Agenda

Advisory Committee on Model Civil Jury Instructions

March 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

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
February 12, 2007
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Timothy M. Shea, Paul M. Simmons, David E. West, and Kamie F. Brown

Excused: Paul M. Belnap

The committee continued its review of the products liability instructions.

1. *1001. Strict liability. Introduction.* Mr. Simmons noted that the reference in the last line of the first paragraph of the comment should be to § 78-15-6, not -3. Mr. West suggested changing *and* at the end of subparagraph (2) to *and/or.* Mr. Dewsnup suggested deleting *and* altogether. Mr. Young suggested adding a provision to the note saying that a given case may involve any of the three theories or any combination of them and that the court should give only the alternatives that apply to the case.

Mr. Shea will propose additional language for the note.

Subparagraph (3) referred to "hazards involved in [the product's] foreseeable use." Mr. Shea had suggested using one term throughout rather than using *hazard, danger,* and *risk* interchangeably. Mr. Fowler noted that he and Ms. Brown had opted for *danger* but that MUJI 12.6 and 12.7 refer to "substantial danger." Mr. Dewsnup thought that adding *substantial* was a substantive change. Mr. Simmons noted that *House v. Armour of America,* a more recent pronouncement on liability for failure to warn, simply talks of a failure to warn of "a risk." Mr. West thought that *danger* was sufficient for the introductory instruction. After further discussion, subparagraph (3) was revised to read, "(3) in the way that its users were warned." Mr. Shea asked if the instruction was necessary. The consensus was that it was needed, particularly where a plaintiff has multiple theories of defect. Mr. Fowler questioned whether the committee note belonged with this instruction, whether it should be in an introduction to the whole section, or whether it should be repeated for each instruction that referred to the Products Liability Act. The committee decided to leave it where it is. At Ms. Brown's suggestion, the reference to "some subcommittee members" was changed to "some committee members."

2. *1002. Strict liability. Elements of claim for a [design/manufacturing] defect.* Mr. Shea asked whether the fifth element mentioned in the note should be added to the text of the instruction. Mr. Simmons noted that it is not included in the Utah Supreme Court's most recent restatements of the elements of the claim. The committee thought that if it were added to the text, we would also need to add instructions explaining what elements the jury should consider in determining whether one was "engaged in the business of selling" a product. The committee thought that in most cases the issue would be resolved pretrial, as a matter of law. Because it

would arise so infrequently at trial and because there is no Utah law explaining what factors the jury should consider when the issue does arise, the committee decided to leave it in the note. At Ms. Brown's suggestion, a reference to the "occasional seller" defense was added to the note.

Ms. Blanch was excused.

At Mr. Ferguson's suggestion, *contained* in the first line was replaced by *had.* Dr. Di Paolo asked whether *danger* should be replaced by *unreasonable danger* throughout the instructions, since the instructions also refer to *unreasonably dangerous.* Mr. Fowler noted that *unreasonably dangerous* is a term of art in products liability actions and suggested that it may be confusing to use *danger* in place of *hazard* and *risk* where the instructions also use *unreasonably dangerous.* The committee decided to keep both terms (*danger* and *unreasonably dangerous).* Mr. Shea noted that the California model instruction includes as an element that the product was used in a way that was reasonably foreseeable to the defendant. The committee thought that the concept of foreseeable use was adequately covered in other instructions. At Ms. Brown's suggestion, the reference to Restatement (Third) of Torts § 2, notes, was deleted from this instruction.

3. *1003. Strict liability. Definition of "design defect" and "unreasonably dangerous."* At Mr. Shea's suggestion, approved by Mr. Fowler, *intended* was deleted from both subparagraphs (1). Mr. West questioned whether the second subparagraph (2) was an accurate statement of the law. He gave the example of an employee who is required by his employer to use equipment without necessary protections. He may know the product is dangerous, but Mr. West thought that the law would allow him to recover, that his knowledge does not mean that the product is not unreasonably dangerous but only goes to comparative fault (*e.g.,* of the employer, employee, or both). Mr. Fowler noted that the instruction follows the Tenth Circuit's prediction of Utah law. Mr. Simmons noted that the Tenth Circuit's interpretation of Utah law does not track the language of the Utah statute and thought that the instruction should follow the statute and not the Tenth Circuit's gloss on the statute.

