MINUTES
Advisory Committee on Model Civil Jury Instructions
January 10, 2004
4:00 p.m.

Present: Paul Belnap, Juli Blanch, Frank Carney, Ralph Dewsnup, Tracy Fowler, Rich Humpherys, Jonathan Jemming, Timothy Shea, David West, John Young (chair).

Excused: Paul Simmons, Judge William Barrett, Marianna Di Paolo, Colin King, Phillip Ferguson, Stephen Nebeker.

1. Minutes. Mr. Young called the meeting to order. The committee approved the minutes of the November 8, 2004 meeting.

2. Standard of proof. Mr. Shea presented a draft instruction on preponderance of the evidence and clear and convincing evidence based on provisions of the current MUJI and the instructions of other states. After discussion the committee decided that a burden of proof instruction should be separate from the standard of proof instructions.

Preponderance of the evidence. Mr. Dewsnup stated that the current MUJI instruction adequately described the greater weight of evidence. He suggested using the term "persuasive" rather than "convincing" to avoid confusion with the instruction on clear and convincing evidence. Mr. Young indicated that he thought the phrase "more likely true than not true" was a good addition. Mr. Dewsnup stated that the draft's closing, which instructs the jury to find a fact not proved if the evidence is evenly balanced, should include the corollary that if the evidence shows the burden of proof to have been met, then the jury should take the fact as proved. Mr. Shea will prepare another draft for the committee to consider.

Clear and convincing evidence. The committee discussed whether introducing the requirement that a fact must be "highly probably" to meet the standard was sound. After discussion, the committee decided to delete this phrase from other states and use the traditional Utah description "that there remains no serious or substantial doubt as to the truth of the fact."

The committee asked for a committee note that the judge should specify for the jury which elements must be held to the clear and convincing standard. This might be done in an instruction or as part of the verdict form. If the judge gives the clear and convincing evidence instruction at the start of the trial and for some reason those issues do not go to the jury (settlement, directed verdict, etc.) the judge should instruct the jury that those matters are no longer part of the case. Mr. Shea will prepare another draft for the committee to consider.

3. Standard of care of the mentally disabled, physically disabled, and children. The committee discussed the research by Mr. Jemming and Mr. Humpherys.

Mental disability. Mr. Jemming stated that the Utah Supreme Court has distinguished between insanity and lesser forms of mental disabilities and between primary negligence and comparative negligence. Mr. Jemming indicated that in primary negligence, the regular standard

of care applies and that "insanity or other mental deficiency does not relieve the actor from liability for conduct which does not conform to the standard of a reasonable man under like circumstances." Mr. Jemming contrasted this with comparative negligence in which the Court held that an insane person could not be negligent, but that lesser mental disabilities should be considered by the jury. *Birkner v. Salt Lake County, et al.*,771 P.2d 1053 (Utah 1989). Mr. Jemming stated that the Court's conclusions may be limited to the circumstances of the case.

Physical disability. Mr. Jemming indicated that Utah case law does not address issues regarding the standard of care owed by a person with a physical disability. The Restatement of Torts 2d §283C provides that a person with a physical disability must use the same care as a reasonable person with a similar disability.

Children. Mr. Jemming stated that Utah law follows the general rule that a child must exercise the same standard of care as a child of like age, knowledge and experience but that a child engaging in an adult activity would be held to the standard of care of an adult.

Mr. Humpherys expressed concern that the proposed jury instructions inadequately describe the standard to be applied. That a child of fewer years might have the greater knowledge. That the law appears to distinguish between a child and an adult with the mental capacity of a child. That the standard should not change depending on whether the negligence was "primary" or contributory. Mr. Humpherys suggested a committee note that the law imposing a reduced standard of care is uncertain and that the instruction should be given only if the court first decides that a reduced standard applies.

Mr. Humpherys noted that Utah has a statute, Section 31A-22-303(1)(a)(iv), which requires liability coverage when a driver is overcome by an unforeseen seizure.

Mr. Belnap and Mr. Jemming will further research the standard of care for children. Mr. Jemming will further research the standard of care for persons with disabilities.

4. Fault defined. The committee decided that the instruction should list each of the grounds of comparative fault listed in the comparative negligence act. It was also noted that the first numbered paragraph is not grammatically correct. Mr. Shea will prepare another draft for the committee to consider.

5. Negligence defined. The committee approved the instruction defining negligence.

6. Amount of care required when children are present. The committee approved the instruction.

7. Child participating in an adult activity. The committee approved the instruction.

8. Amount of care for dangerous activities. Mr. Carney questioned whether the instruction is necessary since this instruction merely repeats the principle stated in the definition of negligence. Mr. Shea questioned whether the reference to "ultra-hazardous activities" in the committee note

is confusing since the rest of the instruction speaks of “dangerous” activities. The meeting was adjourned before the committee concluded its review of this instruction.

9. Adjournment. The committee adjourned at 6:00 pm.