Agenda
Advisory Committee on
Model Civil Jury Instructions

January 8, 2007
4:00 to 6:00 p.m.

Administrative Office of the Courts
Scott M. Matheson Courthouse
450 South State Street
Education Room, Suite N31

NCSC Survey	Tim Shea
Product Liability.	Tracy Fowler

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00, Education Room or Judicial Council Room

February 12, 2007
March 12, 2007
April 9, 2007
May 14, 2007
June 11, 2007
July 9, 2007
August 13, 2007
September 10, 2007
October 15, 2007 (3d Monday)
November 19, 2007 (3d Monday)
December 10, 2007

Committee Web Page: http://www.utcourts.gov/committees/muji/
Published Instructions: http://www.utcourts.gov/resources/muji/

MINUTES
Advisory Committee on Model Civil Jury Instructions
December 11, 2006
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, Phillip S. Ferguson, Tracy H. Fowler, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, David E. West, and Kamie F. Brown

Excused: John L. Young

Mr. Fowler, the chair of the Products Liability subcommittee, conducted the meeting in Mr. Young's absence. Mr. Fowler explained that the Products Liability subcommittee has been working on instructions in four areas: (1) strict liability, (2) negligence, (3) breach of warranty, and (4) defenses. Mr. Shea noted that the instructions will not be posted on the court's website for use until the whole section on products liability has been approved.

Draft Instructions

The committee reviewed the draft instructions on strict products liability.

1. *1001. Introduction.* Mr. Dewsnup did not like defining "defective" in terms of "a defect" and suggested revising the second paragraph to read: "A product may be defective in one or more of three ways." Others pointed out that the jury does not have to be instructed on all the ways a product can be defective but only on the way or ways at issue in the case. Mr. King suggested revising the instruction to read, "[Name of plaintiff] claims that the product is defective in [manufacture] [and/or] [design] [and/or] [because of a failure to adequately warn]." Other committee members pointed out that the instruction would then simply duplicate subsequent instructions on each type of product defect, which begin, "[Name of plaintiff] claims . . ." Mr. Fowler questioned whether the instruction was necessary.

Mr. Shea suggested bracketing "product" so that the court could use the name of the product instead. Mr. Fowler thought the practice should be consistent throughout the instructions.

Mr. Shea asked whether the comment was necessary, given courts' citations to the statute. Mr. Simmons pointed out that no Utah appellate court has squarely addressed the issue of whether those portions of the statute that were declared unconstitutional in *Berry v. Beech Aircraft* and never repealed or reenacted are effective.

Mr. Fowler asked if a reference to *Sanns v. Butterfield Ford* should be added to the last paragraph of the note. Mr. King and Mr. Simmons thought not, since the comment is merely talking about nomenclature and not the law of retailer liability.

Someone asked if there was a corresponding instruction in MUJI 1st. There is not, but the first paragraph of the comment has a counterpart in the comment to MUJI 12.12. Mr. Carney noted that the medical malpractice subcommittee is preparing a table cross-referencing MUJI 1st to MUJI 2d and explaining why some instructions in MUJI 1st are not included in MUJI 2d. The committee thought it would be a good idea to do the same for all instructions. Mr. Shea noted that the table should exist separately from the committee notes. The usefulness of the table will diminish over time, as courts and attorneys become more familiar with MUJI 2d and begin to use it exclusively. Mr. Fowler noted that MUJI 12.1 has not been replicated and that the subcommittee has avoided using "strict liability" in the text of the instructions.

Mr. Ferguson joined the meeting.

The draft instructions do not say that lack of privity and the exercise of reasonable care are not defenses. Mr. Simmons asked whether the committee had found that jurors are concerned about privity. The committee thought they were not. Mr. Fowler noted that an instruction on the exercise of care may be necessary where theories of strict liability and negligence both go to the jury. In those cases, the court and parties may need to craft an instruction explaining the difference between the two theories.

2. *1002. Strict liability. Elements of claim for manufacturing defect.* The committee noted that the comment to instruction 1002 applies to strict liability claims generally and not just to manufacturing defect claims. Mr. Fowler suggested moving the comment up to instruction 1001. Mr. Carney suggested making an introductory note for the whole topic. Mr. King and Ms. Brown noted that comments relevant to one theory of products liability may not be relevant to another and suggested having introductory notes for each subsection, such as one for strict liability and one for negligence.

Mr. King volunteered to have the subcommittee revise its notes.

Mr. Dewsnup expressed a concern about the structure of the instructions. He noted that the elements of a strict liability claim are (1) a defect, (2) that made the product unreasonably dangerous, (3) that was present at the time the product left the defendant, and (4) that caused the plaintiff's injuries. He thought there should be a generic instruction on the elements, followed by instructions defining each of the different types of product defects, followed by an instruction defining "unreasonably dangerous," followed by instructions on the other elements. Mr. Dewsnup thought that the first element as stated in instruction 1002 ("that a defect made the product unreasonably dangerous") should be broken out into two elements ("defect" and "unreasonably dangerous"). He also questioned whether the definition of "unreasonably dangerous" is different depending on the type of defect. Mr. Simmons noted that the elements as stated in instruction 1002 were taken from the Utah Supreme Court's statement of the elements of a strict liability claim. The committee thought, however, that it was not bound to state them in

the same language as the supreme court but could restate them to make them clearer to jurors. Ms. Brown defended the structure of the draft instructions, noting that the elements as stated in 1002 may not be helpful in a failure to warn case.

