

MINUTES

Advisory Committee on Model Civil Jury Instructions

January 12, 2004

4:15 p.m.

Present: John L. Young (chair), Timothy M. Shea, Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Paul M. Simmons

1. *Minutes.* Judge Barrett moved that the minutes of the October 8 and December 8, 2003, meetings be approved. The motion passed without opposition.

2. *Drafting Guidelines.* The committee discussed a draft of Guidelines for Drafting Plain-Language Jury Instructions, which Mr. Simmons had prepared from the materials Mr. Shea had circulated earlier. Mr. Young suggested that the committee refine the guidelines before the next meeting and come to the next meeting prepared to approve them, so that they can be circulated to all the subcommittees.

If committee members have other suggestions or examples for the drafting guidelines, they should get them to Mr. Shea, who will circulate them to all committee members before the next meeting.

3. *Charge.* Mr. Young reviewed the committee's charge, which is to propose a set of plain-language jury instructions. Subcommittees should reach a consensus if at all possible. The court would like to avoid alternative instructions.

4. *Preliminary Instructions.* Mr. Carney suggested that the instructions include a recommendation that instructions be given at different points during the trial. For example, an instruction on expert testimony and the weight it deserves could be given before the first expert witness testifies in the case. Mr. Young suggested that such suggestions be included in the introductory materials.

5. *California Jury Instructions.* Mr. Carney reviewed the new California plain-language jury instructions and noted that the instructions themselves are not copyrighted. Mr. Shea loaned a set of the California instructions to Messrs. Ferguson and Humpherys, who will see that Mr. Belnap gets a set of the damage instructions. Mr. Shea will also see if he can obtain additional complimentary copies of the California instructions.

6. *Negligence Instructions.* The committee reviewed a draft of the instructions prepared by Mr. Carney's Negligence Subcommittee. The committee reviewed and made additional changes to the instructions that were approved at the last committee meeting:

In the third line of instruction 2, "person" was added after the word "careful."

The second paragraph of instruction 2 was revised to read, "One can be negligent in doing something or in not doing something." Mr. Belnap asked whether the examples in that paragraph were necessary. Mr. Humpherys noted that they could lead to disputes in the instruction conference over the examples the court uses.

In the third paragraph, the phrase "an average person" was replaced with "an ordinarily careful person."

Mr. Simmons suggested deleting the first sentence of instruction 4 (regarding the amount of caution required when children are present). Mr. Carney reviewed the corresponding California instruction and decided it was better and will use it instead.

The committee debated whether special instructions were necessary for the standard of care involved in ultrahazardous activities and controlling electricity. Mr. Carney reviewed the corresponding California instruction and noted that some activities may be considered ultrahazardous in California but not in Utah. The committee agreed that more research was needed on the standard of care for ultrahazardous activities in Utah. Mr. Humpherys suggested adding a comment to the effect that the instruction should not be given unless the court has first determined that the activity in question meets the legal criteria for an ultrahazardous activity.

The committee renumbered the instruction on electricity number 7 (and renumbered the following instructions accordingly). Mr. Carney reviewed the corresponding California instruction. Ms. Blanch suggested adding a requirement that it be foreseeable that the plaintiff would come in contact with the power line or other source of electricity. The committee tabled the instruction for further discussion.

Mr. Carney will ask Rick Rose and a plaintiff's attorney who deals with electricity cases to review proposed instruction 7 and its California counterpart.

The committee also considered the following new instructions:

Definition of "Legal Cause." The committee debated whether foreseeability is an element of both duty and proximate causation. Mr. Humpherys asked whether foreseeability was a legal question or a question for the jury to decide. Mr. Belnap expressed his opinion that current MUJI 3.13 accurately expresses the law and should be used. Other committee members thought the current instruction was a good example of the type of instruction that needs to be rewritten to be more comprehensible. The committee tabled the instruction to allow further review of the law on proximate (or legal) causation.

Definition of "Fault." Mr. Young suggested rewriting the instruction to read: "You must determine if any of the following were at fault in causing harm to the plaintiff," and then listing all persons or entities who will be listed on the special verdict form. Mr. Humpherys recommended that the definition of "fault" ("any breach of duty") be tied to the instructions on each of the plaintiff's claims, so that the latter either be stated in terms of a breach of duty or specifically say that negligence, intentional misconduct, breach of warranty, products liability and so forth are "fault." Alternatively, Mr. Humpherys suggested revising the instruction to read: "In deciding this case, you must decide whether any party was at fault. 'Fault' means negligence [or whatever other legal theories of fault the plaintiff may have alleged] that legally caused harm to the plaintiff." The committee deferred further discussion of this instruction and the remaining instructions until the next meeting.

7. *Next Meeting.* The next meeting will be Monday, February 9, 2004, at 4:00 p.m. All committee members are encouraged to be there. After the negligence instructions are approved, the committee will discuss the preliminary and damage instructions.

The meeting concluded at 6:00 p.m.