MINUTES
Advisory Committee on Model Civil Jury Instructions
October 14, 2008
4:00 p.m.

Present: John L. Young (chair), Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill.

1. *Contract Instructions*. The committee continued its review of the motor vehicle instructions.

a. *CV6##. "Right of way" defined*. The committee revised the instruction to read:

> A [vehicle/pedestrian] has the right of way when [he] has the right to proceed in a lawful manner in preference to an approaching [vehicle/pedestrian].

The committee approved the instruction as revised.

b. *CV616. Emergency vehicles*. Mr. Ferguson thought the instruction did not clearly tell the jury what it was supposed to decide. At Mr. Ferguson's suggestion, the following changes were made: The following sentence was added to the beginning of the instruction: "You must decide whether [name of driver of an emergency vehicle] acted reasonably." The third paragraph was revised to read, "The law allows the driver of an emergency vehicle to disregard certain duties if each of the following is true:" And "but only" was deleted from the phrase starting "[drive through a stop signal . . .". **The committee approved the instruction as revised.**

c. *CV617. Pedestrians*. The committee deleted the phrase "at all times" and **approved the instruction as modified.**

Mr. Humpherys joined the meeting.

d. *CV618. Pedestrian crossing a roadway*. At Mr. Ferguson's suggestion, the committee replaced the first sentence of the instruction with the following: "You must decide whether [name of pedestrian] acted reasonably. You shall consider the following:"

Mr. Summerill joined the meeting.

Mr. Shea questioned whether the reference to unmarked crosswalks was necessary, since it appeared that all pedestrians must yield the right-of-way unless they are in a marked crosswalk. Mr. Carney looked up the statute, which gives the right-of-way to pedestrians in either a marked crosswalk or an

unmarked crosswalk at an intersection. The committee thought the definition of "unmarked crosswalk" was too cumbersome to include in the instruction and left it to the court and parties to craft an instruction defining "unmarked crosswalk" if that is an issue in the particular case. At the suggestion of Mr. Shea, subparagraph (1) was broken into two subparagraphs: one (subparagraph (1)) covering marked crosswalks, and the other (new subparagraph (2)) covering unmarked crosswalks, and the parenthetical referring to the statutory definition of unmarked crosswalks was placed at the end of new subparagraph (2). The phrase "shall yield" was replaced with "must yield," and the phrase "reasonably careful person in the position of a pedestrian" was replaced with "reasonable pedestrian."

Dr. Di Paolo joined the meeting.

Dr. Di Paolo suggested that the first sentence read: "To decide whether [name of pedestrian] acted reasonably, you must consider the following:" **The committee approved the instruction as modified.**

e. *CV619. Drivers toward pedestrians.* The committee revised the instruction to read:

> If traffic signals are [not in place/not in operation] a driver shall yield the right-of-way to a pedestrian:
>
> (1) if [he] is within a crosswalk on the half of the road where the driver is traveling, or
>
> (2) if [he] is approaching so closely from the opposite half of the road as to be in danger.
>
> Both a driver and a pedestrian have a continuing duty to use reasonable care for the safety of others and themselves, even when one has the right-of-way over the other.

Dr. Di Paolo asked whether subparagraphs (1) and (2) should be bracketed. Mr. Humpherys thought not, since the jury may have to decide whether the pedestrian fits within subparagraph (1) or (2), or both may apply in a given case. **The committee approved the instruction as revised.**

f. *CV620. Pedestrian signals.* Mr. Ferguson thought the instruction did not explain what the jury was supposed to do. He suggested starting the instruction with "You must decide whether [name of pedestrian] acted

reasonably." Mr. Young noted that the instruction should only be given if CV6## is given first. Mr. Young questioned whether the last paragraph was necessary. It was revised to read, "But both a driver and a pedestrian have a continuing duty to use reasonable care for the safety of others and themselves, even when one has the right-of-way over the other." The paragraph was moved to the end of CV6##. Mr. Ferguson asked what a pedestrian's duty is if the signal counts down to zero. At what point must the pedestrian not try to cross the street? Mr. Carney noted that there may be municipal traffic codes that address the issue. He looked up Salt Lake City's, which appears to let a pedestrian start crossing an intersection during the countdown. At Mr. Young's suggestion, a committee note was added that says, "The judge should adjust this instruction if the pedestrian signal uses a different technology or the case is controlled by a local ordinance." The committee discussed which modal to use ("may" or "shall"). Dr. Di Paolo noted that "shall" is not commonly used and not readily understood by lay people. Mr. Summerill thought that, if a statute defines the standard of care (that is, if it is being used to define negligence), the instruction should say a violation "is evidence" of negligence, but he noted that the committee has not followed that convention with other instructions, such as CV607, which says that driving over the speed limit "may be evidence of fault." He thought the committee should be consistent. Messrs. Young and Ferguson, however, thought that the speed limit law was different, that more flexibility was built into it; that is, the speed limit is just prima facie evidence of a reasonable speed. The last clause of subparagraph (2) was revised to read, "but a pedestrian who has started crossing keeps the right-of-way while continuing to a [sidewalk/safety island]." **The committee approved the instruction as revised. The question at the end of the instruction was deleted.**