Mr. Shea volunteered to work with Ms. Brown to reformat the instructions in the way Mr. Dewsnup suggested so that the committee can compare the two approaches. Mr. Dewsnup offered to help.

The committee then focused on the language of instruction 1002. Mr. Dewsnup questioned whether "identical" should be "the same." Mr. Fowler did not think the distinction was significant or that any difference was intended thereby. Mr. Ferguson noted that most manufacturing has reasonable tolerances for variations.

Mr. King suggested that the subcommittee reconsider the issue.

Ms. Blanch was excused.

Mr. Ferguson noted generally that the products liability instructions seemed to be written for those with a higher level of education than those for whom the other instructions are written, which may be because the subject matter requires more sophistication.

3. *1003. Strict liability. elements of claim for design defect.* Mr. Dewsnup suggested that, for the sake of symmetry and simplicity, the instructions should refer to "design defect" throughout, rather "defective in design."

4. *1004. Definition of "unreasonably dangerous."* Mr. Nebeker questioned whether the notes should refer to "some subcommittee members." Mr. Dewsnup suggested saying, "There is an issue as to . . ." Mr. Carney suggested, "The drafting committee was not unanimous. The instruction should be reviewed with caution." Mr. Shea questioned whether there should be any note where some members merely disagree with a decision, such as *Brown v. Sears, Roebuck & Co.* Mr. Simmons pointed out that *Brown* is not a Utah decision but a Tenth Circuit decision and therefore is not a definitive statement of Utah law. Mr. Shea suggested saying, "Utah state courts are silent on the issue, but federal courts have said . . ." Mr. King suggested saying, "There is a question as to whether the Tenth Circuit's opinion of Utah law is correct." Mr. Fowler noted that the disagreements among committee members may be because there is no Utah law on point, or they may disagree on the interpretation of Utah law. After further discussion, the committee thought that it was appropriate to present alternative instructions for instruction 1004.

5. *1005. Strict liability. Elements of claim for failure to warn.* Mr. Dewsnup questioned whether the term "hazard" should be "risk." Mr. Ferguson thought the two terms

were not synonymous, that "hazard" refers to a potential mechanism of injury, and "risk" refers to the likelihood of the hazard occurring.

Mr. Fowler asked whether there needs to be a definition of what constitutes an "adequate" warning. Mr. Ferguson thought so. Some committee members thought that no definition of the adequacy of a warning could be given since it depends on the facts of the particular case. Mr. Carney suggested looking at the case law on the adequacy of warnings to determine the standard.

Mr. King offered to check the California pattern instructions (CACI) to see how they address the adequacy of a warning.

Mr. Dewsnup asked whether inadequate instructions for the use of a product are treated as a failure to warn.

6. *1008. Failure to warn. Presumption that warning will be read and heeded.* Mr. Shea questioned whether alternative instructions were necessary. The difference between the two alternatives is primarily on the question of whether the presumption arises for any warning (alternative A) or only for an adequate warning (alternative B). Mr. King noted that alternative A was based on comment *j* to the Restatement (Second) of Torts § 402A and suggested that the adequacy of the warning was not an issue at that time. Messrs. Carney, King, Simmons, and West all thought that an adequate warning is a prerequisite for the presumption to apply. Mr. Fowler thought there was some difference of opinion worth preserving but suggested that alternative instructions may not be the best way to present that difference.

7. *1011. Strict liability in tort. Component part manufacturer. Defective part incorporated into finished product.* Mr. Shea suggested presenting alternative instructions rather than burying the alternative in the note.

8. *1012. Defective condition of FDA approved drugs.* Mr. Dewsnup thought the presumption stated in this instruction should be rebuttable. Mr. Carney thought there should be no presumption, given the way the FDA works.

9. *1013. Defect not implied from injury alone.* Mr. Dewsnup noted that his subcommittees had made a concerted effort not to state the negative of propositions. He thought that instruction 1013 was improper and should not be given. Messrs. Carney, King, Simmons, and West agreed. Mr. Fowler suggested leaving the instruction in but including a warning against using it. Mr. Shea and Mr. Simmons thought that if the instruction were included, attorneys would think that the committee had endorsed its use.

The meeting concluded at 6:00 p.m.

Next Meeting. The next meeting will be Monday, January 8, 2007, at 4:00 p.m.

