MINUTES

Advisory Committee on Model Civil Jury Instructions
April 12, 2010
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West.

1. *CV209 & CV309, Causation instructions.* Mr. Carney noted that Curt Drake and Scott DuBois of Snell & Wilmer had asked the committee to revisit CV209 and CV309, the definitions of "cause" in the negligence and medical malpractice instructions. They thought that the instructions should adopt the "substantial factor" test for proximate causation that was alternate B in MUJI 1st (MUJI 3.14). Mr. Carney noted that proximate causation encompasses two elements, actual, or "but for," causation, and legal causation, which he defined in terms of foreseeability. Mr. Carney noted that the "but for" test is problematic in cases of concurrent causation where neither cause alone would have caused the harm, such as where two fires combine to burn down the plaintiff's home. The Restatement (Second) of Torts § 431 says that negligent conduct is a "legal cause" of harm if it "is a substantial factor in bringing about the harm," and "there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." Mr. Carney noted that some Utah cases discuss proximate causation in terms of "substantial factor" or "substantial role," and others use the more traditional definition of "that cause which, in natural and continuous sequence, produces the injury and without which the injury would not have occurred"--"one which sets in operation the factors that accomplish the injury." Cases in the former category include *McCorvey v. Utah Department of Transportation,* 868 P.2d 41 (Utah 1993); *Holmstrom v. C.R. England,* 2000 UT App 239, 8 P.3d 281; *Hall v. Blackham,* 18 Utah 2d 164, 417 P.2d 664 (1966); and *Devine v. Cook,* 3 Utah 2d 134, 279 P.2d 1073 (1955). Cases in the latter category include *Steffensen v. Smith's Management Corp.,* 862 P.2d 1342 (Utah 1993).

Dr. DiPaolo joined the meeting.

Mr. Simmons said that the problem with the "substantial" factor test is that it does not give the jury sufficient guidance and gives the jury too much leeway to decide that a cause in fact was not a proximate cause because the jury doesn't think it was substantial enough. The jury may confuse the concept of "substantial factor" with a preponderance of the evidence and think the cause must have been the main cause of the harm (something more than 50%). He thought the problem with foreseeability as a test for proximate causation is that it is also a test for whether or not a duty exists. The court decides the question of duty as a matter of law, so by allowing the case to go to the jury, the court has already determined that harm to the plaintiff was a foreseeable result of the defendant's conduct. Allowing the jury to revisit the issue of foreseeability can lead to conflicts between the court's determination of foreseeability and the jury's.

Mr. Shea compared CV209 with the California model instructions on proximate causation. The California instructions state as an element of a negligence claim that the defendant's negligence "was a substantial factor in causing" the plaintiff's harm (CACI 400) and then define "substantial factor":

> A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.
>
> [Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

(CACI 430.) Mr. Simmons thought that "more than a remote or trivial factor" was too vague to help the jury and would eliminate cases where the defendant's fault was a cause in fact of the injury but perhaps not the main cause. He also thought that the last sentence was problematic because it would eliminate cases of concurrent causation, such as the two-fire hypothetical. Mr. Fowler noted that other instructions require the jury to look at matters from the point of view of a reasonable person.

Dr. Di Paolo suggested revising the first subparagraph of CV209 to read, "(1) the person's act or failure to act was a substantial factor in producing the harm directly or set in motion events that produced the harm in a natural and continuous sequence." Mr. Carney thought it made the instruction too complicated. Messrs. Simmons and Summerill thought CV209 was fine the way it was written.

Mr. Simmons thought that the committee had thoroughly discussed the "substantial factor" instruction (MUJI 3.14, alternate B) when it adopted CV209 and did not need to revisit the issue. Mr. Carney noted that there was no unanimity in either the committee or the court decisions defining proximate cause. Mr. Young thought that the full committee needed to be present if it was going to change CV209. He suggested that someone draft an alternative instruction using the "substantial factor" test.

