MINUTES

Advisory Committee on Model Civil Jury Instructions
April 11, 2005
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons

Excused: Tracy H. Fowler

1. *Minutes.* The minutes of the February 14, 2005, meeting were approved. (There was no meeting March 14, 2005; it was canceled.)

2. *Efficiency.* The committee discussed ways to speed up its work:

a. *Starting Time.* Meetings will start promptly at 4:00 p.m.

b. *Minutes.* The committee will not spend meeting time going over minutes. The minutes of the prior meeting will be sent out ahead of time, and if no objections are received before the next meeting, the minutes will be deemed approved.

c. *Law Clerks.* Mr. Young and Mr. Carney will ask the Litigation Section of the Bar to provide law clerk help for subcommittees over the summer.

d. *Extended Meetings.* Mr. Carney suggested that the committee set aside a full day to complete whole sets of instructions. Mr. Young suggested that a half day might be sufficient. The committee agreed to meet for a half day in June to finalize the preliminary, negligence, comparative fault, causation and damage instructions. Mr. Humpherys, the chair of the damages subcommittee, is starting a trial on June 13, the date originally set for the June committee meeting, so the committee tentatively agreed to meet for a half day on Monday, June 6, beginning at noon, subject to the other committee members' availability. (Mr. Dewsnup is not available that day but agreed that the meeting could go ahead without him.)

Note: After the meeting, Mr. Young suggested that the committee meet on Wednesday, June 1, from 12:00 p.m. to 6:00 p.m., rather than Monday, June 6.

Committee members should let Mr. Shea know by e-mail as soon as possible whether they can meet on Wednesday, June 1, from 12:00 p.m. to 6:00 p.m.

Mr. Humpherys said that the damages subcommittee would try to have a draft of its instructions for the next meeting. Mr. Jemming offered to assist the subcommittee.

3. *Draft Preliminary and General Instructions.* The committee continued its review of the draft preliminary and general instructions:

a. *01.102: Role of the Judge, Jury and Lawyers.* Mr. Dewsnup suggested that the instruction start out, "You, I and the lawyers . . ." Several members did not like the language at the end of the fourth paragraph on professionalism. They thought it called undue attention to the attorneys' conduct. Judge Barrett and Mr. Belnap did not think that civility at jury trials was a problem or that the instruction was necessary. Mr. Simmons thought the instruction infringed on the jury's job of determining credibility by suggesting that the attorneys who are most civil are most believable. Ms. Blanch suggested that the instruction be made more general so as not to single out the attorneys. Mr. Carney explained that the purpose of the instruction was not to change the attorneys' behavior but to change juror expectations so that they would not expect the attorneys to act like the attorneys they see on television and in the movies. Mr. Dewsnup suggested the following language in place of the last two sentences of paragraph 4: "Things that you see on television and movies may not be an accurate reflection of the way that trials should be conducted. Modern trials should take place in an atmosphere of professionalism, courtesy and civility." Mr. Ferguson suggested that this language be placed as a separate paragraph at the end of the instruction. The committee also agreed to make the last paragraph part of the third paragraph. Dr. Di Paolo noted that most jurors would not understand the term "legal questions" in the second paragraph. Mr. Carney suggested changing it to "questions about the admission of evidence and the meaning of the law."

b. *01.401. Burden of Proof.* Mr. Simmons suggested that the instruction would be awkward if there are multiple claims or defenses. The committee agreed that it would not be a good idea to list the elements of each claim and defense in the preliminary instructions, that the preliminary instructions should only provide a general statement of the parties' claims and defenses. Mr. Young suggested that an abbreviated instruction on burden of proof follow the general instruction on the parties' claims and defenses.

c. *01.402. Preponderance of the Evidence.* Mr. Dewsnup suggested that "testimony" in the third paragraph be replaced with "evidence" and that the fourth sentence of that paragraph read: "In weighing the evidence, you should consider all the evidence that applies to a fact, no matter which party presented it." Mr. Young questioned whether "the persuasive character of the evidence" in the third sentence of paragraph 3 should be "the convincing character." Mr. Simmons thought "persuasive" was more correct, that "convincing" suggested a higher standard than mere preponderance.

Mr. Jemming will search for cases referring to the "convincing character of the evidence" and will try to update the references.

The committee approved the instruction as modified.

d. *02.102.* Mr. Shea noted that the last paragraph was added for cases in which one of the actors was under a physical disability. Dr. Di Paolo suggested that the last paragraph be placed after the second paragraph, and Mr. Carney suggested that it be set off in brackets, with the introductory sentence italicized, to show that it is only to be used where applicable. Mr. Carney noted that the definition of negligence in the first paragraph was circuitous ("Negligence means that a person did not use reasonable care. Reasonable care is simply what a reasonably careful person would do in a similar situation."). He compared the new California jury instruction on negligence: "Negligence is the failure to use reasonable care to prevent harm to oneself or to others. [¶] A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. . . ." Mr. Dewsnup thought that the standard should be "what a reasonable person would do in a similar situation," not what "a reasonably careful person" would do. Mr. Young, Ms. Blanch and Mr. Jemming all thought the standard should be that of "a reasonably careful person." The committee did not change "reasonably careful person" to "reasonable person" but approved the instruction as otherwise modified, making 02.103 ("Standard of Care of the Physically Disabled") unnecessary.

e. *02.105. Standard of Care of Children.* Mr. Belnap questioned whether the third sentence ("Rather, a child is negligent if he does not use the amount of care that is ordinarily used by children of similar age," etc.) had the effect of directing a verdict on negligence. The committee thought it was merely definitional and did not invade the province of the jury. The instruction was approved as written.