g. *CV621. Driving near children.* At Dr. Di Paolo's suggestion, "around" was changed to "near." Mr. Humpherys suggested deleting "than a mature person" because he thought it was ambiguous and imprecise, but others thought it was necessary to answer the implicit question, More carefully than what? Messrs. Humpherys and Shea suggested changing the instruction to track CV204 and to include a cross-reference to CV204, so that the instruction would read: "A driver must anticipate the ordinary behavior of children and must be more careful when children are present than when only adults are present." **The committee approved the instruction as revised.**

h. *CV622. Bicyclist.* The committee revised the instruction to read:

> A bicyclist must use reasonable care to operate [his] bicycle safely under the circumstances, both for [his] own safety and for the safety of others.

> However, a driver should be more cautious when [he] knows or should know a bicyclist is riding in the vicinity.

The committee approved the instruction as revised.

i. *CV623. Bicycles. Three-foot rule.* The committee revised the instruction to read:

> A driver may not drive within three feet of a moving bicycle, unless it is necessary to drive closer and it can be done safely.

The committee approved the instruction as revised.

j. *CV624. Real property owner to remove obstruction impairing view.* Mr. Humpherys suggested "landowner" for "owner of real property," but Dr. Di Paolo thought most jurors would interpret "landowner" as someone owning a large estate or undeveloped property, such as a rancher. The introductory phrase, "The owner of real property," was changed to "A property owner." Mr. Ferguson asked whether the duty also applied to tenants and whether it extended to pedestrians. The committee note was deleted, and a citation to *Jones v. Bountiful City Corp.,* 834 P.2d 556 (Utah Ct. App. 1992),was added to the references. **The committee approved the instruction as revised.**

k. *CV625. Violation of statute, ordinance or safety law.* The committee noted that CV625 is substantially similar to CV212. Mr. Humpherys questioned whether a violation of a statute is or should be excused if the violator "was incapable of obeying the law" or "incapable of understanding what the law required." Mr. Ferguson asked what these phrases meant. Mr. Johnson offered an example--a 14-year-old driving a car. Mr. Summerill thought that a child engaged in an adult activity was held to the same standard of care as an adult. Mr. Johnson did not think that was necessarily the case. Messrs. Carney and Young thought that the committee did not have to resolve these issues, that they were legal questions for the court to decide. Mr. Humpherys asked why the jury should be instructed on them at all, then, if they were legal issues. Mr. Young noted that the legal question, which the committee cannot resolve, is whether inability to understand or obey the law is a legal justification or excuse for violating the law; Utah appellate decisions seem to say that it is. If someone disagrees, they will have to take the matter up with the Utah Supreme Court. What the jury must decide is the factual question of whether a person was unable to understand or obey the law in a particular case. Messrs. Young and Summerill thought that the instruction should be approved if it is consistent with CV212.

Mr. Johnson thought that the instruction should be moved up to precede the instructions on specific statutory duties. **The committee approved the instruction. Mr. Young asked committee members to give Mr. Shea their suggestions on where the instruction should be moved to.**

l. *CV626. Comply with all duties.* Mr. Ferguson thought that CV626 was redundant, given CV625. Mr. Carney thought the instruction lacked authority and was more argument than a proper jury instruction. Mr. Fowler wanted to know if the motor vehicle subcommittee thought the instruction was necessary and why. **The committee struck the instruction, subject to some justification by the subcommittee for including it.**

m. *CV627. Assuming obedience to law.* The committee revised the first part to read, "A driver has a right to assume that others will obey the law." Mr. Ferguson questioned whether the phrase "a good reason to believe otherwise" was sufficiently specific. Others did not have a problem with it. Mr. Shea thought the instruction fit better in the negligence instructions. **The committee approved the instruction.**

n. *CV628. Increased duty.* **The committee deleted the instruction** because it was not specific to motor vehicle accidents and was already included in the general negligence instructions.

o. *CV629. Owner who allows minor to drive.* Mr. Young thought the last sentence was unnecessary. Mr. Johnson thought it may be necessary under *Dixon v. Stewart.* Mr. Simmons noted that the law was an exception to the Liability Reform Act's abolition of joint and several liability, which the jury will be instructed on in other instructions, and that, if both the owner and the driver are listed separately on the special verdict form, the jury should probably be instructed as stated in the last sentence. Mr. Young called for a vote on whether the last sentence should be struck. **The committee voted to strike the last sentence,** with Messrs. Carney, Ferguson, Fowler, Humpherys, and Summerill voting in the affirmative.

p. *CV630. Negligent entrustment.* The committee asked what the authority for the instruction was. Mr. Summerill noted the following Utah cases on negligent entrustment: *Lane v. Messer,* 731 P.2d 488 (Utah 1986); *Wilcox v. Wunderlich,* 73 Utah 1, 272 P. 207 (1928); and *Utah Farm Bureau v. Johnson,* 738 P.2d 652 (Utah Ct. App. 1987). The committee revised the first paragraph to read:

> The owner of a motor vehicle who allows another person to [use/drive] [his] vehicle may be responsible under certain circumstances for the harm caused by the [user/driver] if the owner knew or a reasonable person should have known that it was unsafe to allow the driver to [use/drive] the vehicle.

