MINUTES

Advisory Committee on Model Civil Jury Instructions
January 9, 2012
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Hon. Deno Himonas, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Ryan M. Springer, Peter W. Summerill, Hon. Kate A. Toomey

Excused: Marianna Di Paolo, John R. Lund, David E. West

1. *Instructions on Ski Resort Injuries*. Mr. Carney moved that the committee approve Mr. Shea's January 3, 2012 memorandum on the effect of the Inherent Risks of Skiing statute on the holdings in *Clover v. Snowbird,* 808 P.2d 1037 (Utah 1991), and *White v. Deseelhorst,* 879 P.2d 13 (Utah 1994), and Mr. Shea's proposals for CV1111, CV1112, and CV1113A and B. Judge Toomey seconded the motion. The motion passed without opposition. Mr. Shea will revise the committee note to CV1113A and CV1113B to say that, if the dispute in a given case is over whether the plaintiff wanted to confront the risk, the defendant will likely have the burden of proof, since it is in the nature of an affirmative defense (assumption of risk), but if the dispute is over whether the defendant could have eliminated the risk through the use of reasonable care, the plaintiff will likely have the burden of proof because it is more in the nature of an element of his cause of action. If both prongs of the test for an inherent risk of skiing are disputed in a given case, each party may have the burden to prove one of the prongs.

2. *CV2013. Wrongful death claim. Adult. Factors for deciding damages.* Mr. Carney noted that the wrongful death verdict form asked the jury to award economic and non-economic damages, but the wrongful death instruction did not clearly define these categories of damages. CV2013 was revised to make it clear what the jury should consider in awarding economic and non-economic damages in a wrongful death case. Mr. Springer noted that the elements of non-economic damages in the instruction did not include some items mentioned in *Oxendine v. Overturf,* 1999 UT 4, 973 P.2d 417, specifically, "pleasure." Mr. Springer noted that one could argue that *Oxendine* leaves open the possibility of recovering hedonic damages under Utah law. He suggested revising the second to the last paragraph of CV2013 to say, "comfort and pleasure." Mr. Fowler opposed trying to make the list of factors the jury may consider exhaustive, since, he noted, a plaintiff's attorney could use the instruction to argue that the jury must award a different sum for each item listed. Judge Himonas asked whether the list was meant to be exclusive. If not, he suggested it say that non-economic damages include damages "for the loss of such things as . . ." Mr. Simmons noted that *Oxendine* also allowed the jury to consider the loss of "counsel and advice" and suggested that that language be added to the instruction as well. Judge Himonas questioned whether there was any difference between "counsel" and "advice." Some committee members thought there was. The committee revised the second-to-last paragraph to read:

> You may calculate non-economic damages for the loss of such things as love, companionship, society, comfort, pleasure, advice, care, protection and affection which [name of plaintiff] has sustained and will sustain in the future.

The committee approved the instruction with this modification, with Mr. Johnson opposed.

3. *Verdict Forms*. Mr. Shea announced that the personal injury and wrongful death verdict forms (CV299) are available on the website as Word files so that attorneys and courts can adapt them more easily to make them case-specific.

4. *CV2019. Aggravation of dormant pre-existing condition*. In light of the Utah Court of Appeals' discussion of CV2019 in *Harris v. ShopKo Stores, Inc.,* 2011 UT App 329, and its approval in that case of the instruction given in *Ortiz v. Geneva Rock Products, Inc.,* 939 P.2d 1213, 1219 n.5 (Utah Ct. App. 1997), Mr. Shea proposed replacing CV2019 with the following:

> If a latent condition does not cause pain, but that condition plus the injury brings on pain by aggravating the latent condition, then it is the injury, not the latent condition, that causes the pain.

At Judge Himonas's suggestion, "latent" was replaced with "pre-existing." At Mr. Simmons's suggestion, "causes" was replaced with "is a cause of." The committee approved the instruction as modified. Mr. Ferguson noted that the defendant in *Harris* has petitioned for a writ of certiorari. He also noted that the issues in such cases will often be whether or not a condition was asymptomatic and at what point the condition must have been asymptomatic.

5. *Vicarious Liability Instructions*. The committee started its review of the vicarious liability instructions.

a. *CV2801. Corporation acts through its agents*. Judge Himonas suggested replacing "corporation" with "business entity" in the title. Mr. Springer suggested "principal," and Mr. Fowler suggested "organization." The committee chose to go with "organization." At Mr. Summerill's suggestion, "[name of defendant]" in the second line was changed to "[name of party]," consistent with the first line. At the suggestion of Messrs. Ferguson and Shea, "while performing" was deleted from the second line. The committee approved the instruction as modified.

