

MINUTES

Advisory Committee on Model Civil Jury Instructions

June 9, 2014

4:00 p.m.

Present: Juli Blanch (acting chair), Alison Adams-Perlac, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, L. Rich Humpherys, Gary L. Johnson, Paul M. Simmons

Excused: John R. Lund, Ryan M. Springer, Honorable Andrew H. Stone, Peter W. Summerill

Ms. Blanch presided.

1. *Minutes*. Mr. Humpherys moved to approve the minutes of the May 12, 2014 meeting. Mr. Johnson 2d. The motion passed without opposition.

2. *Supreme Court Update*. Ms. Adams-Perlac reported on the meeting that she, John Young, and Judge Denise Lindberg had with the Utah Supreme Court. The court suggested that the committee be moved under the umbrella of the bar. Ms. Adams-Perlac's sense was that the court was concerned that it is perceived as being too closely tied to MUJI 2d, even though the instructions are not approved by the court. Judge Lindberg, Mr. Young, and Ms. Adams-Perlac spoke against the idea and suggested ways to revitalize the jury instruction committees, such as term limits and involving younger members of the bar. The court took the matter under advisement. Ms. Adams-Perlac said that she has been working on an article for the *Utah Bar Journal* encouraging suggestions for jury instructions and encouraging members to apply for the committee. She will probably wait for a new chair to be appointed before submitting it to the bar journal.

3. *Punitive Damage Instructions*. The committee continued its review of the punitive damage instructions.

a. *CV2026. Punitive damages—introduction*. Mr. Humpherys noted that he had removed the definition of “malicious conduct” from the instruction because the term was not defined in the Utah cases. Mr. Ferguson suggested saying in a committee note that the term has not been defined by Utah appellate courts. The definition of “knowing and reckless indifference” was taken from *Behrens v. Raleigh Hills Hospital*, 675 P.2d 1179, 1187 (Utah 1983). Mr. Humpherys asked to what extent the issue of punitive damages is governed by the statute (Utah Code Ann. § 78B-8-201) and to what extent it is governed by the common law (including pre-statute common law). (*Behrens* predated the statute, and its definition was not defining the statutory standard but was taken from a Wyoming case.) There is also an issue as to how much, if any, of *Crookston v. Fire Insurance Exchange*, 817 P.2d 789 (Utah 1991), survives the more recent U.S. Supreme Court punitive-damage decisions. Mr. Simmons suggested listing the predicates for punitive damages separately and in brackets, e.g.: “[¶] [willful

and malicious] [¶] [intentionally fraudulent] [¶] manifested a knowing and reckless indifference toward, and a disregard of [name of plaintiff]’s rights].” Because of the way the elements are listed in the statute, the committee chose to leave “willful and malicious” and “intentionally fraudulent” together, but bracketed, to show that one or both may not apply in a given case. The committee thought that the third option (“knowing and reckless indifference”) is pleaded in almost every case seeking punitive damages. Mr. Simmons also questioned whether “[name of plaintiff]’s rights” should be replaced with the statutory language (“the rights of others”). Mr. Humpherys noted that the Supreme Court has held that due process forbids a state from using punitive damages to punish a defendant for injury that it inflicts on a nonparty, *see Philip Morris, USA v. Williams*, 549 U.S. 346, 353 (2007) (cited with approval in *Westgate Resorts, Ltd. v. Consumer Prot. Grp., LLC*, 2012 UT 55, ¶ 10, 285 P.3d 1219, meaning that the effect of the defendant’s conduct on others is not a proper consideration. Mr. Simmons noted the apparent inconsistency in this holding and the principal that the amount of punitive damages should be sufficient to deter similar misconduct in the future. Judge Harris noted that plaintiffs generally do not like the last sentence of the instruction because they think that juries will be reluctant to award punitive damages if they think it will mean more work for them. Some committee members thought it was in keeping with the philosophy of telling jurors the consequences of their actions. Dr. Di Paolo suggested making the language more neutral, e.g., “I will then give you further instructions.” Judge Harris thought it was a matter to be handled by the special verdict form. Mr. Humpherys agreed that it was not a legal matter; he did not object to striking it. Dr. Di Paolo and Mr. Ferguson suggested striking the entire last paragraph. Mr. Johnson noted that there may not be a special verdict form. Ms. Adams-Perlac suggested putting the last sentence of the last paragraph in brackets and letting the attorneys argue their positions as to whether or not it should be given to the jury. Dr. Di Paolo asked whether “ordinary care” in the preceding paragraph needed to be defined. For example, the instruction could say “an extreme departure from ordinary care, that is, the care a reasonable person would provide” Mr. Ferguson suggested inserting the definition of “ordinary care” from the negligence instructions. He also asked whether “intentionally fraudulent” was redundant and whether “intentionally” could be deleted. He thought it suggested a higher standard than merely proving fraud by clear and convincing evidence. Judge Harris thought that the committee should not deviate from the statutory language. Mr. Humpherys suggested adding the following language from *Behrens*: “Punitive damages are not awarded for mere inadvertence, mistake, errors of judgment and the like, which constitute ordinary negligence.” Mr. Simmons thought that the committee should not deviate from its policy of not defining things by what they are not. Mr. Johnson added that, if the evidence showed that the defendant made a mere mistake or error of judgment, the matter would generally be dealt with by a motion before the case