NCSC
National Center for State Courts

A nonprofit organization improving justice through leadership and service to courts

Mary Campbell McQueen
President

Tom M. Clarke, Ph.D.
Vice President of Research and Chief Information Officer
Williamsburg Office

December 19, 2006

Tim Shea
Utah Administrative Office of the Courts
450 South State
Salt Lake City, UT 84114-0241

Dear Mr. Shea:

Juries and jury trials have received an unprecedented amount of attention from judges and lawyers in recent years. Much of this attention has focused on pretrial jury management issues and in-court trial procedures. In the process, judicial and bar leaders have become increasingly aware of the importance of pattern jury instructions (PJI), especially their credibility to trial judges, lawyers, and reviewing courts in terms of legal accuracy and clarity to jurors. To meet increased expectations, many PJI committees are considering new internal procedures to address organizational and technical issues such as the optimal committee composition, membership qualifications, and publication and dissemination strategies.

To provide PJI members with an opportunity to exchange information about these issues and to learn about effective practices, the National Center for State Courts (NCSC) and the Ohio Judicial Conference (OJC) will co-host a two-day National Pattern Jury Instruction Conference in Ohio in Spring 2008 (exact dates and location to be determined). Invitations to attend the conference will be extended to all members of state and federal PJI committees as well as judicial and bar policy makers and academics who have demonstrated an interest in this area.

To prepare for the conference, I am seeking the input of the Utah Civil and Criminal PJI Committees about issues that would be most useful at such a conference. The attached survey lists a number of topics that have already been identified as potential topics for the conference agenda. Please rank each topic on a scale of 1 to 5 (1=no interest, 5=very high interest) based on your interest and the need for education and/or discussion. In the space provided, also indicate any additional topics that I have overlooked as well as any nuances about the existing topics that you would especially like to see addressed at the conference.

If you Chair this committee, please complete the survey and return to my attention by January 31, 2006. If you staff this committee please forward it to the appropriate Chairperson(s). Please feel free to return the survey by fax (757-564-2065) or email (phannaford@ncsc.dni.us). You may also complete the survey online at http://www.ncsconline.org/ASPSurvey/TakeSurvey.asp?SurveyID=8MM5p35Kml95G

Please let me know if you have any questions about the survey (757-259-1556) or the upcoming conference. Thank you in advance for your cooperation.

Sincerely,

Paula L. Hannaford-Agor
Director, Center for Jury Studies

National Pattern Jury Instruction Conference
Needs and Interest Assessment Survey

On a scale of 1 to 5, please indicate the extent to which it would be of interest [to you personally, to the members of your PJI committee] if presented at the conference.
1=No Interest, 5=Very High Interest

Juror Comprehension and Use of Pattern Jury Instructions					
Empirical research on juror comprehension of instructions	1	2	3	4	5
Empirical research on juror use of instructions during deliberations	1	2	3	4	5
Techniques for drafting instructions that are understandable to jurors	1	2	3	4	5
Criminal jury instruction terms and concepts that are particularly challenging for jurors	1	2	3	4	5
Civil jury instruction terms and concepts that are particularly challenging for jurors	1	2	3	4	5
Best practices for trial judges and lawyers about the form and timing for instructing juries	1	2	3	4	5
Effective methods of evaluating the comprehensibility of "plain English" jury instructions	1	2	3	4	5
How to obtain appellate court imprimatur on "plain English" jury instructions	1	2	3	4	5
PJI Operations and Procedures					
Historical development of pattern jury instructions	1	2	3	4	5
Comparative description of the structure and organization of pattern jury instruction committees	1	2	3	4	5
Composition and institutional sponsorship of pattern jury instruction committees	1	2	3	4	5
Techniques for timely responses to statutory, rule or common law changes	1	2	3	4	5
Communication or relationships with courts of appeal or courts of last resort	1	2	3	4	5
Communication or relationships with bar associations	1	2	3	4	5
Role of special consultants in drafting pattern jury instructions	1	2	3	4	5
Publication and distribution issues in print and electronic media	1	2	3	4	5
Contractual issues with PJI commercial vendors	1	2	3	4	5

Model Utah Jury Instructions
Second Edition
Working Draft
January 4, 2007

1001. Introduction. (Original)

[Name of plaintiff] seeks to recover damages based upon a claim of a defective [product].

Plaintiff claims the [product] is defective
[in manufacture] [and/or]
[in design] [and/or]
[because of a failure to adequately warn the consumer of a hazard involved in the foreseeable use of the [product]].

MUJI 1st References.

References.

House v. Armour of Am., 929 P.2d 340 (Utah 1996).

Advisory Committee Notes.

Utah's Product Liability Act is codified at Utah Code Ann. §§ 78-15-1 to -7. Section 78-15-3 of the Utah Product Liability Act was declared unconstitutional in Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985). Following the Berry decision, the Utah legislature repealed former sections 78-15-2 (legislative findings) and -3 (the unconstitutional statute of repose), and enacted a new section 78-15-3 (statute of limitations). The legislature did not repeal, amend or otherwise change sections 78-15-1, -4, or -6, which were held to be not severable from the portions of the statute declared unconstitutional in Berry. Although Utah courts have consistently cited and relied upon the Product Liability Act as codified since the legislature's action, some subcommittee members believe those sections are invalid. This argument has been rejected by the Utah Federal District Court. See Henrie v. Northrop Grumman Corp., 2006 U.S. LEXIS 23621 (D. Utah 2006) (rejecting Plaintiffs' argument that §78-15-3 is unconstitutional).

