MINUTES

Advisory Committee on Model Civil Jury Instructions
September 22, 2008
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West. Also present: Lynn Davies, chair of the Motor Vehicle subcommittee.

1. *Motor Vehicle Instructions*. The committee reviewed the motor vehicle instructions.

a. *CV601. Introduction*. The committee approved CV601.

b. *CV602. Driver's general duty*. Mr. Summerill asked whether the instruction needed to define reasonable care. Mr. Davies noted that some general negligence instructions are typically given in motor vehicle cases. At Mr. Young's suggestion, a committee note was added referring users to the general negligence instruction defining reasonable care (CV202). The committee approved CV602.

Ms. Blanch and Dr. Di Paolo joined the meeting.

c. *CV603. Duty. Control of automobile*. Mr. Summerill did not think the driver's "ability to guide" the vehicle was a relevant factor; a driver has a duty to keep the vehicle under reasonable control even if he has a medical or other condition that would prevent him from doing so. The committee revised the instruction to read: "A driver has a duty to keep the vehicle under reasonable control and to operate the vehicle so as to avoid danger." The committee approved the instruction as revised.

Mr. Humpherys joined the meeting.

Mr. Davies noted that the instruction the subcommittee had prepared (5.4) had seven subsections. Mr. Davies acknowledged the desire to simplify the instructions and put them in plain English but thought that there should still be a general instruction on violations of the motor vehicle code that could be adapted to specific provisions of the code. The subcommittee's proposal had stated that the court should paraphrase the relevant statute in plain English. Mr. Nebeker thought the court should have the option of instructing in the words of the statute. Mr. Humpherys and Mr. Simmons noted that the subcommittee's general instruction was now CV625 and asked whether it should come earlier in the instructions. Mr. Shea suggested that there be a general committee note to all the motor vehicle instructions, as there is with the medical malpractice instructions. The committee deferred further discussion on the proposal.

Mr. Ferguson and Mr. Fowler joined the meeting.

d. *CV604. Lookout.* The instruction was revised to read: "A driver has a duty to keep a proper lookout for other traffic and hazards that can be reasonably anticipated." The committee approved the instruction as revised.

e. *CV605. Following at a safe distance.* Dr. Di Paolo did not like stating the driver's duty in the negative ("A driver has a duty not to follow . . ."). At Mr. Davies's suggestion, the instruction was revised to read: "A driver has a duty to follow another vehicle at a distance that is reasonable and prudent under all existing conditions and circumstances." Ms. Blanch questioned whether both "conditions" and "circumstances" were necessary. Dr. Di Paolo thought there was a distinction in meaning and that it did not hurt to include both. The committee approved the instruction as revised.

f. *CV606. Duty of maintenance.* At Mr. Davies's suggestion, the instruction was revised to read: "A driver [an owner] has a duty to drive [move] a vehicle [allow a vehicle to be driven/moved] on a roadway only if the vehicle is in a safe condition." Mr. Carney suggested deleting "on a roadway." Mr. Davies noted that the statute uses the term "highway," which is a defined term under the Motor Vehicle Code, but he thought jurors would have a different understanding of "highway" than the statutory definition and that the term "roadway" would be understood by most jurors to include those roads that come within the statutory term "highway" and was therefore acceptable. The committee debated whether there was a common-law duty not to move a vehicle in other circumstances if the vehicle is in an unsafe condition. Some committee members thought there was, but others (including Mr. Johnson) thought there was not. Someone suggested adding a committee note saying that the scope of any common-law duty was not clear. Mr. Humpherys thought no committee note was needed; if the instruction does not apply because the vehicle was not on a roadway, then the parties and the court will have to craft their own instruction, but no instruction is necessary to tell them that. Mr. Humpherys further noted that the duty of maintenance is a statutory duty that is subject to the statutory exceptions set out in CV625. He suggested having a general committee note at the beginning of the instructions saying that, if a person is alleged to have violated a statutory duty, the parties and court should consider CV625 dealing with violations of statutes and exceptions to and justifications for such violations. Mr. Davies suggested that a note to CV606 be added referring to the statute, since the statute itself says it does not apply to certain equipment, such as farm equipment. The committee noted was revised to read: "If there is an alleged violation of a particular statute regarding required equipment and circumstances (e.g., Utah Code section 41-6a-1601), instruction CV625 may be considered." The instruction was approved as revised.

