

MINUTES

Advisory Committee on Model Civil Jury Instructions

September 10, 2012

4:00 p.m.

Present: John L. Young (chair), Diane Abegglen, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Honorable Ryan Harris, John R. Lund, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, David E. West

Excused: Tracy H. Fowler

Mr. Young welcomed Judge Harris to the committee and noted that Judge Andrew Stone has also been added to the committee.

1. *Vicarious Liability Instructions.* The committee continued its review of the vicarious liability instructions:

a. *CV2814. Independent contractor defined.* Mr. Shea noted that the subcommittee added a new subparagraph: “(4) who was actually directing the work.” On Mr. Lund’s motion (Messrs. Carney and Summerill 2d), the committee approved the instruction as amended.

b. *CV2815. Liability for independent contractor.* Mr. Shea noted that the approach taken in CV2815 follows that taken in the trespass instructions: the court should give CV2815 followed by CV2815A, B, and/or C, as the claims and evidence require.

c. *CV2815B. Principal may remain liable despite delegating duty.* The committee approved CV2815B.

d. *CV2815C. Inherently dangerous work.* Mr. West questioned the definition of “special danger” in the last paragraph. He noted that it could apply to just about any activity. It was taken from CACI 3708. Mr. Lund suggested leaving the term undefined, since there is no Utah case defining the term. He and other committee members thought that the instructions should state what Utah law is rather than advocating or suggesting what the law should be. At Mr. Young’s suggestion, the third paragraph of CV2815C was removed. Mr. Carney questioned whether any instruction should be given. He thought that it did not fit cleanly into negligence law.

Dr. Di Paolo joined the meeting.

Mr. Lund suggested leaving the instruction in, since *Thompson v. Jess*, 1999 UT 22, 979 P.2d 322, at least implies that Utah recognizes the doctrine, and clarify in the committee note the holding of *Thompson*. Mr. Shea revised the committee note to say: “The committee has no guidance on the definition of a special danger from the Utah Supreme Court, although the Supreme Court has recognized the

principle. This provision has no application when the injured person is an employee of the independent contractor undertaking the allegedly dangerous work [citing *Thompson v. Jess*].” The committee approved the instruction as modified.

2. *CV1005. Industry standard.* The committee deferred discussion of CV1005 until Mr. Fowler could be present.

3. *CV2016. Survival claim.* Mr. Shea noted that the Utah survival statute, Utah Code Ann. § 78B-3-107, was amended in 2009 to provide that, if an injured person dies from an unrelated cause before judgment or settlement, his or her personal representatives or heirs may still recover special damages and general damages “not to exceed \$100,000, which resulted from the injury caused by the wrongdoer and which occurred prior to death of the injured party from the unrelated cause,” unless the death occurred more than six months after the incident and the claimant did not give written notice of intent to hold the wrongdoer responsible or the claim was not the subject of ongoing negotiations. Before the amendment, the plaintiff in such a case could not recover general (noneconomic) damages, and CV2016 so provides. The committee discussed whether the jury should be instructed on the \$100,000 limit or on the notice provisions of the statute and concluded that those were matters for the court to consider and apply and did not present jury questions in the typical case. Mr. Simmons asked whether the jury needed to be instructed to find whether or not the death was related to the wrongdoing giving rise to the action. Judge Harris thought the question for the jury was whether the death was caused by the defendant’s fault. Messrs. Lund and Ferguson thought that that question was adequately presented in the wrongful death instructions and that CV2016 did not serve any purpose. Mr. Lund moved to delete CV2016 and keep CV2015. Dr. Di Paolo suggested revising CV2015 to cover cases where the death was caused by the tortious conduct and where it was unrelated. The committee considered various proposals and finally settled on the following language for CV2015:

If you decide that [name of defendant]’s fault was a cause of [name of decedent]’s harm, you must award economic and noneconomic damages for the period of time that [name of decedent] lived after the injuries, regardless of whether the death was caused by [name of defendant]’s fault.

Mr. Carney questioned whether the verb should be “must,” “should,” or “may.” Mr. Lund suggested that the instruction use the same verb as other damages instructions. Dr. Di Paolo thought that if the jury has to award damages if it finds causation, then “must” is the proper verb. On Mr. Lund’s motion (Mr. Simmons 2d), the committee approved the revised instruction.

4. *Liquidated Damages.* Mr. Ferguson noted that the Utah Supreme Court had recently issued an opinion addressing liquidated damages (*Commercial Real Estate Investment, L.C. v. Comcast of Utah II, Inc.*, 2012 UT 49). He noted that the instructions do not include a liquidated damages instruction and questioned whether one should be added. Mr. West thought it should go in the Commercial Contracts section. Mr. Ferguson thought that the case did not change the law of substantive unconscionability or mitigation of damages. Judge Harris noted that the holding of the case is that liquidated damages are not subject to heightened scrutiny. Mr. Lund asked what the jury would have to decide in a liquidated damage case. Mr. Ferguson thought that the questions for the jury would be whether a liquidated damage provision was unenforceable for one of the typical contract defenses, such as mistake, procedural or substantive unconscionability, or fraud. Mr. Lund questioned whether these were fact questions for the jury or legal questions for the court. Mr. Ferguson thought that in some cases, such as where there was a question of the parties' intent, they could present fact questions. At Mr. Young's suggestion, the committee decided to have the contract subcommittee, headed by Bruce Badger, look at the issue and recommend a jury instruction if they think one is appropriate.

5. *Next Meeting.* The next meeting will be Tuesday, October 9, 2012, at 4:00 p.m.

The meeting concluded at 5:40 p.m.