

MINUTES

Advisory Committee on Model Civil Jury Instructions

September 12, 2005

4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King, Timothy M. Shea, Paul M. Simmons and David E. West

Excused: John L. Young (chair)

Mr. Carney conducted the meeting in Mr. Young's absence.

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.103. Personal injury--economic damage. Loss of earnings.* Mr. Shea will try to split the instruction into two instructions, one covering lost earnings and one covering loss of earning capacity.

2. *15.108. Personal injury damages. Aggravation of pre-existing conditions.* Mr. Shea suggested using the term "harm" in place of "disability, impairment, pain, suffering or other damage" in the second and third paragraphs. Judge Barrett and Mr. Humpherys questioned whether "harm" conveyed the same meaning. Judge Barrett suggested that the court specify the type of harm involved in the particular case. On Mr. Carney's suggestion, the phrase was replaced with "[specific injury]." Mr. Shea also suggested changing the first sentence of the second paragraph to read "you must first try to" rather than "it is your duty, if possible." Mr. Dewsnup suggested that the sentence read, "it is your duty to determine to the fullest extent possible." The committee discussed whether the sentence should be restated in terms of the burden of proof. After further discussion, the phrase was amended to read, "it is your duty to try to determine . . ." Mr. Dewsnup also pointed out that the word "that" needed to be inserted in the fourth line ("any aggravation of the pre-existing condition *that* was caused"). At Mr. Shea's suggestion, the phrase "or not" in the last line of the advisory committee note was replaced with "if any." The instruction was approved as amended.

Dr. Di Paolo joined the meeting.

3. *15.109. Personal injury damages. Aggravation of dormant pre-existing condition.* At Mr. Shea's suggestion, the phrase "pain, disability or other problems" was replaced with "[specific injury]." Mr. Shea asked whether 15.109 could be consolidated with 15.108 into one instruction. The former deals with asymptomatic pre-existing conditions, while the latter deals with symptomatic pre-existing conditions. The committee chose to keep them separate. Mr. Jemming noted that *Biswell*, one of the cases cited as authority for instruction 15.109, referred to a "lighting up" of an asymptomatic condition. The committee added the

phrase “or a lighting up” after “aggravation” in the second paragraph. Mr. Dewsnup questioned whether the instruction was stated in sufficiently plain English.

Mr. King joined the meeting.

4. *15.110. Personal injury damages. Mitigation of damages.* Mr. Ferguson, citing *American Jurisprudence 2d* as authority, noted that “damage,” “damages” and “harm” are distinct concepts. “Damage” is physical injury; “harm” is an invasion of a legal right; and “damages” are money awarded for harm. He asked whether the duty to mitigate is a duty to mitigate harm, damages or both. The committee decided not to change “damages” to “harm.” Dr. Di Paolo asked whether “damages” needs to be defined in this instruction. The committee thought it is adequately explained in other instructions that will be fresh in jurors’ minds. Mr. Dewsnup noted that the word “damages” was used six times in the instruction. Mr. Carney changed the second sentence to read, “Any damages awarded . . . should not include those that [name of plaintiff] could have avoided . . .” and changed the last sentence to read, “. . . your award should include the amounts that he reasonably incurred to minimize them.” The committee approved the instruction as amended.

5. *15.111. Personal injury damages. Life expectancy.* Mr. Humpherys noted that there may be an issue as to the proper date for measuring life expectancy, that is, whether it should be measured from the date of trial or the date of injury. Mr. Simmons noted that life expectancy tables are rarely current, so for a trial held in 2005, for example, the jury may be considering life expectancies from a 2000 table. Mr. King thought that there may be cases (such as failure to diagnose cases) where life expectancy should be measured from the time of the event giving rise to the claim and not the time of trial, since part of the plaintiff’s damages may be the reduction in life expectancy. Judge Barrett noted that in such cases, the life expectancy tables would not apply, and the plaintiff’s life expectancy would become a matter of expert testimony. The committee added the word “race” to the fourth line (“of a given age, *race*, and gender”) and approved the instruction as amended.

6. *15.112. Personal injury damages. Wrongful death claim. Adult.* Dr. Di Paolo suggested adding the last sentence of the advisory committee note to the instruction. Mr. Humpherys noted that it is not clear who has claims for funeral, burial and medical expenses and property damage--that is, whether the claims belong to the decedent’s estate or to the wrongful death beneficiaries. Mr. Shea thought subparagraph (1) was confusing because it mixed fixed items of damage (loss of financial support) with conditional items (loss of the right to receive financial support). Dr. Di Paolo suggested combining the two sentences of subparagraph (1). Mr. Carney compared the equivalent California instruction. After further discussion, subparagraph (1) was revised to read, “The loss of financial support, past and future, that [name of plaintiff] would likely have received or been entitled to receive from [name of decedent] had [name of decedent] lived.” The second sentence of subparagraph (1) was deleted. Mr. Simmons asked whether an instruction needed to be included on when someone is “entitled to receive”

support or whether that would be a matter of evidence. The committee thought that a separate instruction was not necessary. Mr. Dewsnup and Mr. Carney thought that subparagraphs (2) and (4) were redundant. Mr. Jemming noted that the case law lists them as separate items of damage. Mr. Humphery thought that subparagraph (4) was more a comment on the evidence. The committee decided to delete subparagraph (4). The committee reviewed the instruction as modified.

Messrs. Jemming and West were excused.

7. *15.113. Wrongful death claim. Minor.* The committee questioned whether another instruction was needed for the wrongful death of an emancipated minor. The committee thought that emancipated minors could best be covered in an advisory committee note. The first sentence of subparagraph (1) was revised to read, "The loss of financial support, past and future, that [name of plaintiff] would likely have received from [name of decedent] had [name of decedent] lived." The second sentence of subparagraph (1) was deleted. The committee also deleted subparagraph (4). The committee also considered whether loss of inheritance should be listed as a separate item of damages. Although loss of inheritance from a minor would be rare, the committee added a subparagraph that reads, "The loss of inheritance from [name of decedent] that [name of plaintiff] is likely to suffer because of [name of decedent]'s death." With these changes, Mr. Humpherys questioned whether we need separate instructions on the wrongful death of an adult and the wrongful death of a minor. Mr. Carney noted that in the latter case, there is a reduction in damages for the cost of supporting the minor. Mr. Shea noted that that difference could be handled by bracketed language in a consolidated instruction. Mr. Humpherys noted that there may also be a difference in funeral, burial and medical expenses as an item of damages. In the case of a minor's death, the parents are responsible for those expenses and may recover them, whereas in the case of an adult, a claim for those expenses may belong to the estate and not to the heirs in their own right. After further reflection, Mr. Humpherys thought that attorneys will expect separate instructions since there are separate statutes governing the two claims. The committee therefore decided to keep instructions 15.112 and 15.113 separate. Instruction 15.113 was approved as modified.

8. *15.114. Personal injury damages. Survival claim.* Mr. Humpherys noted that survival claims raise two issues: How long must the person survive, and what must the quality of his life be during that period of time? For example, if someone survives but is unconscious the whole time, do his heirs have a claim for pain and suffering or just for his medical expenses? Mr. Ferguson noted that there is little Utah case law explaining the parameters of a survival claim. The advisory committee note was amended to read, "There is no Utah case law at the time . . ." Mr. Carney thought that more research was needed on the instruction.

The meeting concluded at 6:00 p.m.

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Next Meeting. The next meeting will be the third Monday in October, October 17, 2005,
at 4:00 p.m.