MINUTES

Advisory Committee on Model Civil Jury Instructions
September 10, 2007
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Jonathan G. Jemming, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and John L. Young (chair). Also present: Kamie F. Brown

Excused: Francis J. Carney, Colin P. King

1. *Products Liability Instructions.* The committee continued its review of the products liability instructions.

a. *CV 1001. Strict liability. Introduction.* Mr. Simmons noted that he had proposed a revision to the second paragraph of the committee note, to reference the recent decision in *Egbert v. Nissan North America, Inc.*, 2007 UT 64, which clarified that the constitutionality of those portions of the Products Liability Act that were not reenacted after *Berry v. Beech Aircraft* is still an open question. The committee approved the proposed revision. Mr. Young asked whether the products liability instructions also reference the recent decision in *Tabor v. Metal Ware Corp.*, 2007 UT 71. Mr. Fowler noted that the decision was issued after the subcommittee last met, so it has not been accounted for.

b. *CV 1007. Strict liability. Elements of claim for failure to adequately warn.* Mr. Simmons noted that CV 1007 presupposes that the court also gives CV 1006 regarding the duty to warn. Where the duty to warn does not raise a jury issue but is decided by the court as a matter of law, CV 1006 will not be given. Mr. Simmons therefore proposed that the words "If you find that a warning was required" and "next" in the first line of CV 1007 be bracketed and the committee note be revised to say that the bracketed language should not be used if the court does not give CV 1006. The committee approved the change.

c. *CV 1008. Strict liability. Definition of "adequate warning."* Mr. Simmons noted that the first sentence of the instruction ("A [product] with an adequate warning is not defective or unreasonably dangerous.") was misleading, since a product with an adequate warning can still be defectively designed and manufactured. Dr. Di Paolo suggested dropping the first paragraph. The committee agreed with her suggestion and deleted the last paragraph as well, since it restated the misleading first paragraph. Dr. Di Paolo also noted that CV 1007 says that the court will define "adequate warning," but CV 1008 defines "inadequate warning." She asked whether the jury would be confused if the instruction were phrased in terms of an "adequate" warning if all the evidence and arguments are stated in terms of an "inadequate" warning. The committee did not think so. After some discussion, the committee revised the instruction to

say when a warning is "adequate," rather than "inadequate." The committee approved the instruction as revised.

d. *CV 1011. Strict liability. Component part manufacturer. Part defective only as incorporated into finished product.* The committee approved the instruction as drafted.

e. *CV 1012. Strict liability. Component part manufacturer. Defective part incorporated into finished product.* Mr. Fowler explained that the instruction offers alternatives because the members of the subcommittee could not agree whether a component part manufacturer and the manufacturer of the finished product should have their fault compared (alternative A) or whether they can be jointly liable (alternative B). There is no Utah appellate court decision on point. The committee discussed when alternative instructions should be used. Some thought that a disagreement among committee members alone was insufficient and that alternatives should be offered only when there is a conflict in the controlling case law. Others thought that alternatives are appropriate when there is no controlling law on point and the committee cannot agree that one position accurately states the law. Mr. Jemming suggested that the disagreement within the committee or subcommittee should be substantial, and that one member's unsupported opinions should not be enough to warrant an alternative instruction. Mr. Simmons noted that the subcommittee was pretty evenly divided on this instruction, hence the alternatives. Mr. Ferguson noted that a trial court had denied his request for an instruction substantially in the form of alternative A. Mr. Fowler thought that alternative B should be relegated to the committee note. Mr. Simmons thought that, if the committee could not agree that alternative A accurately stated the law, the committee should offer courts and practitioners an alternative. He agreed, however, that there was no Utah law to support alternative B but noted that there was law from other jurisdictions with similar statutory schemes that would support alternative B. Mr. Young noted that the committee note can be as long as we would like. The committee agreed to move alternative B to the committee note, with an explanation.

Mr. Simmons will revise the committee note to CV 1012 to include alternative B and explain the rationale for the alternative.

f. *CV 1014. Negligence. "Negligence" defined.* Dr. Di Paolo noted that the instruction does not define "negligence," as its title promises. Instead, it defines "reasonable care." She thought that it needed a sentence saying that negligence is the failure to use reasonable care. Mr. Shea compared the instruction with the general negligence instruction (CV 202). Mr. Jemming asked whether CV 202 was meant to be given with CV 1014. Mr. Fowler said that

the intent was to have a stand-alone instruction for products liability cases. At the suggestions of Messrs. Young and Shea, the second paragraph of the instruction was deleted, and the third paragraph was revised to read:

> Negligence means that a [manufacturer/designer/tester/inspector/seller/distributor] did not use reasonable care in [designing/manufacturing/testing/inspecting] the product [to avoid causing a defective and unreasonably dangerous condition] [to eliminate any unreasonable risk of foreseeable injury]. Reasonable care means what a reasonably careful [manufacturer/designer/tester/inspector] would do under similar circumstances. A person may be negligent in acting or failing to act.