g. *CV607. Speed.* Dr. Di Paolo said she did not understand what the jury was supposed to do with CV607. She suggested deleting the first sentence, but Mr. West preferred starting each instruction with the phrase, "A driver has a duty to . . ." Dr. Di Paolo also suggested revising the order of the sentences. Messrs. Carney and Humpherys noted that "negligence" should be replaced with "fault." Mr. Summerill thought, based on *Gaw v. State,* 798 P.2d 1130 (Utah 1990), that the instruction should say that driving faster than the posted speed limit "is" evidence of fault, not "may be" evidence of negligence. Others preferred the phrase "may be evidence," noting that *Gaw* uses both terms and further noting that driving above the speed limit may be subject to justification or excuse. Mr. Humpherys and Dr. Di Paolo thought that jurors would not distinguish between "is evidence of fault" and "is fault." Mr. Davies thought there should be a general committee note explaining that, if there is evidence of a justification or excuse for breaking the speed limit (or any other statutory violation), the court should instruct the jury according to CV625. Dr. Di Paolo noted that the last sentence of the instruction tells the jury that a driver may have to drive above or below the speed limit, depending on the circumstances, yet the sentence before tells the jury that driving above the speed limit is negligent. She asked whether the last sentence was meant to trump the preceding sentence. At Mr. Shea's suggestion, "posted" was dropped from the phrase "posted speed limit"; the committee noted that there are default speed limits that apply even where no speed limit is "posted." Mr. Summerill suggested adding a citation to *Gaw* to the reference section, but Mr. Carney thought that *Gaw* did not support the instruction and noted that it is already cited to support CV625. Mr. Summerill suggested replacing "accident" with "collision," for fear that jurors would interpret "accident" to mean that no one was at fault. Dr. Di Paolo did not think that fear was realistic, and Mr. Fowler pointed out that not all motor vehicle accidents involve collisions between vehicles; there may be a one-car rollover accident, for example. The committee revised the instruction to read:

> A driver has a duty to drive at a safe speed.
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> The speed limit at the place of this accident was [____] miles per hour. Driving at a speed in excess of the posted limit may be evidence of fault. However, conditions and circumstances may allow a driver to drive at a [lower/greater] speed with proper regard for existing and potential hazards.

The committee approved the instruction as revised.

h. *CV608. Minimum speed.* Mr. West suggested starting the instruction, "A driver has a duty to not operate . . . ," but Dr. Di Paolo noted that

that construction was hard to make sense of. The committee revised the instruction to read: "A person may not drive at a speed so slow as to interfere with the normal and reasonable movement of traffic unless conditions or circumstances justify a reduced speed for safe operation." The committee approved the instruction as revised.

i. *Titles*. Mr. Summerill proposed deleting the word "Duty" from the titles of CV609 to CV624. Mr. Humpherys thought that the titles were not part of the instructions and would not be given to the jury. Mr. Carney, however, noted that the introduction to MUJI 2d says that "judges and lawyers should include the title of the instruction" in written instructions because they help jurors "organize their deliberation and decision-making." The committee decided to delete "Duty" from the titles of CV609 to CV624.

j. *CV609. Turning/lane change*. Mr. West thought that the instruction improperly implied that a driver has a duty to turn. The committee revised the instruction to read: "A driver may turn a vehicle [change lanes] only when it can be done with reasonable safety and after giving an appropriate signal." The committee approved the instruction as revised.

k. *CV610. Right of way. Left turns*. Mr. Young asked whether the phrase "yield the right of way" needed to be defined. The committee did not think so, since lay people must understand the phrase to get a driver's license. Mr. Young noted that some jurors may not be licensed drivers. After Mr. Davies read the statutory definition of "right-of-way" (Utah Code Ann. § 41-6a-102(50)), most of the committee thought it would only confuse the jury to attempt to define the term. Dr. Di Paolo offered to try to draft an instruction defining "right-of-way" if someone would send her the statutory language. Mr. Carney asked whether the phrase "the right of way" was necessary. Mr. Davies thought it had a well understood meaning among lay people. The committee approved the instruction as written, subject to any further instruction defining "right-of-way" that Dr. Di Paolo may suggest.

l. *CV611. Right of way. Unregulated intersection*. Mr. West questioned whether the last sentence was necessary. The committee decided to make the last two sentences separate paragraphs and to bracket them to indicate that they should only be included if they are supported by the facts of the case. At Mr. Simmons's suggestion, the first sentence of the second paragraph was revised to read: "When more than one vehicle enters or approaches the intersection at approximately the same time, the driver of the vehicle on the left has a duty to yield the right of way to the vehicle on [his] right." The committee approved the instruction as revised.

m. *CV612. Right of way. Traffic signals.* Mr. Humpherys noted that the first sentence was problematic. The duty of a driver faced with a red light is to stop, not to "yield the right of way." Mr. Shea thought the second sentence was too long. The committee revised the instruction to read:

> A driver who approaches an intersection with a red light has a duty to stop. The driver with the green light has the right to assume that traffic will not enter the intersection against a red light. However, if that driver sees, or in the exercise of reasonable care should see, that another vehicle is going to proceed against the red light, the driver with the green light has a duty to use reasonable care to avoid a collision.

