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.