Mr. Simmons will draft alternative instructions to 1003 and 1004 tracking Utah Code Ann. § 78-15-6(2).

Mr. Humpherys thought that the last subparagraph (2) was too broad. A plaintiff may know of dangers involved in the use of the product, but unless he knows of the particular danger that causes his injury, his knowledge should not affect his claim. Yet, as the instruction is currently drafted, one could argue that knowledge of any defect defeats a claim. Mr. Young suggested adding an introductory sentence: "[Name of plaintiff] claims that [the product] had the following design defect: [Describe the claimed defect]." Mr. Humpherys thought it may be too hard to define the claimed defect simply in a sentence or two. The committee debated whether such an introductory sentence should appear in this instruction or in the general instructions on the nature of the parties' claims. Mr. Humpherys and Mr. Young thought it should go in an introductory

instruction regarding the parties' claims. The committee revised the last subparagraph to read, "(2) [name of plaintiff] did not have actual knowledge, training, or experience sufficient to know the dangers associated with the claimed defect."

Mr. Dewsnup was excused.

Dr. Di Paolo thought that the instructions were confusing and asked whether instruction 1003 should be integrated into instruction 1002, that is, whether the concepts of "defect" and "unreasonably dangerous" should be defined when they are first stated as elements of the claim. Mr. Fowler suggested handling the difficulty by adding a sentence to the end of instruction 1002 to the effect that the court will now explain what "defect" and "unreasonably dangerous" mean. Mr. Humpherys suggested deleting the last paragraph of the comment. Mr. Young suggested adding a cross-reference to the alternative instruction instead. The committee also deleted *or lack of instructions or warnings* from the second subparagraph (1). At Ms. Brown's suggestion, the second sentence of the committee note was revised to read that no Utah appellate court has considered whether a safer alternative design must be proved. At Mr. Simmons's suggestion, the sentence was further revised to say that the Tenth Circuit has required this element (not that it has "recognized this element as essential"). At Ms. Brown's suggestion, the second reference to *Brown v. Sears, Roebuck* in the References section was deleted.

4. *1004. Strict liability. Definition of "manufacturing defect" and "unreasonably dangerous."* The committee revised instruction 1004 to track the changes to instruction 1003. Mr. Shea asked whether the term *manufacturer's* in the first line should be *designer's*. Mr. Fowler noted that the instructions say to substitute the appropriate term for *manufacturer,* depending on the facts of the case. Mr. Fowler noted that, under MUJI 12.2, the injury has to arise from a foreseeable use of the product. He thought this concept should be included in instruction 1004. Mr. Humpherys thought the first sentence was confusing because it could allow the jury to find a manufacturing defect where the product complied with specifications. The first paragraph was revised to read:

> The [product] had a manufacturing defect if it
>
> [(1) differed from the manufacturer's design or specifications]
>
> [(2) differed from products from the same manufacturer that were intended to be identical.]

Dr. Di Paolo asked whether *actual* was needed before *knowledge* in the last subparagraph, or whether it could be revised to read "did not have enough knowledge . . . to know . . . ." Mr. Simmons thought that *actual* was used to distinguish the knowledge from constructive knowledge. Mr. Humpherys suggested "enough actual knowledge." Dr. Di Paolo thought that

jurors would not understand the phrase, but Judge Barrett thought that if it allowed the attorneys to argue the difference between actual and constructive knowledge and did not confuse the jury, it was worth maintaining. The committee debated whether *sufficient* was in the right place. Mr. Fowler suggested changing *[name of plaintiff]* in the last subparagraph to *[name of user]*. He noted that it may not be the plaintiff's knowledge that is at issue; it could be the knowledge of the plaintiff's decedent or other user.

5. *1005. Strict liability. Elements of claim for failure to adequtely warn.* Dr. Di Paolo thought the instruction was unclear. She was was not sure whether subparagraphs (2) and (3) were meant to define subparagraph (1). Mr. Humpherys noted that the adequacy of a warning and the lack of a warning at the time of sale were separate issues. The committee reserved further discussion of instruction 1005 till the next meeting.

6. *Next Meeting.* The next meeting will be Monday, March 12, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Model Utah Jury Instructions
Second Edition
Working Draft
March 6, 2007

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.]

