

MINUTES
Advisory Committee on Model Civil Jury Instructions
March 11, 2024
4:00 p.m.

Present: Alyson McAllister, Ben Lusty, John Macfarlane, Douglas G. Mortensen, Stewart Harman, Ricky Shelton, Michael D. Lichfield, William Eggington, Jace Willard (Staff), Kara H. North (Staff).

Excused: Mark Morris

Guest: Todd Wahlquist

1. *Welcome and Approval of Minutes*

Ms. McAllister welcomed the Committee and the February meeting minutes were approved.

2. *Welcome to Kara North*

Ms. McAllister welcomed the new Recording Secretary, Kara H. North, and the Committee members introduced themselves.

3. *CV301B and CV301C - Draft Amendment per Meeks v. Peng, 2024 UT 5, ¶ 43 n.5*

Ms. McAllister invited discussion from the Committee regarding CV301B and CV301C in light of the recent *Meeks* decision. The Committee discussed whether language needs to be added to either instruction specifying that the Plaintiff has the burden to establish the standard of care, or whether the comments should reflect that consideration of the jury instructions as a whole together address the issue.

Mr. Macfarlane suggested the instructions are adequate given the instructions as a whole, and CV301B's instruction that Plaintiff has the burden of proof. He suggested adding a comment in the Committee Notes, referencing that the Committee considered the *Meeks* decision.

Mr. Lusty disagreed, urging that the instructions need to reinforce that the Plaintiff has to prove what the standard of care is. He suggested adding language to CV301C: "It is your duty to decide, based on the evidence, what the standard of care is. The Plaintiff has burden of proving what the standard of care requires."

Mr. Harman moved to add a reference to *Meeks* to both instructions. Mr. Lichfield seconded. The Committee unanimously approved.

Mr. Macfarlane further moved to make no changes to the language of the instructions, but to add comment language, allowing the combining of 301B and 301C in some manner on a case by case basis. Mr. Shelton seconded. The Committee voted in favor of the motion, except for Mr. Lusty and Mr. Lichfield, who opposed it.

Mr. Macfarlane moved to add language to the Committee Notes as follows:

The Committee has met and considered footnote 5 from the Meeks decision, and determined that the instructions, when read together, accurately reflect the law. CV301B states it is the plaintiff's burden to prove breach of the standard of care, and proving the standard of care is implicit in that instruction. Additionally, CV301C is generally read immediately after CV301B. If either party has additional concerns, it may be appropriate to combine CV301B and CV301C into a single instruction to further clarify that the burden is on the plaintiff.

A majority of the Committee voted in favor of this amendment (Mr. Macfarlane, Mr. Shelton, Mr. Mortensen, Dr. Eggington, and Ms. McAllister), with two opposing (Mr. Lichfield and Mr. Harman) and one abstention (Mr. Lusty).

Following further discussion, Mr. Lusty moved to add a further sentence indicating as follows: "A minority of the Committee advocated amending the language of the instruction regarding the burden of proof." Mr. Lichfield seconded, and the Committee unanimously voted in support.

4. *CV324 – Use of Alternative Treatment Methods*

Mr. Todd Wahlquist, from the Medical Malpractice Committee of the Utah Association for Justice, expressed concerns as to CV324, which states: "The standard of care may include more than one acceptable method of treatment." Plaintiffs, who have the burden of proving the standard of care and its breach, will often present an expert saying that no reasonable doctor would have done what the Defendant doctor did. The defense expert then says, Plaintiff's expert is wrong, what the Defendant doctor did was within the standard of care, there is more than one way to do things. The jury then goes back to decide what the standard of care is, meaning they decide which expert to believe. The problem is that this instruction may lead the jury to side with the defense because the court instructs them as a matter of law that there is more than one way to treat a problem. This instruction is not necessary.

The Committee discussed *Turner v. University of Utah Hospitals and Clinics*, 2013 UT 52, 310 P.3d 1212. Mr. Macfarlane said that, compared to other instructions, this one does not have clear support or helpful guidance for its use in the case law. Although there is recognition that it may not always be appropriate, we can't say when that would be the case. Ms. McAllister agreed and said that it inherently favors the defense. Dr. Eggington at first expressed that it was a legal question, but later agreed that the language seems to be biased toward the defense.

Mr. Lichfield stressed that standard of care in the instruction is singular and that the word "may" leaves it within the discretion of the jury to determine that factual issue. He suggested that "or may not" could be added. Mr. Lusty argued that the instruction should be given whenever there is evidence that there is more than one way of meeting the standard of care.

Following discussion, a majority of those present voted to remove this instruction from MUJI (Mr. Macfarlane, Mr. Shelton, Mr. Mortensen, Ms. McAllister, and Dr. Eggington) and three opposed (Mr. Lusty, Mr. Lichfield, and Mr. Harman).

The Committee discussed how to announce the removal.

Mr. Lichfield said that, under *Turner*, there may still be times that it may be appropriate to give the instruction, and that the Committee should not indicate a prejudice in all cases, if a party wants to request it. Ms. McAllister agreed. She suggested the Committee could note that the instruction was removed from the model instructions, but that the parties could still submit/propose the instruction to the court. Discussion of this will continue at the next meeting.

5. Adjustment of Committee Meeting Schedule

Due to scheduling conflicts for multiple Committee members and staff, the next Committee meeting will be May 13, which will also include public comments regarding the recently published easement instructions, and draft assault instructions from Mr. Mitch Rice.

The Committee adjourned at 6:01 p.m.