.

The committee amended CV 1110 to include snowboarders. The committee approved CV 1110 as amended and CV 1111 as drafted. Publication will be delayed until the committee can consider the proposed note.

### **Verdict form**

Mr. Lund suggested removing the instruction that the jurors not deduct an amount due to plaintiff's negligence. Mr. Shea said that the concept is part of the current verdict form for negligence.

Professor Di Paolo suggested amending the introductory paragraph into a more easily read list. The committee agreed.

Mr. Lund suggested adding to the damages section an item for economic damages to the decedent's heir, namely, for loss of support. Mr. Carney said that the heirs would have to be distinguished because support for a 17-year old would be different from support for a 2-year old, and children will be different from a spouse. Mr. Carney said that the instruction on economic damages may need to be amended to include loss of support.

**Mr. Shea will add the category of economic damages for an heir to the verdict form, and the committee will consider it at the next meeting.**

### **Punitive damages**

The committee amended CV 2026 to bracket each of the three types of conduct giving rise to punitive damages and add a committee note that the jury be instructed only on the types of conduct for which there is evidence. The committee amended CV 2027 to include the definition of "intentionally fraudulent" rather than merely link to the instruction in the committee note.

Several committee members said that the third type of conduct, “a knowing and reckless indifference toward the rights of others,” is a relatively low standard, and that plaintiffs might claim punitive damages in a regular negligence case. The text of the instruction is taken directly from the statute. The definition of those terms is taken from caselaw. **Ms. Blanch said she will research whether there is another definition for these terms.** The committee approved both instructions, pending Ms. Blanch’s research.

Professor Di Paola said that the word “vicarious” probably would be misinterpreted by jurors. The word is used only on the title, so the committee changed the title of CV 2028 to “Liability for the acts of agents.” Mr. Shea amended the instruction to better distinguish between the acts of the defendant’s agent for which the defendant might be liable, and the defendant’s managerial agent, who is acting on the defendant’s behalf. The committee suggested that the instructions could not be approved without Mr. Humpherys being present. The committee also suggested inviting Mr. Paul Belnap to participate.

The meeting ended at 6:00 p.m.