MINUTES

Advisory Committee on Model Civil Jury Instructions
March 13, 2006
4:00 p.m.

Present: Paul M. Belnap, Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Marianna Di Paolo, Tracy H. Fowler, Colin P. King, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Phillip S. Ferguson, Jathan Janove (chair of the employment instruction subcommittee)

Mr. Young called the meeting to order. Because Mr. Janove could not be present, the committee deferred further discussion of the employment law instructions.

1. *Web Demonstration and General Comments.* Mr. Shea circulated with the meeting materials a memorandum explaining the process for approval and publication of the jury instructions. He demonstrated the proposed website that will contain the jury instructions. The goal is for it to be up and running before the district court judges' conference in May 2006. The instructions will not be in .pdf format, so attorneys can cut, paste and edit the instructions to suit their needs. Mr. Shea noted that attorneys will be able to designate the instructions they want for their particular case and then cut and paste them as a group into a new document, in the order in which they appear online. Mr. Carney suggested including on the website the jury instructions actually used in trials. The committee asked whether some of the instructions should be designated for use before trial. Mr. Shea pointed out that the introduction to the instructions says that they should be given when they would do the most good. Mr. Carney asked how instructions would be revised or corrected. Mr. Shea noted that the instructions would be published without a comment period. Mr. Young noted that it would be the committee's responsibility to review any comments or suggestions for changes to the instructions and modify the instructions accordingly. By publishing them electronically, it will be easier to amend them. Mr. Dewsnup suggested that there be a citation to controlling law for each instruction.

Committee members were encouraged to review the instructions posted on the committee website and propose references or comments for them.

Mr. Carney asked how the bar would be advised of the new instructions. Mr. Shea noted that they could be the topic of CLE classes. Mr. Young asked how attorneys can tell which instructions are available, since they will be published before the committee has completed its work. Mr. King suggested printing the links to completed instructions in boldface. Mr. Carney asked how attorneys will be able to tell when an instruction that was in MUJI 1st has been deliberately omitted. Mr. King suggested including an introduction to each section that says, "The committee has omitted the following instructions that were found in MUJI 1st for the following reasons: . . ." Mr. Dewsnup suggested including a history such as appears in the Utah Code Annotated, showing which instructions have been effectively repealed. Mr. Shea pointed out that that would only work if the same numbering system were kept, and a new numbering

system has been proposed for MUJI 2d. Mr. Fowler suggested a table cross-referencing instructions from MUJI 1st to MUJI 2d. The committee questioned whether the instructions should be available to the public generally. If they are, jurors may look up instructions before the case is submitted to them, and they may be influenced by instructions that do not apply to the particular case. Mr. Shea thought that the instructions could not be confined to just attorneys and judges. Mr. Carney noted that special verdicts will need to be included with the instructions. Mr. Shea was not sure whether case captions could be included. Mr. Young noted that the instructions will be sent to the Utah Supreme Court piecemeal, in packages. He hopes to submit the first package after the committee completes its review of the negligence and damage instructions. They will be followed by the employment, products liability and medical malpractice instructions.

Dr. Di Paolo and Mr. Jemming joined the meeting.

2. *Superseding Cause Instruction.* The committee considered a proposed instruction on superseding cause. Mr. Dewsnup felt that it needed a lot of work. The committee discussed whether the doctrine of superseding causation survived the enactment of the Utah Liability Reform Act, whether intentional acts can be superseding causes and whether negligent acts can be superseding causes. Mr. King thought that the Liability Reform Act superseded the doctrine of superseding cause and questioned whether intentional misconduct can be a superseding cause. He noted that the Utah Supreme Court suggested in *Jedrziewski v. Smith,* 2005 UT 85, that the Liability Reform Act may not cover intentional torts, and the Utah legislature recently rejected a bill that would have made it clear that intentional acts can be compared with negligent acts under the Liability Reform Act. Mr. Dewsnup noted that the Utah Court of Appeals quoted section 442B of the Restatement (Second) of Torts with approval in *Bansanine v. Bodell,* 927 P.2d 675 (1996). That section states that a later act does not relieve an earlier actor of liability for negligence unless the harm is intentionally caused by a third person and is outside the scope of the risk created by the defendant's conduct. From this, Mr. Dewsnup concluded that the doctrine of superseding cause may only apply to intervening acts where the intervening actor intended to cause harm and that negligent intervening acts are governed by the Liability Reform Act. Mr. Jemming, who drafted the proposed instruction, noted that the language "relieved from liability" was taken from *Mitchell v. Pearson Enterprises,* 697 P.2d 240 (Utah 1985). Mr. Dewsnup noted that *Mitchell* preceded the Liability Reform Act. Mr. Dewsnup thought that the instruction should define "superseding cause." Ms. Blanch noted that, because superseding cause relieves a defendant from liability, the jury must decide the issue of superseding cause before it apportions fault. Mr. King thought that absolute defenses like contributory negligence, last clear chance and superseding cause are no longer valid in light of the Liability Reform Act. Mr. Young noted that the Liability Reform Act keeps the doctrine of proximate causation, and the traditional definition of proximate cause includes the language "unbroken by an efficient intervening cause," suggesting that superseding causation may still be a viable doctrine under the Liability Reform Act. Mr. Young and Mr. Carney suggested that, if the committee could not agree on the effect of

