Agenda
Advisory Committee on
Model Civil Jury Instructions

February 12, 2007
4:00 to 6:00 p.m.

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

Product Liability.	Tracy Fowler

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

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
January 8, 2007
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Ralph L. Dewsnup, , Tracy H. Fowler, Colin P. King, , Timothy M. Shea, David E. West, Jonathan Jemming, Marianna Di Paolo, and Kamie F. Brown

Excused: John L. Young, Phillip S. Ferguson, Paul M. Simmons

Mr. Fowler, the chair of the Products Liability subcommittee, conducted the meeting in Mr. Young's absence.

Survey by the National Center for State Courts

Mr. Shea explained that the NCSC is planning to sponsor a conference in 2008 of plain language pattern jury instructions. The NCSC is surveying committees such as ours to determine which topics should be included. The committee agreed that topics dealing with juror comprehension and use of instruction should have a high priority and that topics dealing with committee operations and procedures would have less relevance in Utah. Mr. Shea will respond to the survey on behalf of the committee.

Draft Instructions

Mr. Dewsnup presented his proposed alternative reorganization of the first six product liability instructions. This alternative includes definitions for "design defect," "manufacturing defect" and "unreasonably dangerous" and a single statement of the elements for both design and manufacturing defects. It then states the definitions and elements for failure-to-warn. Mr. Dewsnup tried not to change the substance of the instructions, but to present them in an order that preserved their symmetry. Mr. Dewsnup proposed that the disputed element of a design defect – the availability of a safer alternative – would be better included in the definition of a design defect, rather than among the elements.

After discussion, the committee agreed with Mr. Dewsnup's proposal, but that the order should place the elements of the claim immediately before the definitions. The order will be:

Introduction
Elements of claim for a [design/manufacturing] defect.
Definition of "design defect" and "unreasonably dangerous."
Definition of "manufacturing defect" and "unreasonably dangerous."
Elements of claim for failure to adequately warn.
Definition of "failure to warn" and "unreasonably dangerous."

The committee noted that the instructions use “hazard,” “risk” and “danger” somewhat interchangeably. Mr. Fowler and Ms. Brown will propose a uniform term at the next meeting.

The committee noted that there should be a definition of “adequate” warning so that jurors might better decide whether a warning is adequate. Mr. Fowler and Ms. Brown will propose a definition at the next meeting.

The committee discussed whether 1001. Introduction was needed. The committee decided to keep the instruction at least for cases in which more than one theory is presented to the jury.

In discussing the definition of “unreasonably dangerous,” the committee agreed that there should be just one alternative. Most members favored Alternative A. Mr. Fowler and Ms. Brown will propose a definition at the next meeting.

The meeting was adjourned.

Model Utah Jury Instructions
Second Edition
Working Draft
February 5, 2007

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1001. Strict liability. Introduction.

[Name of plaintiff] seeks to recover damages based upon a claim that [he] was injured by a defective and unreasonably dangerous [product]. A product may be defective and unreasonably dangerous:

[(1) in the way that it was designed;]

[(2) in the way that it was manufactured; and]

[(3) in the way that its users were warned of hazards involved in its foreseeable use.]

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 78-15-7. 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 78-15-3 (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, 78-15-4, or 78-15-6, 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 drafting 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.

Status. Changes from: 1/8/2007

1002. Strict liability. Elements of claim for a [design/manufacturing] defect.

[Name of plaintiff] claims that [he] was injured by a [product] that contained a [design/manufacturing] defect that made the [product] unreasonably dangerous. You must decide whether:

(1) there was a [design/manufacturing] defect in the [product];

(2) the [design/manufacturing] defect made the [product] unreasonably dangerous;

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

(4) the [design/manufacturing] defect was a cause of [name of plaintiff]'s injuries.

MUJI 1st References.

12.1; 12.2; 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).
Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003).
Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003).
Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993).
Restatement (Second) of Torts § 402A (1963 & 1964).
Restatement (Third) of Torts § 2, notes.

Advisory Committee Notes.

Section 402A of the Restatement (Second) of Torts, which the Utah Supreme Court adopted in Ernest W. Hahn, Inc., requires that the defendant be engaged in the business of selling the product. 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 dismiss any strict products liability claim before trial. If there is evidence from which reasonable minds could disagree, however, the court should add a fifth element: "whether … (5) [Name of defendant] was engaged in the business of selling the [product]."

Staff Notes.

Should we just add: (5) [Name of defendant] was engaged in the business of selling the [product]." and delete the note?

In the CACI strict liability instructions, plaintiff must prove the element that "the [product] was used in a way that was reasonably foreseeable to [name of defendant]."

Status. Changes from: 1/8/2007

1003. Strict liability. Definition of "design defect" and "unreasonably dangerous."

A [product] contains a design defect if:

(1) as a result of its design, the [product] fails to perform as safely as an ordinary user would expect when the [product] is used in an intended or reasonably foreseeable manner; and

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

A [product] with a design defect 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 [product]'s hazards.