In crafting instructions for a particular case, note that when the term "manufacturer" is used, the terms "retailer," "designer," "distributor," may be substituted, if appropriate, as the circumstances of the case warrant.

Staff Notes.

If the proposed reorganization is approved, this instruction might be deleted. Some of the committee notes might be worked in with other instructions.

Status. Changes from: 12/11/2006

1002. Strict liability. Elements of claim for manufacturing defect. (Proposed Reorg)

[Name of plaintiff] claims that the [product] contained a manufacturing defect that made it unreasonably dangerous.

A product has a manufacturing defect if the product differs from the manufacturer's design or manufacturing specifications, or if the product differs from products intended to be identical from the same manufacturer.

MUJI 1st References.

12.1; 12.2.

References.

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)).
Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Restatement (Second) of Torts § 402A (1963 & 1964).

Advisory Committee Notes.

Staff Notes.

Status.

1003. Definition of "unreasonably dangerous." (Proposed Reorg. Original 1004)

Alternative A.

A product is unreasonably dangerous if:

(1) it is more dangerous than an ordinary user of the product would expect considering the product's characteristics, its intended and foreseeable uses and any instructions or warnings (or lack of instructions or warnings); and

(2) [name of plaintiff] did not have actual knowledge, training, or experience sufficient to know the risks of the product.

Alternative B.

A product is unreasonably dangerous if it is more dangerous than an ordinary user of the product would expect considering:

(1) the product's characteristics, propensities, risks, dangers, and uses; and

(2) any actual knowledge, training, or experience [name of plaintiff] had.

MUJI 1st References.

12.14.

References.

Utah Code Section 78-15-6(2).
Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1281-82 (10th Cir. 2003).

Advisory Committee Notes.

Section 78-15-6(2) of the Utah Code defines "unreasonably dangerous" in terms of consumer expectations. Based on section 78-15-6(2), the Tenth Circuit has concluded that the Utah Supreme Court would apply a consumer expectation test and not a risk-utility test in a strict products liability design defect case. Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1278-81 (10th Cir. 2003). Some subcommittee members disagree with the Brown decision, and believe that a risk-utility test is an appropriate way to define "unreasonably dangerous." Under the risk-utility test, the plaintiff bears the burden of showing that the product's risks outweigh its utility. Some subcommittee members assert that the following risk-utility factors ought to be considered in determining whether a product is unreasonably dangerous:

(1) how serious of a danger the design poses;
(2) how likely it is that the danger would occur or cause injury;
(3) how useful and desirable the product is to the plaintiff and to the public in general;
(4) whether another product or design is available that would do the same thing but would not be as dangerous;
(5) how easily the defendant could eliminate the danger from the product without making it less useful or too expensive; and
(6) whether a different design would create disadvantages to the public or the product.

See CACI 1204.

In addition, some members of the subcommittee disagreed on the application and interpretation of the second prong of the unreasonably dangerous test. Some members of the subcommittee believe that the second factor of the unreasonably dangerous test -- the actual knowledge, training, and experience of the plaintiff -- is just one factor for the jury to consider in deciding whether the product was unreasonably dangerous, as opposed to a complete defense as set forth in Brown v. Sears, Roebuck & Co., 328 F.3d 1274 (10th Cir. 2003). Alternative B was meant to reflect the “one factor” approach.

Staff Notes.

Status. Reviewed: 12/11/2006

1004. Strict liability. Elements of claim for manufacturing defect. (Proposed Reorg)

To prevail on a claim for manufacturing defect, [name of plaintiff] must prove each of the following:

(1) that the [product] was defective;

(2) that the defect made the [product] unreasonably dangerous;

(3) that the defect was present at the time [name of defendant] [manufactured/distributed/sold] the [product]; and

(4) that the defect caused [name of plaintiff]'s injuries.

MUJI 1st References.

12.1; 12.2.

References.

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)).
Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Restatement (Second) of Torts § 402A (1963 & 1964).

Advisory Committee Notes.

This instruction tracks the Utah Supreme Court's statement of the elements of a claim for strict products liability. Section 402A of the Restatement (Second) of Torts, which the Utah Supreme Court adopted in Ernest W. Hahn, Inc., also requires that the defendant be engaged in the business of selling such a product. The subcommittee thought that this rarely presents a jury question. In most cases, there will be no dispute as to whether the defendant was engaged in the business of selling the product. If the defendant was not, the court will generally dismiss any strict products liability claim before trial. If there is evidence from which reasonable minds could disagree, however, the court should tailor the instruction to require the jury to also find that the defendant was engaged in the business of selling the product.

Staff Notes.

Status.

1005. Strict liability. Definition of "design defect." (Proposed Reorg)

[Name of plaintiff] claims that the [product] contained a design defect that made it unreasonably dangerous.

A product has a design defect if, as a result of the design, it fails to perform as safely as an ordinary consumer or user would expect when used in an intended or reasonably foreseeable manner.

MUJI 1st References.

12.1; 12.3.

References.