the Liability Reform Act on the doctrine of superseding causation, perhaps it should include alternative instructions, with a committee note explaining the disagreement. Mr. Belnap and Ms. Blanch noted that they had not requested superseding causation instructions and thought the issue may not arise much but asked for more time to review the issue. The committee continued its discussion of superseding causation until the next meeting.

Any committee member who wants to may propose an alternative instruction on superseding causation to be considered at the next meeting.

3. *Damage Instructions.* Mr. Shea noted that he had edited some of the damage instructions to try to make the wording consistent. The instructions variously read, "you may award," "you should award," "you must award," "you shall award," and "the plaintiff must prove." Mr. Shea revised the instructions to read, "To recover damages for . . . , [name of plaintiff] must prove . . ." Mr. Dewsnup thought the revised instructions unduly emphasized the plaintiff's burden; the jury might think that the plaintiff must be the one who introduced the evidence, whereas the evidence that meets the plaintiff's burden may be introduced by any party. Mr. Young and Mr. Shea noted that the instruction on burden of proof says that the jury may consider all the evidence, regardless of who presented it. Mr. Dewsnup suggested revising the instructions to put them in the passive voice (e.g., "the value of the expenses must be proved"). He noted that such a construction would also eliminate the third-person pronoun ("he" or "she"). Mr. Fowler and Mr. King noted that the committee has preferred the active voice to passive voice throughout. Mr. Young and Mr. Simmons noted that putting the sentences in passive voice does not clearly show who has the burden of proof. Dr. Di Paolo questioned whether the jury would understand what it was supposed to do if the instruction just reads, "The plaintiff must prove . . ." Mr. King suggested simply listing and defining the different elements of damage. Mr. Young suggested dealing with the burden of proof in the opening instruction and rephrasing the other instructions so as not to overemphasize the burden of proof. At Mr. King's suggestion, instruction 2002 was revised to read:

> Before you may award damages, [name of plaintiff] must prove two points:
>
> First, that damages occurred. . . .
>
> Second, the amount of damages. . . .

Mr. Shea noted that he had deleted the fourth paragraph of instruction 2004 and incorporated it into instruction 2002, where it seemed to fit better, since it does not apply exclusively to non-economic damages. Mr. Fowler thought that, because of the nature of non-economic damages, the concept should be retained in instruction 2004.

Mr. Carney was excused.

Mr. Fowler thought that if the instructions simply say, "award the plaintiff . . . ," the jury may think that it should award damages even if they have not been adequately proved. Mr. Young suggested addressing this concern as well in the opening damage instruction.

Mr. Shea will revise the damage instructions to address the committee's concerns.

4. *Loss of Consortium Instruction.* Mr. Belnap moved to defer discussion of the proposed loss of consortium instruction till the next meeting. Mr. Humpherys, the subcommittee chair who circulated the proposed instruction, was not present to comment on it, and Mr. Belnap had concerns with the opening paragraph and the definition of "consortium." Mr. Dewsnup suggested reviewing Justice Durham's dissent in *Hackford v. UP&L* for a definition of consortium. Mr. West suggested looking at JIFU for a definition. He noted that early Utah cases seemed to recognize a claim for loss of consortium, and JIFU included an instruction on the claim. But Judge A. Sherman Christensen distinguished those cases, and later Utah decisions held that the claim did not exist in Utah. The committee deferred further discussion of the issue until the next meeting.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, April 10, 2006, at 4:00 p.m.