MINUTES

Advisory Committee on Model Civil Jury Instructions
May 9, 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, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons

The committee discussed the following draft instructions:

1. *01.102: Role of the Judge, Jury and Lawyers.* Mr. Simmons suggested that "why" be added before "how" in the second sentence of the third paragraph and that the last sentence be revised to read, "Real trials should be conducted with professionalism, courtesy and civility." The committee approved these changes and approved the instruction as modified.

2. *01.401: Burden of Proof.* Mr. Humpherys suggested that the instruction as written was misleading because a defendant does not have the burden of proving all defenses; for example, he does not have the burden of proving that there is insufficient evidence to support the plaintiff's claims. Mr. Dewsnup suggested omitting the "general statement of the claim or defense." Mr. Carney suggested going back to something along the lines of MUJI 2.16: "Whenever in these instructions it is stated that the burden of proof rests upon a certain party, or that a party must prove a certain proposition, . . . I mean that unless the truth of the allegation is proved by [a preponderance of the evidence] . . . , you shall find that the same is not true." Mr. Carney noted that the new California civil jury instructions (CACI) include a separate section on evidence that has two instructions on the burden of proof. The instruction on preponderance of the evidence (CACI 200) reads:

> A party must persuade you, by the evidence presented in court, that what he or she is required to prove is more likely to be true than not true. This is referred to as "the burden of proof."
>
> After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the party did not prove it. You should consider all the evidence, no matter which party produced the evidence.
>
> In criminal trials, the prosecution must prove that the defendant is guilty beyond a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need prove only that it is more likely to be true than not true.

Some of the committee expressed a preference for an instruction similar to CACI 200. Mr. Young thought it was important to explain the difference between a preponderance of the

evidence and beyond a reasonable doubt. Mr. Shea suggested eliminating instruction 01.401 from the preliminary instructions. Mr. Carney suggested that the instruction could be given both at the beginning and at the end of trial. The committee agreed to use a modified version of CACI 200.

3. *01.402: Preponderance of the Evidence.* Mr. Jemming reported that his research showed that the phrase "convincing nature" has been used most recently in Utah in the context of a "clear and convincing" standard of evidence and should probably not be used in an instruction defining the preponderance of the evidence.

4. *02.107: Amount of Care Required for an Abnormally Dangerous Activity.* At Mr. King's suggestion, the title was changed to "Abnormally Dangerous Activity," dropping any reference to the "amount of care," since engaging in an abnormally dangerous activity gives rise to strict liability. Mr. Humpherys noted that there may be a factual dispute for the jury to resolve as to whether the defendant was actually engaged in the activity, in which case the instruction could be inaccurate or misleading. Mr. Carney noted that he had drafted a comment addressing when the instruction should be given.

Mr. Carney will e-mail the draft comment to Mr. Shea to include in the next draft of the instruction.

The committee debated whether the second paragraph was necessary. Mr. Young thought it assumed both breach of a duty and causation, whereas strict liability does not relieve a plaintiff of his obligation to prove causation. Mr. Carney shared an illustration from the Restatement (Second) of Torts to show that a defendant is not necessarily strictly liable for all the harm caused by an abnormally dangerous activity, no matter how remote.

Dr. Di Paolo thought the first paragraph was confusing in that it suggested that fault and causation were separate concepts, whereas fault subsumes both breach of a duty and causation. The committee debated the meaning of "fault" and whether "fault" could be used as shorthand for breach of duty (as opposed to causation) or meant breach of duty and causation. Based on the statutory definition of "fault" in the Liability Reform Act, the committee concluded that it meant the latter. Dr. Di Paolo said that if fault, causation and harm are not the same, the distinction among them must be clearly articulated for the jury.

Mr. Humpherys suggested revising the last sentence of the first paragraph to read, "You must still decide what harm resulted from [or was caused by] the defendant's fault." Mr. King moved to delete the last sentence of the first paragraph and leave in the second paragraph, in brackets, to be used in cases of multiple defendants or comparative fault. Mr. Humpherys seconded the motion. Dr. Di Paolo noted that a lay juror would not readily understand the instruction to "allocate" fault. After further discussion, Mr. King withdrew his motion.