Mr. Carney asked whether the "substantial factor" test incorporated the concept of foreseeability or whether it still needed to be stated separately. He suggested that the committee review comment *a* to section 431 of the Restatement (Second), which defines "substantial factor" to mean that

> the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred.

He also recommended that the committee review sections 434, 435, and 461 of the Restatement (Second).

Mr. Fowler also suggested that the committee review *Mitchell v. Gonzalez,* 819 P.2d 872 (Cal. 1991). He thought that a survey would show that the "substantial factor" test is the majority rule among U.S. jurisdictions.

Mr. Summerill noted that *Devine v. Cook* used the "substantial factor" test as a basis for excusing contributory negligence and suggested that the "substantial factor" test may have been imported from contributory negligence law, which no longer exists, leading to confusion. Mr. Summerill also noted, however, that he would rather concede the concept of "substantial factor" and accept Dr. Di Paolo's suggestion rather than fight over which alternative instruction to use in every case.

Mr. Young thought that, whatever the committee decides, there should be an extensive comment identifying and explaining the issues, to help the court and attorneys if the issue goes up on appeal.

The committee deferred further discussion of the issue. Mr. Young asked for memoranda setting out the competing considerations for each proposed definition of cause. Mr. Simmons and Mr. Summerill will draft the memorandum supporting current CV209. Mr. Carney suggested that Messrs. Drake and DuBois be invited to draft the memo supporting a "substantial factor" instruction. Mr. Young asked them to have their memos to Mr. Shea two weeks before the next meeting.

2. *CV299A & B, Special verdict forms.* Mr. Shea noted that he had incorporated changes from the last meeting and added an advisory committee note but was not sure what to put in the note. The third paragraph was meant to avoid a verdict form that lists all of the ways the plaintiff claims the defendant was at fault. Mr. Carney thought that a verdict form that asks, "Was the defendant negligent in any of the following respects?" followed by a laundry list of allegations was inappropriate. Mr. Summerill generally agreed but thought the note should not say so but should allow the court and the parties to decide how much detail to put in the special verdict. The third paragraph of the note was deleted. The first paragraph of the proposed note was also deleted.

Mr. Shea asked if there was any benefit to using "fault" in the instructions and "negligent" in the verdict form. The committee thought not, that the verdict form should track the instructions. Mr. Ferguson thought that the problem was that the law uses "negligence" and "fault" in two different ways, one incorporating the idea of causation and liability, and the other not. Attorneys understand which way the term is being used in context, but juries do not. Mr. Carney asked if we could define "fault"

without including the concept of causation. Mr. Ferguson noted that the statute does not do so, but Mr. Carney did not think the committee was bound to follow the statutory definition. Mr. Summerill noted that the use of "negligence" and "fault" only becomes an issue in cases of comparative fault. Mr. Ferguson suggested changing the order of the instructions so that the definition of "fault" (CV201) went with or was included in the comparative fault instruction (CV211). At Mr. Young's suggestion, the committee decided to make the comparative fault instructions a separate section (section 2900). Mr. Carney noted that this change may require some revisions to the medical malpractice instructions.

Mr. West asked whether, where questions on the special verdict form include subparts, must the same jurors agree on the answer to each subpart. The committee thought not.

Mr. Shea presented his proposed flowchart form of the special verdict form. Mr. Summerilll noted that in a recent trial (*Bustos,* in Second District Court), the jury foreperson tried to make a flowchart on the verdict form because it was so confusing which questions the jury was and was not supposed to answer. Mr. Ferguson thought a flowchart could be used in closing argument. Mr. Summerill suggested that it be used as a demonstrative aid but not necessarily go into the jury room. Dr. Di Paolo asked whether the committee thought the jury should be given both the flowchart and the more traditional verdict form, using the former to help it fill out the latter. Mr. Carney noted that a practical problem with the flowchart is that it would be harder to revise based on events occurring at trial. Mr. Shea said that he had prepared the flowchart in Word and thought it could be easily modified. Dr. Di Paolo noted that if the jury found the flowchart useful, it would use it, but if it did not, it would not.