[(3) in the way that its users were warned.]

MUJI 1st References.

References.

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

Advisory Committee Notes.

Instruct the jury only with the descriptions from (1), (2) and (3) that are relevant to the case.

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 committee 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 §78-15-6 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. Approved for use: 2/12/2007

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

[Name of plaintiff] claims that [he] was injured by a [product] that had 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.

I will now explain what the terms ["design/manufacturing] defect" and "unreasonably dangerous" mean.

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).

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. Occasional sellers are not liable in product liability actions. See Louis R. Frumer & Melvin I. Friedman, Product Liability. Section 5.04 (1997). 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.

Status. Approved for use: 2/12/2007

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

The [product] had a design defect if:

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

(2) at the time the [product] was designed, there was a safer and feasible alternative design.]

Alternative A.

A [product] with a design defect was unreasonably dangerous if:

(1) it was more dangerous than an ordinary user of the [product] would expect considering the [product]'s characteristics, uses foreseeable to the manufacturer, and any instructions or warnings; and

(2) [name of user] did not have actual knowledge, training, or experience sufficient to know the dangers associated with the claimed defect in the [product].

Alternative B.

A [product] with a design defect was unreasonably dangerous if it was more dangerous than an ordinary user of the [product] would expect considering the [product]'s characteristics, risks, dangers, and uses, together with any actual knowledge, training, or experience that the user had.

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, 1280-82 (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).
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 considered whether proving the existence of a safer alternative design is required, but the federal district courts in Utah and the Tenth Circuit have required 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.

Paul's restatement of the second prong of "design defect" seems simpler and clearer.

Status. Changes from: 2/12/2007

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

The [product] had a manufacturing defect if:

[(1) it differed from the manufacturer's design or specifications;] [or]

[(2) it differed from products from the same manufacturer that were intended to be identical.]

Alternative A.

A [product] with a manufacturing defect was unreasonably dangerous if:

(1) it was more dangerous than an ordinary user of the [product] would expect considering the [product]'s characteristics, uses foreseeable to the manufacturer, and any instructions or warnings; and

(2) [name of user] did not have actual knowledge, training, or experience sufficient to know the dangers associated with the claimed defect in the [product].

Alternative B.

A [product] with a manufacturing defect was unreasonably dangerous if it was more dangerous than an ordinary user of the [product] would expect considering the [product]'s characteristics, risks, dangers, and uses, together with any actual knowledge, training, or experience that the user had.

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, 1280-82 (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.

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 considered whether proving the existence of a safer alternative design is required, but the federal district courts in Utah and the Tenth Circuit have required 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.

Status. Changes from: 2/12/2007

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

However, if [name of defendant] knew or should have known of a danger 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 danger "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 if [name of defendant] had 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.

The other instructions speak of an "adequate" warning. To not use the term here might 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.

If the issue is whether the plaintiff should have known of the danger do we need "obvious" and "inherent?"

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

1046. Prefactory comment.

When in these instructions, the term "manufacturer" is used, the terms "retailer," "designer," "distributor," etc. may be substituted as the circumstances of the case warrant.

MUJI 1st References.

References.

Advisory Committee Notes.

Staff Notes.

This seems more like a direction on how to draft the instruction than an instruction to the jury.

Status.

1049. Sophisticated user.

In this case, [name of defendant] claims that [name of plaintiff] was a sophisticated user of the product.

A "sophisticated user" is a user who either:

(1) has special knowledge, sophistication or expertise about the dangerous or unsafe character of the product; or
(2) belongs to a group or profession that reasonably should have general knowledge, sophistication or expertise about the dangerous or unsafe character of the product.

If you find that [name of plaintiff] was a sophisticated user, then [name of defendant] cannot be liable for failure to give an adequate warning

MUJI 1st References.

References.

House v. Armour, 929 P.2d 340 (Utah 1996).
Smith v. Frandsen, 94 P.3d 919 (Utah 2004).

Advisory Committee Notes.

Staff Notes.

Paragraph 2 should be worded more like Paragraph 2 in 1052: What the defendant has to prove.

Status.