Mr. Belnap suggested that the second sentence of the first paragraph read that one "may be liable" rather than "is liable" and that the last phrase of that sentence ("whether or not he exercised reasonable care") be deleted. The committee rejected the suggestions.

Finally, Ms. Blanch suggested that the sentence be revised to read: "One who carries on an abnormally dangerous activity is liable for harm caused by that activity whether or not he exercised reasonable care." The committee approved her suggestion.

5. *02.101a: Order of Decision Making.* Mr. Shea explained that this instruction was his attempt to incorporate Mr. Carney's suggestion from the last meeting by setting out the three questions the jury must answer: (1) Did the act or omission of each actor breach the applicable standard of care or legal duty? (2) If so, was the act or omission a legal cause of the plaintiff's harm? (3) How is the total fault causing the plaintiff's harm to be allocated among those on the verdict form?

Mr. Humpherys noted that it was cumbersome to refer continually to "a person's act or failure to act" and proposed that an act or failure to act that breaches the applicable standard of care and causes harm be defined as "fault" and that thereafter "fault" be used throughout the instructions in place of "act or failure to act." Mr. Carney noted that this was the approach the negligence subcommittee had originally tried. Mr. Shea indicated that he had also tried that approach, but it did not work well because it collapsed the traditional two-step analysis of (1) breach of duty and (2) causation. Under that approach, the special verdict form would just have one question for each actor: Was the person at fault in causing plaintiff's injuries? Mr. Belnap thought that the instructions and verdict form should maintain the traditional two-step analysis.

Mr. Young suggested that the instruction give the jury an overview of its task. Mr. Shea and Mr. King noted that that was what instruction 02.101a was meant to do. Mr. Humpherys suggested that the instruction could read: "A person is at fault if (1) he breaches the applicable standard of care [or breaches a duty he owed the plaintiff], and (2) his breach was a cause of the plaintiff's harm. I will now instruction you on the applicable standard of care [or the applicable duty]. I will then instruction you on causation."

Mr. Dewsnup suggested using "conduct" for "act or failure to act." A majority of the committee thought that most people associate "conduct" with an act, as opposed to a failure to act. Dr. Di Paolo further noted that "conduct" has a connotation of good conduct, not misconduct.

Mr. King and Dr. Di Paolo thought that the repetition of the phrase "act or failure to act" would not be too cumbersome in practice because the jury would only hear the phrase a few times in any given set of instructions.

The committee rejected the phrase "amount of care" as misleading; in cases of strict liability, a defendant can be liable regardless of the amount of care used. Mr. Carney noted that "standard of care" is generally used in cases of professional negligence but could be adapted to refer to any conduct that breaches a legal duty. (Mr. Jemming was excused.)

The committee debated whether to use the term "legal cause" (as a substitute for the disfavored term "proximate cause"). Mr. Dewsnup noted that jurors are likely to think that a "legal cause" is to be contrasted with an "illegal cause." The committee noted that California has abandoned both "proximate cause" and "legal cause." CACI simply refers to "cause."

Mr. Shea will take the ideas discussed in the meeting and revise instruction 02.101a (Order of decision making) and the related instructions on fault and allocation of fault as necessary.

Mr. Humpherys suggested that a subcommittee review the revised instructions on fault and allocation of fault before the next committee meeting to work out any obvious problems.

The committee noted that many of the problems it was grappling with were the result of a poorly drafted statute (the Utah Liability Reform Act). Mr. Dewsnup suggested that the committee draft new language for the statute that would clarify some of the issues without altering the intent of the statute and submit the proposed language to the legislature. Mr. Humpherys noted that the instructions should explain the law to the jury in such a way that jurors can understand it and that will not be affected by any effort to clarify the statutory language.

Next Meeting. The next meeting will be Wednesday, June 1, 2005. It will start at 12:00 p.m. and go to 5:00 p.m. or later. The committee plans to spend the first three hours reviewing the revised instructions on fault and the remainder of the time reviewing the damage instructions.

The meeting concluded at 5:55 p.m.