ever goes to the jury. Dr. Di Paolo had a problem with the phrase “mere inadvertence,” which she did not think lay jurors would understand. Ms. Adams-Perlac thought that “inadvertence” and “mistake” were roughly synonymous. Judge Harris thought that the language from *Behrens* should be a separate paragraph. Mr. Humpherys thought it should also be bracketed because it would not apply in every case. For example, it would not apply in an assault, fraud, or defamation case. The committee approved the instruction as modified.

b. *CV2027. Punitive damages discretionary.* Some committee members thought the instruction was largely duplicative of CV2026. Judge Harris said whether it was necessary may depend on how the special verdict form is worded. In a trial he had where the plaintiffs were seeking punitive damages, the jury was asked, “Is the plaintiff entitled to punitive damages?” Judge Harris did not think any more was needed, since CV2026 tells the jury when a plaintiff is entitled to punitive damages. Mr. Humpherys thought the question on the special verdict form should be, “Was the defendant’s conduct willful and malicious,” etc.? He noted that just because the jury finds that the defendant’s conduct justifies an award of punitive damages does not mean that the jury will want to award punitive damages. He thought that, unless the court asks the jury if the defendant’s conduct meets one of the standards for punitive damages, the jury could award punitive damages for other reasons, for example, because the jurors did not like the defendant or thought he lied on the witness stand. The committee decided to delete CV2027 and to add the following language to the end of CV2029: “Whether or not to award a specific amount or any amount of punitive damages is left entirely up to you.”

c. *CV2028. Purpose of punitive damages.* At Judge Harris’s suggestion, the committee decided to delete CV2028 as a separate instruction and to add it to the end of the first paragraph of CV2026. The committee approved this revision to CV2026.

d. *CV2029. Amount of punitive damages.* Mr. Humpherys suggested deleting the first sentence of CV2029, but Judge Harris disagreed. At Mr. Ferguson’s suggestion, “[If you]” was deleted from the beginning of the sentence, since the instruction will only be given after the jury decides to award punitive damages (unless the punitive damage phase is not bifurcated from the liability phase of the trial and all punitive damage instructions are given together). Judge Harris suggested deleting the phrase “but should not be arbitrarily selected,” but Mr. Johnson disagreed. He thought it was required by due process. Mr. Humpherys asked how a lay juror would understand the sentence “The amount must be . . . in proportion to the [name of plaintiff]’s harm.” Dr. Di Paolo thought that jurors would understand that to mean that they have to weigh the harm and make any award of punitive damages roughly balance. The committee thought

that would be error since an award of punitive damages can be much less than a compensatory award or, presumptively, up to nine times the compensatory award. Ms. Blanch questioned whether the jury should be told anything about proportionality or whether proportionality is simply a matter for the court to deal with in post-trial motions. Mr. Humpherys suggested changing the sentence to read, "The amount must be reasonable and bear some relationship to [name of plaintiff]'s harm." He also suggested adding a committee note regarding the court's role in determining proportionality. The committee approved the instruction as revised, subject to approval of the wording of the committee note.

Judge Harris was excused.

e. *CV2030. Punitive damages.* The committee changed the beginning of the instruction to read, "In determining punitive damages, you may not award . . . ," and changed "[forum state]" to "[Utah]." Because there was no longer a quorum, however, the committee deferred a vote on approving the instruction as modified.

4. *Next meeting.* Barring any action by the Utah Supreme Court in the interim, the next meeting will be Monday, September 8, 2014, at 4:00 p.m. There will be no committee meetings in July and August.

The meeting concluded at 5:50 p.m.