

## *MINUTES*

Advisory Committee on Model Civil Jury Instructions

October 17, 2005

4:00 p.m.

Present: Paul Belnap, Juli Blanch, Phillip S. Ferguson, Tracy H. Fowler, Stephen Nebeker, Timothy M. Shea, John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King, Paul M. Simmons, David E. West

Mr. Young called the meeting to order. Mr. Shea distributed copies of Instruction 15.109. Personal injury damages. Aggravation of dormant pre-existing condition, which was omitted from the advance materials. Mr. Shea distributed new drafts from the Damages Subcommittee on lost earnings and lost earning capacity.

*Damage Instructions.* The committee reviewed the following damage instructions:

1. *15.109. Personal injury damages. Aggravation of dormant pre-existing condition.* The committee discussed whether a mental condition is covered by the use of the phrase “emotional condition.” The committee decided that a mental condition is different. Although aggravation of a mental condition would be rare, the instruction ought to allow for the possibility. The committee decided to include “mental” along with “physical or emotional” condition in this instruction and in 15.108. The committee inserted “pre-existing” before the phrase “condition or disability” at the end of the first sentence, and in the second sentence changed “but” to “however.”

The committee discussed whether “lighting up” a dormant condition would be understood by jurors. Members thought that the phrase would not be understood, but questioned whether the instruction should omit a phrase used in the case law. After discussion, the committee decided to omit the phrase. The committee agreed to the following wording: “However, if a person has a pre-existing condition that does not cause pain or disability, but [describe the event] causes the person to suffer [describe the specific harm], then he may recover all damages caused by the event.” The instruction was approved as amended.

2. *15.112. Personal injury damages. Wrongful death claim.* The committee discussed whether Paragraph (5) needs to be included as a “catch-all” to be used as the evidence warrants. The committee decided that Paragraph (5) is needed and to include a reference to it in the second paragraph of the committee note. In paragraph (4) the committee decided to insert the phrase “or reduction” after “The loss.” Mr. Shea will draft an additional committee note to the effect that the judge should include only those paragraphs for which there is evidence to support the loss. The instruction was approved as amended.

3. 15.114. *Personal injury damages. Survival claim.*
4. 15.115. *Personal injury damages. Survival claim. Disputed cause of death.* Mr. Jemming will be asked to research the law for these two instructions to try to determine the nature and extent of damages recoverable in a survival claim.
5. 15.104. *Personal injury. Economic damage. Loss of earnings.* Mr. Young suggested inserting “lost” before the word “benefits.” The committee agreed. The instruction was approved as amended.
6. 15.104A. *Personal injury. Economic damage. Past loss of earning capacity.* Ms. Blanch suggested that “fact” in item number (4) be plural. The committee agreed. Mr. Young suggested deleting the third sentence and breaking the second sentence into two. The second sentence would read: “Lost earning capacity means the lost potential to earn increased income.” The committee approved the instruction as amended.
7. 15.105B. *Personal injury. Economic damage. Future loss of earning capacity.* Mr. Young asked whether future earning capacity is the same as future earnings. Mr. Belnap responded that any losses in the future are considered lost earning capacity. Ms. Blanch asked how future lost capacity would be reflected on the verdict form. Mr. Belnap said that the subcommittee had not discussed that. Mr. Nebeker said that future damages reduced to present cash value would be part of general damages. Mr. Ferguson cited Section 78-27-44, which says that pre-judgment interest includes lost earnings and lost earning capacity before trial, but not after trial. Mr. Fowler suggested dividing the instructions between special and general damages using the date of the trial as the line between the two. Mr. Belnap will take the committee’s observations to the subcommittee and prepare another draft.
8. 15.116. *Personal injury damages. Effect of settlement.* Mr. Shea suggested deleting the phrase “You have heard evidence that.” Mr. Young said that an earlier instruction tells the jurors of settlements. Mr. Young suggested replacing the phrase “any amount that he may or may not have” with “what the plaintiff.” The committee approved the following wording: “[Name of plaintiff] has settled his claim against [name of settled party]. Your award of damages to [name of plaintiff] should be made without considering what he received under this settlement. After you have returned your verdict, I will make the appropriate adjustment to your award of damages.”
9. 15.117. *Arguments of counsel not evidence of damages.* The committee approved the instruction as drafted.
10. 10. 15.118. *Personal injury damages. Proof of damages.* Mr. Young suggested deleting the last paragraph. Mr. Young suggested that the phrase “who should bear” in the fourth paragraph should be “who bears.” The committee agreed. Some members questioned whether the

instruction is needed. It may leave the impression that proving the amount of damages is subject to a lower burden of proof than proving that damages occurred. Mr. Young observed that the requirement to prove the amount of damages necessarily includes proving that damages occurred.

The meeting concluded at 6:00 p.m.

*Next Meeting.* The next meeting will be the November 14, 2005, at 4:00 p.m.