f. *02.107. Abnormally Dangerous Activity.* Mr. Simmons thought that the last sentence did not accurately state the law because, under the Liability Reform Act, a defendant's strict liability for carrying on an abnormally dangerous activity still has to be compared with the fault of others. He suggested that it read, "Therefore, the defendant was at fault." Mr. Humpherys suggested adding "to some degree." Mr. Dewsnup noted that the same defendant may be at fault in multiple ways. Mr. Ferguson noted that the jury must still find that the defendant's abnormally dangerous activity was a legal cause of the plaintiff's damages. He suggested omitting the last sentence and replacing it with: "You must only decide whether the defendant's activity caused the plaintiff's harm." Dr. Di Paolo thought it would be helpful to let the jury know the consequence of the court's determination that the defendant's activity was abnormally dangerous and thought that most jurors would not understand what "strictly liable" means. Mr. Simmons suggested deleting "strictly" from the first sentence and putting the last phrase ("whether or not [name of defendant] exercised reasonable care") at the end of the first sentence. The

discussion raised several philosophical issues under the Liability Reform Act: What is to be compared--fault or causation? If causation, is it causation of the accident, or causation of the injuries? What forms of fault can be compared? Can an intentional tort, for example, be compared with negligence? Mr. Jemming did not think the issue was resolved by *Field v. Boyer.* Mr. Belnap noted that the Supreme Court had heard arguments on the issue last week.

Mr. Shea will revise the instruction.

g. *02.108. Amount of Care Required in Controlling Electricity.* The committee approved the instruction as written.

h. *02.101 & 02.101a. "Fault" Defined.* Mr. Shea presented 02.101a as an alternative to 02.101. He tried to simplify the definition of fault by parsing the statutory language. Mr. Carney and Mr. Simmons thought that a party must show more than simply that another's act or omission caused the injury; he must also show a breach of duty. The statutory language Mr. Shea relied on was added to allow the conduct of employers and governmental entities that would be actionable but for their immunity to be compared. In light of the discussion, Mr. Shea withdrew 02.101a. Mr. Belnap questioned the need for any instruction defining "fault," since the jury will already be instructed on the elements of each claim. Mr. Simmons noted that an instruction defining "fault" is necessary in cases that involve different types of fault, such as negligence and strict liability. Mr. Young and Mr. Humpherys agreed that an instruction was necessary to help the jury understand what it must do in completing the special verdict form. Mr. Humpherys suggested adding a sentence to the end of each instruction on the elements of a claim to the effect that, if the jury finds that the elements of the claim have been met, then the actor is considered to have been at "fault." The committee agreed that the language "gave rise to a claim for" in subparagraph (1) should not be used. Several committee members objected to subparagraph (2) on the grounds that it required the jury to find causation twice--once as an element of a claim and again as part of the definition of "fault." The committee debated whether causation was an element of negligence. Mr. Carney suggested that the instructions should follow the special verdict form and require the jury to first determine whether a party's conduct breached a standard of care and then determine whether it was a legal cause of the plaintiff's harm. The committee will revisit the instruction.

i. *02.109 & 02.109a. "Legal Cause" Defined.* Mr. Belnap preferred 02.109a to 02.109 on the grounds that it more closely follows the law as it has been traditionally stated. He also preferred to keep the term "proximate cause" rather than "legal cause" and asked whether there was any empirical support for the proposition that jurors are confused by "proximate cause." Mr. Young, Dr. Di Paolo and Mr. Simmons

pointed out that "proximate cause" was criticized as foreign to lay jurors in the articles the committee reviewed when it was starting its work, including the Charrow and Charrow article. Dr. Di Paolo thought that lay jurors would also be confused by "legal cause" as well but agreed that it was better than "proximate cause." She noted that most people hear "approximate" for "a proximate." Mr. Young noted that California just uses "cause." Mr. Humpherys suggested that we ask the court to approve the use of "legal cause." Mr. Young suggested that the instruction include an advisory committee note explaining the change from "proximate" to "legal" cause and citing the studies suggesting that jurors have trouble understanding "proximate" cause. Mr. Dewsnup noted that there is a significant difference between "could foresee" (in 02.109) and "could be expected" (in 02.109a) and that the standard should be foreseeability, not expectations. Mr. Dewsnup moved to combine the draft instructions by adding the first sentence of 02.109 to the beginning of 02.109a and changing subparagraph (3) of 02.109a to read, "could be foreseen by a reasonable person . . ." Mr. Belnap suggested using MUJI 3.13 and simply changing "proximate" to "legal." Mr. Dewsnup objected to MUJI 3.13 on the grounds that it was not plain English. Mr. Young thought that it incorporated elements of superseding and intervening cause, which are best explained in separate instructions. Mr. Carney did not think that MUJI 3.13 was an accurate statement of the law. He thought it defined actual causation and not proximate causation. Mr. Simmons objected to the use of the phrases "substantial role" or "substantial factor" in any causation instruction and circulated an article suggesting that the substantiality of the conduct in producing the harm is not a proper consideration under a causation analysis but goes to the party's relative degree of fault. Mr. Carney and Mr. Jemming argued that "substantial factor" and foreseeability are not separate elements of legal causation but alternatives and that there is more support for a foreseeability test than a "substantial factor" test under Utah law. Mr. Young suggested replacing "and" between subparagraphs (2) and (3) with "or." The committee will revisit the instruction at a later meeting.

4. *Field Testing.* Mr. Carney suggested that the instructions be presented to focus groups before they are submitted to the Supreme Court to determine whether lay people can understand them.

5. *Next Meeting.* The next meeting will be Monday, May 9, 2005, at 4:00 p.m.

The meeting concluded at 6:15 p.m.