

MINUTES

Advisory Committee on Model Civil Jury Instructions

December 12, 2005

4:00 p.m.

Present: Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Jathan Janove (chair of the employment instruction subcommittee), Timothy M. Shea, Paul M. Simmons, David E. West and John L. Young (chair)

Excused: Ralph L. Dewsnup, Tracy H. Fowler, Jonathan G. Jemming, Colin P. King, Stephen B. Nebeker

Mr. Young called the meeting to order.

Damage Instructions. The committee reviewed the following damage instructions:

1. *15.101. Introduction to tort damages. Economic and non-economic damages.*

Mr. Simmons thought the construction of the first sentence was awkward. The committee thought the advisory committee note that says to modify the instruction to fit the situation is sufficient and deleted the first two bracketed phrases. Mr. Humpherys noted that the sentence telling the jury to restore the plaintiff to the position he was in before the harm applies only in some property damage cases and not to personal injury cases or cases involving unique property. The committee deleted the sentence. The instruction was revised to read:

If you decide that [name of defendant's] fault caused [name of plaintiff]'s harm, you must decide how much money will fairly and adequately compensate [name of plaintiff] for that harm. There are two kinds of damages: economic and non-economic.

The instruction was approved as modified.

2. *15.102. Economic damages defined.* Mr. Carney questioned whether the instruction should read "damages is" or "damages are." The consensus was "damages are." Mr. Humpherys questioned whether jurors would understand "pecuniary." At Mr. Shea's suggestion, "pecuniary losses" was changed to "losses of money or property." Mr. Young and Mr. Carney questioned whether the last sentence of the draft instruction was necessary. The committee decided to drop it, so that the instruction now reads:

Economic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for measurable losses of money or property caused by [name of defendant]'s fault.

The instruction was approved as modified.

3. *15.103. Non-economic damages defined.* “Is” was changed to “are” in the first line. At Mr. Simmons’s suggestion, the fourth paragraph was revised and made subparagraph (6), so the third and fourth paragraphs now read:

In awarding non-economic damages, among the things that you may consider are:

...

(6) whether the consequences of these injuries are likely to continue in the future and for how long.

The last sentence of the former fourth paragraph was deleted.

At Dr. Di Paolo’s suggestion, the last phrase of the following paragraph was revised to read “but does not require a mathematical certainty.” The instruction was approved as modified.

4. *15.104. Proof of damages.* Mr. Carney questioned whether the substance of instruction 15.104 was covered in 15.103. The committee decided it was not. Mr. Belnap questioned whether the first sentence of the last paragraph was accurate and necessary. He thought the concept was covered better in the following sentence. The committee debated whether the burden of proof shifted once the plaintiff established the fact of damage. At Dr. Di Paolo’s suggestion, the last sentence (“While the standard . . .”) was moved to the end of the third paragraph. The sentence was revised to read:

While the standard for determining the amount of damages is not so exacting as the standard for proving that damages actually occurred, there still must be evidence, not just speculation, that provides a reasonable, even though not precise, estimate of the amount of damages.

At Mr. Young’s suggestion (as modified by other committee members), the last paragraph was then replaced with the following language:

In other words, if you find [name of plaintiff] has proved that he has been damaged and has established a reasonable estimate of those damages, [name of defendant] may not escape liability because of some uncertainty in the amount of damages.

The instruction was approved as modified.

Ms. Blanch and Mr. West were excused. When it became apparent that the committee would not get to the employment instructions, Mr. Janove was also excused.

5. *15.106 & 15.107. Economic damages. Lost earnings. [Lost earning capacity.]* Mr. Simmons questioned whether two instructions on lost earnings were necessary. The second and third paragraphs of both instructions were identical. The jury needs to be instructed to make separate findings for past and future lost earnings (and earning capacity), but they do not have to understand the reason for doing so (namely, so that the court can award prejudgment interest on past lost earnings). Mr. Shea suggested that the jury needs to be told what lost earnings are recoverable and needs to be given an ending date for future lost earnings. Mr. Belnap questioned whether the jury needs to be told to award lost benefits, since former MUJI 27.4 and 27.5 did not refer to benefits. The committee thought that the jury needed to be told that lost earnings includes lost benefits or it may think it cannot award anything for lost benefits. After further discussion, instructions 15.106 and 15.107 were combined into a single instruction that reads:

Economic damages also include past and future lost earnings, including lost benefits [and lost earning capacity], for the work [name of plaintiff] was not able to do [and/or will not be able to do].

Past lost earnings are calculated from the time of the harm until the trial.

Future lost earnings are calculated from the time of trial forward.

[Lost earning capacity is not the same as lost earnings. Lost earning capacity means the lost potential to earn increased income. In determining lost earning capacity, you should consider:

[(1) [name of plaintiff]'s actual earnings;

[(2) his work before and after [describe event];

[(3) what he was capable of earning had he not been injured; and

[(4) any other facts that relate to employment.]

The first sentence of the advisory committee note was revised to read:

The special verdict form should include separate findings for lost earnings and lost earning capacity before and after the trial.

The instruction was approved as modified.

6. *15.110. Economic damages. Injury to real property.* The committee deferred discussion of instruction 15.110 until Mr. West, its author, could be present.

7. *15.115. Survival claim.* Mr. Humpherys thought that the instruction carried some implication that the jury should not award anything in certain death cases. Dr. Di Paolo suggested starting the instruction with, "You should award the decedent's economic and non-economic damages if you find (1) . . . and (2) . . ." Mr. Belnap suggested eliminating the numerical designations. At Mr. Young's suggestion, the instruction was revised to read:

If [name of decedent] died from injuries caused by [name of defendant]'s fault, then you should award economic and non-economic damages for the period of time that he lived after the injuries.

The committee approved the revised instruction.

8. *15.116. Survival claim. Disputed cause of death.* The committee revised this instruction to read:

If [name of decedent]'s death was not caused by [name of defendant]'s fault, you may award only the economic damages caused by that fault. You may not award non-economic damages.

Mr. Simmons noted that the instruction applies not only where the cause of death is disputed but also where it is undisputed that the defendant's fault did not cause the death. The advisory committee note was therefore revised to read:

This instruction applies only to a claim made under Utah Code Section 78-11-12(1)(b).

9. *15.121. Present cash value.* Mr. Ferguson and Mr. Humpherys noted that the issue of present value came up recently in a case tried by their partner, Mark Anderson, in which Judge Fratto initially was not going to allow the jury to consider the cost of future surgery because no economist had testified as to present value but later reversed his ruling because the evidence showed that the plaintiff needed the surgery immediately. The case highlighted some of the issues involved, namely, whether an economist is necessary to establish present value in every case, or may the jury use tables or accept lay testimony (such as the testimony of the plaintiff) as to the value of future losses; how remote must the future losses be before their present value must be established by expert testimony; and who has the burden of proof on the issue of present value. The committee deferred further discussion of the instruction until the next meeting.

Minutes
December 12, 2005
Page 5

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, January 9, 2006, at 4:00 p.m.