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)).
Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993).
Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003).
Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003).
Restatement (Second) of Torts § 402A (1963 & 1964).
Restatement (Third) of Torts § 2, notes.

Advisory Committee Notes.

Instruction 1003. Definition of unreasonably dangerous" should immediately follow this instruction.

Staff Notes.

Status.

1006. Strict liability. Elements of claim for design defect. (Proposed Reorg)

To prevail on a claim for design defect, [name of plaintiff] must prove each of the following:

(1) that the [product] was defective;

(2) that the defect made the [product] unreasonably dangerous;

(3) that the defect was present at the time [name of defendant] [manufactured/distributed/sold] the [product];

(4) that the defect caused [name of plaintiff]'s injuries; and

[(5) that at the time the [product] was [designed and manufactured/sold], a safer alternative design existed that was technically and economically feasible, practicable under the circumstances, and available.]

MUJI 1st References.

12.1; 12.3.

References.

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)).
Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993).
Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003).
Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003).
Restatement (Second) of Torts § 402A (1963 & 1964).
Restatement (Third) of Torts § 2, notes.

Advisory Committee Notes.

Some members of the subcommittee disagree that the element of safer alternative design is an element of a design defect claim under Utah law, as noted by the brackets. No Utah state appellate court has discussed the necessity of proving the existence of a safer alternative design, the federal district courts in Utah and the Tenth Circuit have recognized this element as essential to a design defect claim. See Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993); Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003); Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003). On the issue of availability, the court in Allen v. Minnstar recognized that plaintiff must prove the safer alternative design was “commercially available” or “commercially feasible.” However, later pronouncements by the Tenth Circuit in Brown

v. Sears, Roebuck & Co., and Wankier v. Crown Equipment Corp. have simply used the term “available.” Whether the timeframe for the safer alternative design is at the time of design or manufacture or the date of sale will be determined by the particular facts of the case.

Staff Notes.

Status.

1007. Strict liability. Definition of "failure to warn." (Proposed Reorg)

[Name of plaintiff] claims that [name of defendant] failed to adequately warn of a hazard involved in the foreseeable use of the [product], rendering the [product] defective and unreasonably dangerous.

MUJI 1st References.

12.6; 12.7.

References.

House v. Armour of Am., 929 P.2d 340 (Utah 1996).
Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Restatement (Second) of Torts § 402A (1963 & 1964).

Advisory Committee Notes.

Staff Notes.

Status.

1008. Definition of "unreasonably dangerous" for failure to warn claim. (Proposed Reorg. Original 1006)

Where a manufacturer knows or should know of a dangerous risk associated with the product's foreseeable use beyond that which would be contemplated by a reasonable consumer or user, the absence or inadequacy of warnings renders that product unreasonably dangerous. However, if the danger posed by the use of a product is generally known and recognized, then the seller is not required to warn about that danger.

MUJI 1st References.

References.

Restatement (Second) of Torts § 402A & comment j (1965).
House v. Armour of Am., 929 P.2d 340 (Utah 1996).

Advisory Committee Notes.

Some members of the subcommittee thought that the definition of "unreasonably dangerous" is the same regardless of the type of product defect claimed and that House v. Armour of America, 929 P.2d 340 (Utah 1996), did not create a new definition of "unreasonably dangerous" in failure-to-warn cases. Those members thought that only instruction 1004 and not instruction 1006 should be given in failure-to-warn cases.

Staff Notes.

Recommend that this instruction be deleted. The first sentence restates the definition from 1004. The second sentence restates 1009.

Status.

1009. Strict liability. Elements of claim for failure to warn. (Proposed Reorg)

To prevail on a claim for failure to warn, [name of plaintiff] must prove each of the following:

(1) that [name of defendant] failed to provide an adequate warning at the time the [product] was [manufactured/distributed/sol], rendering it defective and unreasonably dangerous; and

(2) that [name of defendant]'s failure to provide an adequate warning caused [name of plaintiff]'s injuries.

[If the event that produced the injury would have occurred regardless of the alleged failure to warn, then the failure to provide a warning is not the cause of the harm, and the plaintiff's claim must fail.]

MUJI 1st References.

12.6; 12.7.

References.

House v. Armour of Am., 929 P.2d 340 (Utah 1996).
Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Restatement (Second) of Torts § 402A (1963 & 1964).

Advisory Committee Notes.

Some subcommittee members thought that the last paragraph was redundant and unnecessary.

Staff Notes.

The last paragraph appears to be more appropriate among the causation instructions and deleted here.

Status.

1002. Strict liability. Elements of claim for manufacturing defect. (Original)

[Name of plaintiff] claims that the [product] contained a manufacturing defect that made it unreasonably dangerous.

A product has a manufacturing defect if the product differs from the manufacturer's design or manufacturing specifications, or if the product differs from products intended to be identical from the same manufacturer.

To prevail on a claim for manufacturing defect, [name of plaintiff] must prove each of the following:

(1) that the [product] was defective;

(2) that the defect made the [product] unreasonably dangerous;

(3) that the defect was present at the time [name of defendant] [manufactured/distributed/sold] the [product]; and

(4) that the defect caused [name of plaintiff]'s injuries.

