

MINUTES

Advisory Committee on Model Civil Jury Instructions

November 14, 2005

4:00 p.m.

Present: Honorable William W. Barrett, Jr., Paul M. Belnap, Francis J. Carney, Phillip S. Ferguson, L. Rich Humpherys, Jonathan G. Jemming, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, Tracy H. Fowler

Mr. Young called the meeting to order.

Damage Instructions. Mr. Young discussed with the committee the idea of including a definition of economic and non-economic damages in the first instruction on damages as a way of introducing the concepts. He observed that the instructions contain a series of examples of economic and non-economic damages, but not a definition. The committee agreed that defining the terms is a good idea. Mr. Shea will provide a draft at the next meeting.

The committee reviewed the following damage instructions:

1. *15.119. Personal injury damages. Present cash value.* The committee debated whether to add a sentence to the committee note stating that there must be expert testimony to support giving the instruction. Mr. Carney noted that the California instruction states that expert testimony is usually required, unless there are tables. Mr. Young questioned what table or tables could be used and how they would get into evidence. Mr. Young thought that the issue was one of evidence and was beyond the scope of the instructions and comments. Mr. Carney asked whose burden it is to put on evidence of present value. Mr. King joined the meeting. Mr. Humpherys noted that the committee cannot resolve these issues but should alert attorneys to them. He suggested adding to the advisory committee note a statement to the effect that there is no Utah law on whether expert testimony, government tables or other competent evidence is required before the instruction can be given. Mr. Carney volunteered to research the issue. Mr. Carney also reviewed the cases cited in the advisory committee note and concluded that they were not controlling or helpful, so the committee decided to strike the case discussions. *Bennett v. Denver & Rio Grande Western R. Co.*, 213 P.2d 325 (Utah 1950) is more on point. Mr. Ferguson suggested that *Gallegos ex rel. Rynes v. Dick Simon Trucking, Inc.*, 2004 UT App 322, 110 P.3d 710, *cert. denied* (Utah 2005), might also be relevant. Mr. Jemming suggested striking “and frugally” from the last paragraph. The committee decided to replace references to frugality with references to safety. The committee also deleted the phrase “not necessarily risk free.” Mr. Young thought the last phrase referring to the effects of inflation was confusing. The committee struck it. The last paragraph now reads:

To reduce an award for future damages to present cash value, you must determine the amount of money needed today that, when reasonably and safely

invested, will provide [name of plaintiff] with the amount of money needed to compensate [name of plaintiff] for future economic losses. In making your determination, you should consider the earnings from a reasonably safe investment.

Mr. Shea will revise the advisory committee note. Mr. Carney will research further what evidence is required before the instruction should be given.

2. *15.120. Introduction to tort damages. Liability established.* Mr. King noted that, more often than not, when liability is established at trial it is by stipulation and not by the court. Mr. West suggested revising the introductory phrase to read, "It has been determined . . ." Mr. Young suggested putting alternative openings in brackets, which could be used depending on whether liability was established by a directed verdict, a pretrial ruling or stipulation. The committee agreed that the instruction should follow 15.101 ("Introduction to tort damages. Liability contested").

3. *15.121. Loss of use of personal property. Economic damage.* Mr. Humpherys suggested taking out the bracketed sentence before the numbered subparagraphs. Mr. Young and others noted that subparagraph (1) really covered two different items--rental value and lost income. The committee agreed to separate them into two subparagraphs and to revise the last sentence of the first paragraph to read, "You may consider the following factors [as applicable]:" At Mr. Shea's suggestion, the phrase "under all the circumstances" was deleted from the first paragraph. Mr. Ferguson noted that general damages are not allowed for loss of use of personal property.

4. *15.122. Damage to personal property. Economic damage.* Mr. Jemming suggested that 15.122 precede 15.121. Mr. Shea suggested adding "reasonably" before "restore." Mr. King noted that "reasonably" may not place the plaintiff in the position he was in before the damage. Mr. Jemming suggested "restore to the extent possible." The committee had the same objection to "to the extent possible." The committee decided not to modify "restore." Mr. Ferguson noted that the instruction uses "damage" and "damages" interchangeably. The instruction was revised to use "damage" to refer to injury to property and "damages" to refer to money damages awarded for injury to property. Mr. King and Mr. West suggested revising the second sentence of the second paragraph to read: "If the property can be repaired to its condition before the damage, then the measure of damages is the difference in fair market value immediately before and immediately after the damage or the cost of repair, whichever is less."

Mr. Shea will revise the instruction in light of the committee's discussion.

5. *15.123. Collateral source payments.* At Mr. Ferguson's suggestion, the reference to the medical malpractice statute (section 78-14-4.5) was deleted. Mr. King hoped that the

instruction would not preclude a plaintiff from raising the issue of collateral sources with the jury and from informing the jury of the plaintiff's responsibility to repay from any damages awarded such collateral source payments as workers' compensation. The committee agreed that that issue was beyond the scope of the instruction. The instruction was approved.

6. 15.124. "*Fair market value*" defined. Mr. Ferguson and Mr. Carney noted that the relevant market is an issue of fact. Mr. Simmons suggested moving the instruction to follow 15.122 ("Damage to personal property. Economic damage").

7. 15.117. *Arguments of counsel not evidence of damages*. Mr. Shea questioned whether the instruction was necessary, since it is also covered in the preliminary instructions on what is evidence. The committee agreed that it would be good to repeat the idea in the damage instructions.

Mr. Humpherys asked what damage instructions remain. He suggested instructions on loss of consortium and real property but wondered if the real property instructions would be covered by another subcommittee.

Mr. West volunteered to draft an instruction on damage to real property.

Mr. Belnap noted that the committee also needs to review punitive damage instructions. Mr. Carney suggested an instruction on loss of chance but withdrew his suggestion, noting that it would be covered in the medical malpractice instructions.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, December 12, 2005, at 4:00 p.m. The items to be covered at the next meeting include a review of damage instructions 15.103, 15.104, 15.114, 15.115 and 15.118 and the employment law instructions.