Mr. Shea asked whether the alternative "to" phrases were necessary. Mr. Fowler thought they were, based on alternative views of the statute and case law. Mr. Shea suggested changing the word "causing," since causation as used in the instructions has a specific legal meaning. Mr. Fowler suggested "creating" for "causing." Mr. Shea also asked whether "prudent" should be replaced by "careful," since "prudent" is a less common word. Dr. Di Paolo thought that "prudent" implied more expertise and wisdom than "careful." Mr. Shea noted that the first synonym for "prudent" in the on-line thesaurus was "careful," but "prudent" was not listed as a synonym for "careful." (The first synonym for "careful" is "cautious.") The committee changed "prudent" in the third paragraph to "careful" but left "prudent" in the following paragraph, to suggest that the words were meant to be synonymous. Mr. Simmons suggested adding "seller/distributor" to the bracketed language beginning "manufacturer." Mr. Fowler and Ms. Brown thought that distributors were adequately covered in other instructions, but Mr. Simmons pointed out that those instructions do not purport to define "negligence." Mr. Young suggested that the subcommittee decide whether to include sellers and distributors in CV 1014 or in a separate instruction. The instruction as modified was approved, subject to further action by the subcommittee.

g. *CV 1015 through CV 1021. Negligence instructions.* Mr. Simmons thought that the instructions were based on a misunderstanding of the relationship between strict liability and negligence and that CV 1014 and the general negligence instructions would suffice. Instructions CV 1015 through 1021 add the elements of a claim for strict products liability to those for a negligence claim. Mr. Fowler thought that the critical element in any products liability claim, whether it sounds in strict liability or negligence, is a defect that makes the product unreasonably dangerous. Ms. Brown thought that this result was required by *Bishop v. GenTec, Inc.*, 2002 UT 36, 48 P.3d 218, but Mr. Simmons

thought it was based on a misreading of *Bishop* and was inconsistent with *Slisze v. Stanley-Bostitch*, 1999 UT 20, 979 P.2d 317. At Mr. Young's suggestion, the committee decided to leave the instructions as they are and let the judge decide the issue in each case. The committee thought the dispute was adequately identified in the committee notes to CV 1014 and 1015.

h. *CV 1016. Negligence. Duty to warn.* Mr. Simmons noted that this instruction was essentially the same as CV 1006. Mr. Ferguson noted that the instructions are different. Under CV 1006, the issue is whether the product was defective because there was no adequate warning; under CV 1016, the issue is whether the defendant was negligent because there was no adequate warning. But product defect is also an element of a negligence claim as stated in the first alternative in CV 1014. Dr. Di Paolo suggested adding a committee note to the effect that the court would probably only give CV 1006 or CV 1016, not both. Subject to that addition, the instruction was approved.

i. *CV 1017. Negligence. Elements of claim for failure to adequately warn.* At Mr. Simmons's suggestion, the instruction was revised in accordance with the changes to CV 1007. Mr. Simmons also questioned whether the first element accurately stated the law. It implies that the lack of an adequate warning is prima facie evidence of negligence. At Dr. Di Paolo's suggestion, the first subparagraph was revised to read, "(1) [name of defendant] failed to exercise reasonable care because [he/she/it] did not provide an adequate warning."

j. *CV 1018. Negligence. Definition of "adequate warning."* At the suggestion of Messrs. Young and Ferguson, CV 1018 was revised in accordance with the changes to CV 1008.

k. *CV 1019. Negligence. Duty of designer/manufacturer.* Mr. Young asked whether the subcommittee should reconsider this instruction in light of the Utah Supreme Court's adoption of part of the Restatement (Third) of Torts: Products Liability in *Tabor v. Metal Ware Corp.*, 2007 UT 71. Dr. Di Paolo noted that the instruction was hard to process because it contained so many negatives. The committee revised the second paragraph of the instruction to read:

> However, a manufacturer may market a nondefective product even if a safer model is available. There is no duty to make a safe product safer. A [designer/manufacturer] has no duty to inform the consumer of the availability of the safer model.

Mr. Jemming questioned whether a "nondefective" product is necessarily a "safe" product. At Mr. Shea's suggestion, "[name of defendant]" was substituted for "[designer/manufacturer]."

2. *Next Meeting.* The next meeting will be Monday, October 15, 2007, at 4:00 p.m. (This is the third Monday in October, since the second Monday is Columbus Day.)

The meeting concluded at 6:05 p.m.