At Mr. Davies's suggestion, references were added to the statutes on traffic control signals, Utah Code Ann. §§ 41-6a-304 & -305. The committee approved the instruction as revised.

n. *Additional instructions.* Mr. Davies noted that yellow lights are more problematic than red lights. The committee asked him to ask the subcommittee to propose an instruction on rights-of-way at yellow lights. Mr. Nebeker suggested that there should be instructions on flashing red and yellow lights. Dr. Di Paolo suggested that there should be an instruction on approaching an intersection where the lights are not operating. Mr. Humpherys and Mr. Davies did not think the latter situation resulted in much litigation.

o. *CV613. Intoxicated driver.* Mr. Humpherys noted that the reviewing committee (the so-called gang of three) had a question as to whether a blood alcohol level of 0.08 or greater resulted in strict liability or whether it only gives rise to a presumption that a driver was impaired. Mr. Davies read the subcommittee's response:

> With regard to all of our instructions setting forth Traffic Code provisions, including the .08 standard, the committee intended the negligence *per se* instruction (our MUJI 2d 5.5, which it appears you have renumbered [now CV625]) to be given, followed by the pertinent instruction(s) explaining the applicable Traffic Code provision. In the case of .08 intoxication, testing out at .08 is by statute legal intoxication. The presumption to which you refer is, we think, the rebuttable presumption that the testing equipment is accurate. *State v. Vigil,* 772 P.2d 469 (Utah App. 1989). Establishing .08 blood alcohol or breath alcohol is not a presumption; it shows intoxication. In addition, a driver whose

> blood alcohol is less than .08 can also be deemed intoxicated, if impairment can be shown.
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> There is one caveat, which should perhaps be a Committee Note. There is an involuntary intoxication rule (see *State v. Gardner,* 870 P.2d 900 (Utah 1993), which could apply in the rare or unusual case. To keep the instructions as simple as possible, we have not attempted to write that exception into the main instruction. However, it does provide a defense to a claim of intoxication.

In other words, a blood alcohol content of .08 is negligence per se, but the plaintiff must still prove causation. At Mr. Shea's suggestion, the instruction was revised to read:

> A driver may not operate a vehicle
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> [(1) if [he] has a blood or breath alcohol concentration of .08 grams or greater at the time of operation of the vehicle.]
>
> [(2) if [he] is under the influence of [alcohol, any drug, or the combined influence of alcohol and any drug] to a degree that the person cannot operate the vehicle safely.]

Mr. West thought there should be an "or" between subparagraphs (1) and (2). Other committee members thought that "or" was implied by putting the subparagraphs in brackets. Some committee members noted that it may not be an "either/or" situation, but both subparagraphs could apply in a particular case. Mr. Shea will see how the committee has treated similar situations. Subject to further revision to make the instruction consistent with prior practice, the committee approved the instruction as revised.

p. *CV614. Young drivers.* The instruction was revised to read: "A minor driving a motor vehicle is held to the same standard of care as an adult driver." The committee approved the instruction as revised.

q. *CV615. Drivers approached by emergency vehicle.* At Mr. Summerill's suggestion, "immediately" was dropped from the first line. Ms. Blanch recommended replacing the phrase "audible or visual" signals with "audio or visual" or "audible or visible," to be consistent. Dr. Di Paolo noted that the choice of words depends on whether the focus is on what is being emitted or what is being perceived. Ms. Blanch then suggested replacing the phrase with "horns, sirens, or lights." After Mr. Davies read the statutory language, which included

"bells" and "whistles," the committee decided to use "audio or visual warning devices" instead of "audible or visual signals." The committee revised the last paragraph to read: "In complying with these duties, a driver must use reasonable care under all of the conditions and circumstances."

The committee decided to continue its review of the motor vehicle instructions at the next meeting, to allow the subcommittee and the gang of three to address some of the remaining issues in the meantime and to allow the subcommittee to propose a general, introductory committee note explaining the importance of tailoring statutory instructions to the facts of the particular case and to instruct on justifications or excuses for statutory violations when there is evidence to support them.

2. *Next Meeting*. The next meeting will be Tuesday, October 14, 2008 (because of Columbus Day on Monday, October 13, 2008), at 4:00 p.m. The committee will finish its review of the motor vehicle instructions at that time. It will then take up the construction contact instructions at the October 27, 2008, meeting, since the premises liability and insurance obligations subcommittees have not yet finished their work.

The meeting concluded at 6:00 p.m.