

## ***MINUTES***

Advisory Committee on Model Civil Jury Instructions

April 13, 2015

4:00 p.m.

Present: Juli Blanch (chair), Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Honorable Ryan M. Harris, Gary L. Johnson, Paul M. Simmons, Peter W. Summerill, Nancy Sylvester

Excused: Paul M. Belnap, L. Rich Humpherys, John R. Lund, Stuart Schultz, Ryan M. Springer, Honorable Andrew H. Stone

1. *Approval of minutes.* On motion of Mr. Johnson, seconded by Mr. Ferguson, the committee approved the minutes of the March 9, 2015 meeting.

2. *New committee members.* There are two openings on the committee as a result of Messrs. Ferguson and Humpherys leaving the committee--one for a member of the plaintiff's bar and one for a member of the defense bar. Ms. Blanch and Ms. Sylvester reviewed the applicants. Members of the defense bar who have applied are Steven Combe, Chad Derum, Mark Dalton Dunn, Joel Ferre, and Ricky Shelton. Members of the plaintiff's bar who have applied are Nelson Abbott, Patricia Kuendig, and David Stevenson. Ms. Blanch asked for any feedback the committee might have on any of the applicants. Ms. Blanch and Ms. Sylvester will make a recommendation to the Judicial Council.

3. *Subcommittees.* Ms. Blanch reviewed the list of subcommittee members and noted that some of the subcommittees still need members. Mr. Ferguson recommended Tom Christensen and Greg Barrick for the Wills and Probate subcommittee. Mr. Simmons suggested Bill Prater and Joyce Maughan and Mr. Johnson suggested Matt Barneck for the same subcommittee. Mr. Johnson also recommended Bob Sykes for the Emotional Distress subcommittee. Ms. Blanch invited committee members to e-mail her any other suggestions.

Dr. Di Paolo joined the meeting.

4. *CV2026, Punitive damages--introduction.* The committee reviewed new edits to CV2026. Mr. Schultz had submitted an e-mail commenting on them and noted that there was no substantive difference between the definitions of "willful and malicious" and "knowing and reckless." He asked why, if they are the same, the cases and statute refer to them as alternative bases for punitive damages. Mr. Summerill said that he would not include "knew" under the definition of "willful and malicious." He noted that if a defendant acted intending to cause harm, the action would be criminal, but criminal misconduct is not a prerequisite for punitive damages. In his e-mail, Mr. Schultz had presented a definition of "willful misconduct" from non-punitive-damage cases: "Willful misconduct is the intentional doing of an act, or the intentional failure to do an act, with knowledge that serious injury is a probable result." *Chang v. Soldier*

*Summit Dev.*, 1999 UT App 27 (quoting *Brown v. Frandsen*, 19 Utah 2d 116, 118, 426 P.2d 1021, 1022 (Utah 1967)). Dr. Di Paolo doubted whether jurors would understand the difference between doing an act knowing that serious injury is the probable result and doing the act intending to cause serious injury. She thought that the average person would think that if someone did an intentional act knowing that harm is probable, the person must have intended the harm. The committee noted that someone may know what he is doing but not necessarily intend the consequences. Dr. Di Paolo noted that some languages use different words for *know* depending on what it is a person knows, but English does not. She thought that more should be added to the definition of “willful” for an average juror to understand it. She suggested saying “with knowledge that *some sort of* serious injury is a probable result.” Mr. Simmons asked whether the committee should include definitions at all if neither the statute nor the case law define the terms as used in the statute. Judge Harris thought that the definitions would not vary from one context to another. Dr. Di Paolo doubted whether jurors would understand the terms without definitions in the instruction. Mr. Johnson thought that an intentional act was required so as to avoid awarding punitive damages for negligence, but Mr. Ferguson noted that reckless misconduct may be enough for punitive damages. The committee noted that even though *Chang* offered a definition of “willful misconduct,” the punitive damage statute requires “willful *and malicious*” misconduct. Mr. Ferguson and Dr. Di Paolo noted that “malice” implies to the average person a bad intent, or an intent to cause harm. But Mr. Ferguson also noted that “malice” can have different legal meanings depending on the context. Under general rules of statutory construction, statutes should be construed to give meaning to every word. Mr. Summerill noted that there is a difference between malice in fact and malice in law. He added that, under *Johnson v. Rogers*, actual malice is not required for punitive damages except in cases of shoplifting; legal malice is sufficient in all other cases. Ms. Sylvester noted that the committee note says that “malicious” conduct has not yet been defined. The committee decided to leave in the definition of “knowing and reckless indifference” but say that the committee was unable to reach a working definition of the other terms (“willful and malicious” and “intentionally fraudulent” conduct) and to refer practitioners to the case law. Mr. Simmons suggested leaving out the comment from the instruction itself and just putting it in the committee note, but the committee thought that the instruction should refer to the committee note. Otherwise, practitioners may be confused and may think that “knowing and reckless” is the only standard for punitive damages. Ms. Sylvester will revise the committee note and circulate it to the committee by e-mail to review. The committee revised the last sentence of paragraph 4 of the committee note to say that “one option would be for 2026, 2033, and/or 2034 to be read in the first phase, with the remainder to be read during any second phase.”