MUJI 1st References.

12.1; 12.2.

References.

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)).
Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Restatement (Second) of Torts § 402A (1963 & 1964).

Advisory Committee Notes.

This instruction tracks the Utah Supreme Court's statement of the elements of a claim for strict products liability. Section 402A of the Restatement (Second) of Torts, which the Utah Supreme Court adopted in Ernest W. Hahn, Inc., also requires that the defendant be engaged in the business of selling such a product. The subcommittee thought that this rarely presents a jury question. In most cases, there will be no dispute as to whether the defendant was engaged in the business of selling the product. If the defendant was not, the court will generally dismiss any strict products liability claim before trial. If there is evidence from which reasonable minds could disagree, however, the court should tailor the instruction to require the jury to also find that the defendant was engaged in the business of selling the product.

Staff Notes.

Status. Changes from: 12/11/2006

1003. Strict liability. Elements of claim for design defect. (Original)

[Name of plaintiff] claims that the [product] contained a design defect that made it unreasonably dangerous.

A product has a design defect if, as a result of the design, it fails to perform as safely as an ordinary consumer or user would expect when used in an intended or reasonably foreseeable manner.

To prevail on a claim for design defect, [name of plaintiff] must prove each of the following:

(1) that the [product] was defective;

(2) that the defect made the [product] unreasonably dangerous;

(3) that the defect was present at the time [name of defendant] [manufactured/distributed/sold] the [product];

(4) that the defect caused [name of plaintiff]'s injuries; and

[(5) that at the time the [product] was [designed and manufactured/sold], a safer alternative design existed that was technically and economically feasible, practicable under the circumstances, and available.]

MUJI 1st References.

12.1; 12.3.

References.

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)).
Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993).
Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003).
Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003).
Restatement (Second) of Torts § 402A (1963 & 1964).
Restatement (Third) of Torts § 2, notes.

Advisory Committee Notes.

Some members of the subcommittee disagree that the element of safer alternative design is an element of a design defect claim under Utah law, as noted by the brackets. No Utah state appellate court has discussed the necessity of proving the existence of a

safer alternative design, the federal district courts in Utah and the Tenth Circuit have recognized this element as essential to a design defect claim. See Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993); Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003); Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003). On the issue of availability, the court in Allen v. Minnstar recognized that plaintiff must prove the safer alternative design was "commercially available" or "commercially feasible." However, later pronouncements by the Tenth Circuit in Brown v. Sears, Roebuck & Co., and Wankier v. Crown Equipment Corp. have simply used the term "available." Whether the timeframe for the safer alternative design is at the time of design or manufacture or the date of sale will be determined by the particular facts of the case.

Staff Notes.

Status. Changes from: 12/11/2006

1004. Definition of "unreasonably dangerous." (Original)

Alternative A.

A product is unreasonably dangerous if:

(1) it is more dangerous than an ordinary user of the product would expect considering the product's characteristics, its intended and foreseeable uses and any instructions or warnings (or lack of instructions or warnings); and

(2) [name of plaintiff] did not have actual knowledge, training, or experience sufficient to know the risks of the product.

Alternative B.

A product is unreasonably dangerous if it is more dangerous than an ordinary user of the product would expect considering:

(1) the product's characteristics, propensities, risks, dangers, and uses; and

(2) any actual knowledge, training, or experience [name of plaintiff] had.

MUJI 1st References.

12.14.

References.

Utah Code Section 78-15-6(2).
Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1281-82 (10th Cir. 2003).

Advisory Committee Notes.

Section 78-15-6(2) of the Utah Code defines "unreasonably dangerous" in terms of consumer expectations. Based on section 78-15-6(2), the Tenth Circuit has concluded that the Utah Supreme Court would apply a consumer expectation test and not a risk-utility test in a strict products liability design defect case. Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1278-81 (10th Cir. 2003). Some subcommittee members disagree with the Brown decision, and believe that a risk-utility test is an appropriate way to define "unreasonably dangerous." Under the risk-utility test, the plaintiff bears the burden of showing that the product's risks outweigh its utility. Some subcommittee members assert that the following risk-utility factors ought to be considered in determining whether a product is unreasonably dangerous:

(1) how serious of a danger the design poses;

(2) how likely it is that the danger would occur or cause injury;
(3) how useful and desirable the product is to the plaintiff and to the public in general;
(4) whether another product or design is available that would do the same thing but would not be as dangerous;
(5) how easily the defendant could eliminate the danger from the product without making it less useful or too expensive; and
(6) whether a different design would create disadvantages to the public or the product.

See CACI 1204.

In addition, some members of the subcommittee disagreed on the application and interpretation of the second prong of the unreasonably dangerous test. Some members of the subcommittee believe that the second factor of the unreasonably dangerous test -- the actual knowledge, training, and experience of the plaintiff -- is just one factor for the jury to consider in deciding whether the product was unreasonably dangerous, as opposed to a complete defense as set forth in Brown v. Sears, Roebuck & Co., 328 F.3d 1274 (10th Cir. 2003). Alternative B was meant to reflect the "one factor" approach.

Staff Notes.