Ms. Blanch joined the meeting.

b. *CV2802. Liability of principal for authorized acts or acts within the scope of authority; and CV2804. Scope of actual authority.* The committee questioned whether both CV2802 and CV2804 were necessary. CV2802 was meant as a general statement of the basis for vicarious liability and was meant to replace MUJI 25.2, whereas CV2804 was meant to define actual authority (both express and implied) and was meant to replace MUJI 25.4. The committee agreed, however, that the distinction was not apparent from the instructions and that they could be combined into one instruction. Mr. Ferguson suggested saying that a principal can be liable for the act of an agent under three circumstances: (1) where the principal authorized the act; (2) where the agent was acting within the scope of his duties, authority, or employment; or (3) where the agent's act was necessary or incidental to carrying out his assigned duties. Mr. Shea suggested adding to CV2802 a definition of "scope of duties or authority," and inserting subparagraphs (1) and (2) from CV2804 as the definition. At Ms. Blanch's suggestion, the committee combined the instructions to read:

> *CV2802. Actual authority.*
> [Name of plaintiff] claims that [name of principal] is liable for [describe act or omission] by [name of officer/employee/agent]. To succeed on this claim, [name of plaintiff] must prove that:
> (1) [name of principal] granted [name of officer/employee/agent] the authority to [describe actual authority]; or
> (2) [name of officer/employee/agent]'s conduct was necessary, usual, proper or incidental to the conduct that [name of principal] actually authorized.

Judge Himonas questioned whether conduct can give rise to vicarious liability if it is "incidental" to the authority but not necessary, usual, and proper. Mr. Simmons thought that it could, that if the agent has discretion as to the manner of carrying out his actual authority, the principal can be liable if the agent chooses a manner that is not "necessary" or "usual" but is nevertheless incidental to his authority and proper. *Zions First National Bank v. Clark Clinic Corp.,* 762 P.2d 1090, 1094 (Utah 1988), defines "implied authority" to include "authority to do those acts which are incidental to, *or* are necessary, usual, and proper to accomplish or perform, the main authority expressly delegated to the agent." (Emphasis added and footnote omitted.) The committee approved the instruction as rewritten.

c. *CV2805. Approval of conduct.* This instruction is meant to cover the concept of ratification. Mr. Shea suggested deleting "expressly or impliedly."

Judge Himonas suggested replacing the phrase with "directly or indirectly." Judge Toomey pointed out that the second paragraph makes it clear that approval can be implied from conduct or even silence, so the committee deleted the phrase "expressly or impliedly" from the first paragraph and approved the instruction as modified.

d. *CV2806. Scope of duties.* Judge Himonas questioned whether the instruction was necessary. He saw a possible conflict between it and CV2802. Mr. Simmons noted that CV2806 was a specific application of the general principles stated in CV2802 applicable to employment cases and should be titled "Scope of employment" rather than "Scope of duties." He thought that both instructions would not be given in the same case but that the more specific instruction would be given in employment cases. At Mr. Young's suggestion, the committee deferred further consideration of CV2806 to allow the vicarious liability subcommittee to revisit the issue.

6. *Present Value Tables.* Mr. Carney asked why the committee did not include a present value table for calculating the present value of future damages, as some jurisdictions do. The table would show the value of $1 at different times (e.g., 1 year from the time of trial up to 20 or 30 years after the time of trial) using different discount rates, obviating the need for expert economic testimony in some cases. Ms. Blanch thought that expert testimony would always be required to establish the discount rate. Messrs. Summerill and Springer thought that the court could take judicial notice of inflation rates from government-published statistics. Judge Himonas thought that a table is a good idea, especially if the parties stipulate to the discount rate, but asked what happens when there is a dispute about what rate the jury should use. He noted that the defense often just attacks the plaintiff's economist, without providing a discount rate of its own. Mr. Carney noted that the instructions tell the jurors that they are not required to accept even expert testimony. Ms. Blanch thought that if the jury is given a table, it may select a discount rate that has no basis in the evidence. For example, the parties' experts may disagree about whether the discount rate is 4% or 6%, and the jury could then apply a 20% discount rate. Mr. Young suggested asking the jury on the verdict form to determine the plaintiff's total economic damages and the applicable discount rate and then letting the court reduce the economic damages to present value. Mr. Carney will provide examples of what other jurisdictions have done for the next meeting.

7. *Next Meeting.* The next meeting will be Monday, February 13, 2012, at 4:00 p.m.

The meeting concluded at 5:50 p.m.