MUJI 1st References.

12.1; 12.3; 12.14.

References.

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

Whether the second prong of the design defect definition - a safer alternative design - is an element of a design defect claim may be an open question. No Utah state appellate court has required proving the existence of a safer alternative design, but 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.

Some members of the committee believe that the second prong of the unreasonably dangerous definition - 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).

Staff Notes.

Strike "intended" from element (1) in both definitions. Intended is subsumed in "reasonably foreseeable."

Status. Changes from: 1/8/2007

1004. Strict liability. Definition of "manufacturing defect" and "unreasonably dangerous."

A [product] contains a manufacturing defect if it differs from the manufacturer's (designer's?) design or specifications, or if the product differs from products from the same manufacturer that are intended to be identical.

A [product] with a manufacturing defect 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 [product]'s hazards.

MUJI 1st References.

12.1; 12.2; 12.14.

References.

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

Some members of the committee believe that the second prong of the unreasonably dangerous definition - 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).

Staff Notes.

Strike "intended" from element (1). Intended is subsumed in "reasonably foreseeable."

Status. Changes from: 1/8/2007

1005. Strict liability. Elements of claim for failure to adequately warn.

[Name of plaintiff] claims that [he] was injured by a [product] that was defective and unreasonably dangerous because it lacked an adequate warning of a hazard involved in its foreseeable use. You must decide whether:

(1) [name of defendant] failed to provide an adequate warning, which made the product defective and unreasonably dangerous;

(2) the lack of an adequate warning was present at the time [name of defendant] [manufactured/distributed/sold] the product; and

(3) the lack of an adequate warning was a cause of [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 phrase "of a hazard involved in its foreseeable use." in the first sentence may be difficult for jurors to understand. The CACI 1205 equivalent would end the sentence at "hazard". The concept of "foreseeable use" is one of the elements: You must decide whether ... "the [product] was used in a way that was reasonably foreseeable to [name of defendant]." Such an approach is more easily understood.

CACI includes "instructions" as well as "warnings."

The "which" clause in element (1) is ambiguous: Is it equated with lack of an adequate warning? In which case it should be deleted. Or is it a further conclusion that the jury must reach? In which case it should be redrafted as a separate element.

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

Status. Changes from: 1/8/2007

1006. Strict liability. Definition of “failure to warn.” "unreasonably dangerous?"

If the hazard posed by the [product]’s (foreseeable?) use is generally known and recognized, then [name of defendant] is not required to warn about that hazard.

However, if [name of defendant] knew or should have known of a hazard associated with the [product]’s foreseeable use beyond that which would be contemplated by a reasonable user, the absence or inadequacy of warnings makes the [product] defective and unreasonably dangerous.

MUJI 1st References.

References.

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

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. Under this approach, the definition of "unreasonably dangerous" in Instruction 1003 or 1004 should be given in failure-to-warn cases, rather than 1006.

Staff Notes.

We use hazard "involved," "posed," "associated," and "inherent" in/by a product. We should select one phrase.

Do we need both "known" and "recognized"?

Should it be "generally known" or "should have been known by plaintiff"?

The first sentence is essentially the same as 1009, but 1009 uses different words. We should try to integrate 1009 into this instruction.

The second paragraph may be confusing to jurors. It appears to hold defendant to any knowledge that he may have. That is, defendant foresees uses beyond what the "reasonable user" foresees. If that's the case, is it properly juxtaposed to the first paragraph?

Symmetry and the original 1006 would treat this as a definition of "failure to warn" and/or "unreasonably dangerous." But it's not really a definition. It's more like special doctrines about how far the duty to warn extends.

Status. Changes from: 1/8/2007

1007. Strict liability. Failure to warn. Heeding presumption.

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 heeded it. However, if the evidence shows that [name of plaintiff] would not have 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 committee do not believe this instruction is appropriate if 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 committee also do not believe this instruction is appropriate in cases in which 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. Changes from: 1/8/2007

1008. Strict liability. Failure to warn. Presumption that warning will be read and heeded.

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. Strict liability. Failure to warn. Open and obvious danger.

[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.

This instruction should be integrated into 1006 and eliminated here.

"… cannot economically eliminate" introduces a (disputed) design defect concept into a failure to warn claim.

Delete "obvious" and "inherent." The issue is whether the plaintiff should have known of the danger.

Status.

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

[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. Component part manufacturer. Defective part incorporated into finished product.

[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. Strict liability. Defective condition of FDA approved drugs.

If a drug product was (designed?) in conformity with United States Food and Drug Administration (FDA) standards in existence at the time the product was sold (designed?), 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 a manufacturing defect or an inadequate warning.

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. Strict liability. Defect not implied from injury alone.

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