Status. Reviewed: 12/11/2006

1005. Strict liability. Elements of claim for failure to warn. (Original)

[Name of plaintiff] claims that [name of defendant] failed to adequately warn of a hazard involved in the foreseeable use of the [product], which made the [product] unreasonably dangerous.

To prevail on a claim for failure to warn, [name of plaintiff] must prove each of the following:

(1) that [name of defendant] failed to provide an adequate warning at the time the [product] was [manufactured/distributed/sol], rendering it defective and unreasonably dangerous; and

(2) that [name of defendant]'s failure to provide an adequate warning caused [name of plaintiff]'s injuries.

[If the event that produced the injury would have occurred regardless of the alleged failure to warn, then the failure to provide a warning is not the cause of the harm, and the plaintiff's claim must fail.]

MUJI 1st References.

12.6; 12.7.

References.

House v. Armour of Am., 929 P.2d 340 (Utah 1996).
Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Restatement (Second) of Torts § 402A (1963 & 1964).

Advisory Committee Notes.

Some subcommittee members thought that the last paragraph was redundant and unnecessary.

Staff Notes.

The last paragraph appears to be more appropriate among the causation instructions and deleted here.

Status. Reviewed: 12/11/2006

1006. Definition of "unreasonably dangerous" for failure to warn claim. (Original)

Where a manufacturer knows or should know of a dangerous risk associated with the product's foreseeable use beyond that which would be contemplated by a reasonable consumer or user, the absence or inadequacy of warnings renders that product unreasonably dangerous. However, if the danger posed by the use of a product is generally known and recognized, then the seller is not required to warn about that danger.

MUJI 1st References.

References.

Restatement (Second) of Torts § 402A & comment j (1965).
House v. Armour of Am., 929 P.2d 340 (Utah 1996).

Advisory Committee Notes.

Some members of the subcommittee thought that the definition of "unreasonably dangerous" is the same regardless of the type of product defect claimed and that House v. Armour of America, 929 P.2d 340 (Utah 1996), did not create a new definition of "unreasonably dangerous" in failure-to-warn cases. Those members thought that only instruction 1004 and not instruction 1006 should be given in failure-to-warn cases.

Staff Notes.

Recommend that this instruction be deleted. The first sentence restates the definition from 1004. The second sentence restates 1009.

Status.

1007. Failure to warn. Heeding presumption. (Original)

If you find that [name of defendant] did not provide an adequate warning regarding the use of the [product], you can presume that had [name of defendant] provided an adequate warning, [name of plaintiff] would have read and heeded it. However, if the evidence shows that [name of plaintiff] would not have read and/or heeded any warning, you may not make that presumption.

MUJI 1st References.

References.

House v. Armour of Am., Inc., 929 P.2d 340, 347 (Utah 1996).

Advisory Committee Notes.

Some members of the subcommittee do not believe this instruction is appropriate when an injured party is available to testify. See House v. Armour of Amer., 929 P.2d 340, 346-47 (Utah 1996). In such case, the injured party retains the burden to prove by a preponderance of the evidence the likelihood he or she would have complied with a different instruction or warning.

Some members of the subcommittee also do not believe this instruction is appropriate in cases where the "learned intermediary doctrine" applies. See Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2000 Utah 43, 16, 79 P.3d 922 (citation omitted). While the FDA regulates the labeling of prescription pharmaceuticals and medical devices, it does not regulate the practice of medicine, including the prescribing practices of physicians. See 59 FR 59820-04, 1994 WL 645925 (1994). A physician may, for example, prescribe a medication for an unapproved use or use a medical device in an unapproved manner. Id. Accordingly, warnings accompanying pharmaceuticals and medical devices must be evaluated from the perspective of the learned intermediary rather than that of an average consumer. More important, no heeding presumption should apply because the learned intermediary, in exercising his or her professional judgment, may choose to ignore, entirely or in part, a warning accompanying a pharmaceutical or medical device.

Staff Notes.

Status.

1008. Failure to warn. Presumption that warning will be read and heeded. (Original)

Alternative A.

If you find that [name of defendant] gave a warning, you are instructed that [he] could reasonably assume that the warning would be read and followed.

You can presume that if a product contains a warning, and would be safe if the warning were followed, it is not defective or unreasonably dangerous.

Alternative B.

If you find that [name of defendant] gave an adequate warning regarding the use of [the product], [he] could reasonably assume that the warning would be read and followed.

[A product that contains an adequate warning and that would be safe if the warning were followed is not defective or unreasonably dangerous.]

MUJI 1st References.

12.6; 12.7.

References.

Restatement (Second) of Torts § 402A comment j (1963 & 1964).
CACI 1205.

Advisory Committee Notes.

Some subcommittee members thought that the last paragraph of Alternative B is unnecessary and is subsumed in the elements of a failure-to-warn claim stated in instruction 1005.

Staff Notes.

All of the introductory instructions speak of an "adequate" warning. To not use the term here would confuse the jury.

If the second paragraph of Alternative B is unnecessary, then the final paragraph of A is unnecessary as well, since they say the same thing.