3. *CV140, Post-verdict jury instruction.* Mr. Shea introduced CV140, which he prepared based on discussions at a previous meeting. The committee thought it was good. Mr. Carney asked if he had looked at different judges' stock instructions on the matter. The committee thought that the instruction could be included as a suggestion, but that judges should be free to use it, adapt it as they see fit, or use their own stock instruction.

4. *CV202A, "Negligence" defined.* Mr. Carney noted that he had a call from the court during a trial asking where the model instruction was that laid out the specific allegations of negligence. He noted that MUJI 2d does not have an instruction similar to MUJI 3.1, setting out the parties' contentions. Mr. Fowler noted that his practice has been to submit contention instructions that were not part of MUJI. Mr. Shea noted that CV103 ("Nature of the case") was meant to fill that purpose. But he proposed adding language to CV202A (taken from CV301B of the medical malpractice instructions) to make the parties' claims explicit. The committee revised the added language to read:

To establish negligence, [name of plaintiff] has the burden of proving that:

(1) [name of defendant] was negligent, and

(2) this negligence was a cause of [name of plaintiff]'s harm.

In this action, [name of plaintiff] alleges that [name of defendant] was negligent in the following respects:

(1)

(2)

(3)

If you find that [name of defendant] was negligent in any of these respects, then you must determine whether that negligence was a cause of [name of plaintiff]'s harm.

[[Name of defendant] has the burden of proving that:

[(1) [name of plaintiff] was negligent, and

[(2) this negligence was a cause of [name of plaintiff]'s harm.

[[Name of defendant] alleges that [name of plaintiff] was negligent in the following respects:

[(1)

[(2)

[(3)

[If you find that [name of plaintiff] was negligent in any of these respects, then you must determine whether that negligence was a cause of [name of plaintiff]'s harm.]

The second part would only be given where the defendant claimed that the plaintiff was also at fault in causing his harm.

Mr. Simmons said that, in one of his firm's recent trials, the court gave the old MUJI 1st instructions rather than repeat the MUJI 2d general instructions at the close of the evidence. Mr. Shea noted that the instructions to MUJI 2d encourage the court to give substantive instructions at the beginning of the case to help the jury understand the evidence and to repeat preliminary instructions at the end of the case. Mr. Summerill noted that CV101-136 are preliminary instructions that ought to be repeated at the end of the case. Mr. Carney noted that CV103 should be read at the beginning of the case and also repeated at the end of the case. But the preliminary instructions as written do not fit well at the end of the case. They need to be revised for use at the end of the case. Mr. Carney suggested breaking the General Instructions (the 100 series of instructions) into two sets--those to be given before the evidence is heard, and those to be given after all the evidence is in. He offered to prepare the two sets.

Mr. Carney asked whether judges are giving preliminary jury instructions, as contemplated by MUJI 2d. Mr. Young suggested adding something to the survey to be given judges asking if they gave preliminary instructions. Dr. Di Paolo noted that it would be useful to also know what instructions they gave. Mr. Shea thought the committee would get fewer responses if we asked the judges to identify the instructions given. Mr. Summerill agreed that the survey needs to be kept simple so that we will get responses. Mr. Carney suggested asking judges to attach a copy of the instructions that were given. Mr. Shea noted that he can get a report of the trials that took place each month and can obtain a copy of the jury instructions given in those cases from the court file. Messrs. Young and Carney asked Mr. Shea to see if he could get them on the agenda for the monthly Third District judges' meeting to discuss the matter with the judges. Dr. Di Paolo thought that the committee should also sample a rural district to get a good demographic representation.

The meeting concluded at 6:05 p.m.

Next Meeting. The next meeting will be Monday, May 10, 2010, at 4:00 p.m.