Mr. Young questioned the need for the last paragraph. Mr. Humpherys suggested deleting the "such as" clause. Mr. Shea suggested changing "exercised reasonable care" to "is responsible." Mr. Young suggested, "may be responsible" or "may be at fault." Mr. Humpherys thought the last paragraph implied vicarious liability on the part of the negligent entrustor. At Mr. Young's suggestion, **the last paragraph was struck, and the instruction was sent back to the motor vehicle subcommittee to rewrite it in terms of fault.**

q. *CV631. Threshold.* Mr. Humpherys suggested adding "reasonable and necessary" before "medical expenses" in subparagraph (3). Mr. Summerill disagreed, noting that the phrase "reasonable and necessary" was not in the statute. Mr. Johnson thought that there is an unpublished Utah Court of Appeals decision (*Vaughn v. Anderson,* 2005 UT App 423) that says whether the expenses were reasonable and necessary is a question for the jury. Mr. Summerill thought there were cases that said that one can infer that medical expenses are reasonable and necessary if insurance has paid for them. At Mr. Summerill's and Mr. Young's suggestion, a committee note was added saying that whether the medical expenses must be "reasonable and necessary" is an open issue under Utah law. Dr. Di Paolo thought the second sentence should be stated in the positive. The second sentence was revised to read: "For a person to recover non-economic damages resulting from an automobile accident [he] must meet one or more of the following threshold injury requirements." **The committee approved the instruction as modified.**

r. *CV632. Police officer testimony.* Dr. Di Paolo questioned the need for the first three paragraphs. Mr. Johnson noted that the subcommittee agreed that there is a problem in how juries view police officers' testimony and that an instruction on the subject is needed. Dr. Di Paolo thought that the instruction nevertheless did not have to explain the difference between a fact witness and an expert witness, unless the jury had to decide whether the officer was testifying as a fact witness or an expert. And if that is what the jury must decide, the instruction does not tell the jury how to make that decision. Mr. Ferguson thought that the instruction left it to the jury to decide how an officer is testifying. Dr. Di Paolo suggested adding a sentence before the last paragraph that says, "[Name of officer] testified in this case as a [fact/expert] witness." Dr. Di Paolo said she did not have a problem with the instruction if it is clear to the jury that a

given officer testified as a fact witness or as an expert (or both). Other committee members thought it would be clear during the course of the trial. **The committee approved the instruction without changes.**

s. *CV633. Insurance.* Mr. Young asked whether the instruction was already covered by CV2024, on collateral source payments. Mr. Humpherys thought it was important to include the instruction in the motor vehicle instructions because all owners and operators of motor vehicles are required to have insurance, so jurors will be more likely to consider insurance in motor vehicle cases. **The committee decided to leave the instruction in and approved it as written.**

t. *CV634. Motorcycle helmet usage.* Mr. Ferguson asked whether the same rules apply to bicyclists. The answer was no. Mr. Humpherys said the problem with the instruction was that it did not tell the jury what to do with the information. Is the failure to wear a helmet when required by law a matter of strict liability or comparative fault, or does it go to damages? Mr. Johnson thought it went to damages, under the doctrine of avoidable consequences. Mr. Summerill noted that it can also go to the issue of causation. Mr. Humpherys asked whether a violation of the statute is subject to justification or excuse under CV625. Mr. Young thought that the instruction should not be included unless there is some Utah appellate decision saying what the jury is supposed to do with the information.

u. *CV635. Seatbelt usage.* Mr. Fowler thought that the instruction should have a committee note saying that it may not apply in crashworthiness cases. **Mr. Fowler will propose such a note.** Mr. Johnson thought that the seatbelt usage statute was unconstitutional, as a legislative encroachment on the judiciary's power to adopt rules of evidence. The committee rewrote the instruction to read:

> You must decide this case without regard to whether you believe that a [seatbelt/child restraint device] was either used or not used by any party in this case. If you have heard evidence or if you believe that any party in this case used or did not use seatbelts or child restraint devices, you should not consider such information in reaching a verdict.

The committee approved the instruction as revised.

2. *Next Meeting*. The next meeting will be Monday, October 27, 2008, to discuss the construction contract instructions.

The meeting concluded at 6:30 p.m.