Do phrases like "regarding the use of the product" in B and "you are instructed that" in A create any significant differences? If not, then at least that much of the alternatives

could be made identical so that the judges and lawyers focus on the real difference between the two: whether the warning is adequate.

Status. Reviewed: 12/11/2006

1009. Failure to warn. Open and obvious danger. (Original)

[Name of defendant] cannot be liable for injuries that result from a failure to warn about obvious dangers inherent in the [product] that a reasonable user should recognize and that [name of defendant] cannot economically eliminate.

MUJI 1st References.

References.

House v. Armour of Am., Inc., 929 P.2d 340, 344 (Utah 1996).

Advisory Committee Notes.

Staff Notes.

As a whole, this instruction is very similar to 1006.

"… cannot economically eliminate." Is very similar to 1004, Alternative B and the accompanying Committee Note.

Perhaps this instruction could be integrated with one or the other of these two.

Status.

1010. Strict liability. Component part manufacturer. Part defective only as incorporated into finished product. (Original)

[Name of defendant] [designed/manufactured/distributed/sold] a component part of the [product]. If you find that the component part was not defective as [designed/manufactured/distributed/sold] but only became defective as a result of the way it was [installed/incorporated/used] in the finished [product], then [name of defendant] can only be liable to [name of plaintiff] if:

(1) [Name of defendant] knew enough about the design or operation of the finished [product] that [he] could have reasonably foreseen that an injury could occur because of the way the component part would be used in the [product], and

(2) [Name of defendant] did not warn the [final assembler of the product] of that danger.

MUJI 1st References.

12.8.

References.

Advisory Committee Notes.

Staff Notes.

Status.

1011. Strict liability in tort. Component part manufacturer. Defective part incorporated into finished product. (Original)

[Name of defendant] [designed/manufactured/distributed/sold] a component part of the [product].

Alternative A.

If you find that the component part was defective as [designed/manufactured/distributed/sold] and that the defective part made the finished product unreasonably dangerous, then you may apportion fault to [name of defendant], the manufacturer of the component part, and [name of co-defendant or third party], the manufacturer of the finished product.

Alternative B.

If you find that the component part was defective as [designed/manufactured/distributed/sold] and that the defective part made the finished product unreasonably dangerous, then you may find both [name of defendant], the manufacturer of the component part, and [name of co-defendant or third party], the manufacturer of the finished product, liable to [name of plaintiff].

MUJI 1st References.

References.

Utah Code Sections 78-27-37 to 78-27-43.

Advisory Committee Notes.

Some subcommittee members believe that whether the liability of the component part manufacturer and the manufacturer of the finished product is joint and several, or apportioned under the Liability Reform Act, is an open issue under Utah law.

Staff Notes.

Status. Changes from: 12/11/2006

1012. Defective condition of FDA approved drugs. (Original)

If a drug product was in conformity with United States Food and Drug Administration (FDA) standards in existence at the time the product was sold, the product is presumed to be free of any defect. [Name of plaintiff] may still recover by proving that the product was defective and unreasonably dangerous due to an inadequate warning or a manufacturing defect.

MUJI 1st References.

12.13.

References.

Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991).

Advisory Committee Notes.

In Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991), the Utah Supreme Court exempted claims for misrepresentation on the FDA from the operation of this rule. However, in the subsequent decision of Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 121 S.Ct. 1012, 69 USLW 4101, the United States Supreme Court held that state law fraud on the FDA claims conflict with and are preempted by federal law. 531 U.S. at 348, 121 S.Ct. at 1017. Accordingly, the committee has not included claims of misrepresentation on the FDA in this instruction. At the time of the drafting of this instruction, there was an unresolved split among federal district courts regarding preemption of warnings claims for FDA approved pharmaceuticals. The language of this instruction may, therefore, require amendment depending upon the resolution of that conflict.

Staff Notes.

Status. Reviewed: 12/11/2006

1013. Defect not implied from injury alone. (Original)

The fact that an accident or injury occurred does not support a conclusion that the [product] was defective.

MUJI 1st References.

References.

Burns v. Cannondale Bicycle, Co., 876 P.2d 415, 418 (Utah 1994).

Advisory Committee Notes.

Some subcommittee members thought the instruction was substantially similar to the "unavoidable accident" and "mere fact of an accident" instructions that the Utah Supreme Court has held should not be given. See Green v. Louder, 2001 UT 62, ¶ 18, 29 P.3d 638; Randle v. Allen, 862 P.2d 1329, 1334-36 (Utah 1993). Some subcommittee members thought that such instructions are not necessary and create a potential for confusing and misleading the jury by suggesting to the jury that the plaintiff has an additional hurdle to get over. These members believe such instructions circumvent proper application of instructions on the elements of a claim and burden of proof and allow the jury to reach a result without following the principles set out in those instructions. These members also believe that such instructions tend to reemphasize the defendant's theory of the case and, to that extent, constitute an inappropriate judicial comment on the evidence. See Randle, 862 P.2d at 1335-36.

Staff Notes.

There was no motion and vote, but, from the minutes, it appears that most committee members favored deleting this instruction.

Status. Reviewed: 12/11/2006