Mr. Summerill was excused.

5. *CV2031, Reprehensibility—similar conduct toward other people.* On motion of Mr. Johnson, the committee approved the new CV2031.

6. *CV2033, Driving under the influence.* Judge Harris initially suggested deleting the first two sentences of the first paragraph as duplicative of CV2026. But later, when it became apparent that CV2033 and CV2026 may not be given in the same case, the committee decided to leave them in. Ms. Sylvester thought there was some issue as to whether the standard of evidence in a case involving driving under the influence or causing the death of someone by a controlled substance was a preponderance standard or a clear and convincing standard, based on *C.T. ex rel. Taylor v. Johnson*, 1999 UT 35, 977 P.2d 479, but the committee thought that the statute was clear that a preponderance standard applies and that *C.T.* did not address the issue. Consequently, the committee deleted the first paragraph of the committee note from CV2033 and CV2034. The committee revised the third sentence of CV2033 to read, "Punitive damages can be awarded to . . .," rather than "are intended to." The committee revised the next part to read:

Punitive damages may be awarded if [name of plaintiff] has proved by a preponderance of the evidence that [name of defendant] operated or was in actual physical control of a vehicle within this state and any one of the following:

1. Had sufficient alcohol in [his][her] body that a subsequent chemical test showed that [he][she] had a blood or breath alcohol concentration of .08 grams or greater at the time of the test;
2. Had a blood or breath alcohol concentration of .08 grams or greater at the time of operation or actual physical control; or
3. Was under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that rendered [name of defendant] incapable of safely operating a vehicle.

On motion of Mr. Ferguson, the committee approved the instruction as revised.

7. *CV2034, Providing controlled substance.* The committee thought the statutory language was problematic, including such words as "chain of transfer." Dr. Di Paolo suggested adding a committee note saying that the committee thought the last subparagraph was confusing but left in "chain of transfer" but because it was the statutory language, and the committee was not sure what it meant. Mr. Ferguson thought that it was meant to get at the head of a drug distribution ring who may not have given the decedent the drugs personally. Ms. Blanch did not think a committee note was necessary. The committee revised CV2034 along the lines of its changes to CV2033 so that the first part of the instruction now reads:

In addition to compensatory damages, [name of plaintiff] also seeks to recover punitive damages against [name of defendant]. Punitive damages are not intended to compensate [name of plaintiff] for [his][her][its] loss. Punitive damages can be awarded to punish a wrongdoer for causing the drug-related death of another person.

Punitive damages may be awarded if [name of plaintiff] has proved by a preponderance of the evidence that [name of defendant]--

1. Provided or administered an illegal controlled substance to the deceased person in violation of the law; or
2. Provided an illegal controlled substance to any person in the chain of transfer connected directly to someone who subsequently provided or administered it to the person whose death was caused in whole or in part by the substance.

At Judge Harris's suggestion, the next two paragraphs were deleted. The statutory references are contained in the References at the end of the instruction. Mr. Simmons suggested deleting the brackets around the last paragraph, but the committee rejected the suggestion. On motion of Mr. Johnson, seconded by Judge Harris, the motion passed without opposition.

8. *Next Meeting.* The next meeting will be Monday, May 11, at 4:00 p.m.

The meeting concluded at 6:10 p.m.