1050. Conformity with government standard.

If the manufacturer of a product complies with federal or state laws, standards or regulations for the industry that are in effect when it makes the product, regarding proper design, inspection, testing, manufacture, or warnings, you shall presume that the product is not detective. However, if [name of plaintiff] has shown you evidence that causes you to believe that the [product] is still defective even though the manufacturer followed government laws, standards or regulations, you are free to abandon that presumption if you so choose.

MUJI 1st References.

12.1.

References.

Utah Code Section 78-15-6(3).

Advisory Committee Notes.

Some members question whether the instruction should be used at all because the "rebuttable presumption" may render it meaningless. Some committee members feel that the Plaintiff must produce clear and convincing evidence, and that that is 'what is needed to overcome the presumption. Others believe that the Plaintiff must show only a preponderance of evidence. If the latter is the case, then the instruction is little different than a restatement of the burden of proof.

Staff Notes.

Plain language favors "must" over "shall."

Should resolve the Preponderance/C&C dispute. As written, any evidence at all is sufficient.

Status.

1051. Product misuse.

[Name of defendant] claims that [name of plaintiff] misused the [product] and that the misuse caused [name of plaintiff]'s claimed injury.

A person misuses a [product] if [he] uses it or handles it in a way that the manufacturer did not intend and could not reasonably anticipate.

If you find that [name of plaintiff] misused the [product] in the way claimed by [name of defendant] and that the misuse caused the injury, you may consider that misuse in apportioning fault to [name of plaintiff] on the Special Verdict form.

MUJI 1st References.

12.39.

References.

Advisory Committee Notes.

Staff Notes.

Paragraph 2 should be worded more like Paragraph 2 in 1052: What the defendant has to prove.

Status.

1052. Product alteration.

[Name of defendant] claims as a defense that the [product] was modified or altered by someone.

To prove this defense, [name of defendant] must show:

(1) that the [product] was altered or modified after it sold the [product];
(2) that the alteration or modification changed the manufacturer's intended purpose, use, construction, function, design, or manner of use of the product; and
(3) that the modification or alteration either caused or substantially contributed to [name of plaintiff]'s injury.

If [name of defendant] proves these things, you may consider this defense when apportioning fault on the Special Verdict form.

MUJI 1st References.

12.11.

References.

Utah Code Section 78-15-5.

Advisory Committee Notes.

Staff Notes.

Status.

1053. Retailer liability.

A person or company that does not make a product that is alleged to be defective, but merely sells [or distributes] the product, is not necessarily liable for the defect. To make a retailer [or distributor] liable for a defect, [name of plaintiff] must prove that the retailer was at fault in a manner that was a contributing cause of the injury.

MUJI 1st References.

References.

Sanns v. Butterfield, 94 P.3d 301 (Utah Ct. App. 2004).

Advisory Committee Notes.

This instruction may not be applicable in a case in which the manufacturer is insolvent or not subject to the court's jurisdiction.

Some members think this instruction is altogether inappropriate because the Utah Supreme Court has not set forth the law on this subject.

Staff Notes.

Consider: [Name of defendant] retails/distributes] the [product]. To make a [retailer/distributor] liable for a defect, [name of plaintiff] must prove that the [retailer/distributor] was at fault in a manner that contributed to the injury.

Status.

1054. Assumprion of risk.

[Name of defendant] claims that if the [product] was defective, [name of plaintiff] knew about the defect and voluntarily assumed the risk that [he] could be injured by the [product].

To establish that [name of plaintiff] assumed the risk, [name of defendant] must show that [name of plaintiff]:

(1) knew about the defect;
(2) knew the defect could cause injury; and
(3) despite this, unreasonably exposed [himself] to the risk of injury.

If you find that [name of plaintiff] assumed the risk, you may consider that in apportioning fault to [name of plaintiff] on the Special Verdict form.

MUJI 1st References.

References.

Jacobsen Construction Co., Inc. v. Structo-Life Engineering, Inc., 619 P.2d 306 (Utah 1980).

Advisory Committee Notes.

Staff Notes.

Status.

1055. Industry standard.

When determining if the [product] is defective, you may consider other similar products in the applicable industry with respect to design, testing, manufacture or the type of warning given.

MUJI 1st References.

References.

Restatement (Third) of Torts, Product Liability §4.

Advisory Committee Notes.

Staff Notes.

Consider: In deciding whether the [product] is defective, you may consider the design, testing, manufacture and type of warning for similar products.

Status.