MINUTES

Advisory Committee on Model Civil Jury Instructions
June 11, 2007
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Tracy H. Fowler, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons, David E. West, and John L. Young (chair). Also present: Kamie F. Brown

Excused: Paul M. Belnap, Ralph L. Dewsnup, and Colin P. King

1. *Committee Meetings*. Mr. Young referred to his e-mails to the committee of May 22 and 27, 2007, which reminded committee members to provide proposed instructions and related materials to Mr. Shea at least 10 days before committee meetings and established a format for the participation of subcommittee members in committee meetings. He emphasized that debates over the substantive law should be resolved in subcommittee meetings whenever possible so that the full committee can focus on the language of the instructions.

2. *Products Liability Instructions*. The committee continued its review of the products liability instructions.

a. *1005. Strict liability. Definition of "unreasonably dangerous."* Mr. West said that he was troubled by alternative B, which says that a product is not unreasonably dangerous if the user knew about the danger. He thought it conflicted with instruction 1054 on assumption of risk. He noted that an employee may be required to use what he knows is a dangerous product but have no choice in the matter. He did not think the product manufacturer should be relieved from liability in that situation. Mr. Carney did not think alternative B could be the law. Otherwise, a manufacturer that built a car with no seatbelts and no brakes could not be liable for putting a defective product on the market. Mr. Young noted that there was apparently no dispute over alternative A, which tracks the statute (Utah Code Ann. § 78-15-6(2)), and alternative B accurately restates the Tenth Circuit's interpretation of the statute in *Brown v. Sears, Roebuck & Co.,* 328 F.3d 1274 (2003). He suggested approving the instruction and letting the courts decide whether to use alternative A or alternative B. Ms. Blanch moved to approve instruction 1005; Judge Barrett seconded the motion. The motion passed, with Judge Barrett, Ms. Blanch, Mr. Jemming, Dr. Di Paolo, and Mr. Fowler voting in favor of it, and Messrs. Carney and West opposing the motion. Mr. Young suggested adding a committee note to the effect that the committee was not unanimous that alternative B should be given and that some members thought it was inconsistent with the assumption of risk instruction. Ms. Blanch thought that to do so would make a new precedent, that the mere fact of alternative instructions shows that the committee could not agree on a single instruction. Mr. Young thought it would still be helpful to note the disagreement over alternative B. Mr. Fowler noted that not all committee members agreed that

alternative A was a correct statement of the law. Mr. Shea recommended against including the committee vote in any note. Ms. Brown noted that no explanation was given for the alternatives in instruction 1003 other than to explain the difference between the alternatives. The committee ultimately concluded that the general explanation in the introduction to the instructions about why some instructions have alternatives was sufficient.

b. *1008. Strict liability. Definition of "adequate warning."* John Anderson of the products liability subcommittee was going to propose a comment for instruction 1008 stating his view that it may be appropriate to instruct on the user's subjective knowledge of the product's dangers in a particular case. The committee deferred further discussion of the instruction until Mr. Fowler can check with Mr. Anderson to see if he still intends to propose a committee note. The instruction was later approved, subject to the addition of any note. (*See* ¶ 2.d, *infra.)*

c. *1009. Strict liability. Failure to warn. Presumption that a warning would have been read and followed.* Mr. Carney thought the committee note (that says the instruction is appropriate only if it cannot be demonstrated whether the injured party would have read and followed a warning) was an incorrect statement of the law. He noted that the *House* opinion cited, as authority for the note, does not say that it only applies where the plaintiff is not available to testify. (The citation in the note to *House* was corrected to cite to the court of appeals' decision in that case, not the supreme court decision.) *House* cited a New Jersey case where the plaintiff was alive and well. Mr. Carney reviewed an A.L.R. annotation (38 A.L.R.5th 683) that cites cases in which the presumption applied even where the plaintiff had testified. Mr. Jemming suggested revising the note to read, "This instruction is appropriate when [rather than "only if"] it cannot be demonstrated . . ." Mr. Shea suggested changing "it cannot be demonstrated" to "it is not demonstrated." Mr. Fowler thought the note was vague. Mr. Simmons thought the second sentence of the note was misleading, since it suggests that the injured party only has the burden of proof when he can testify, and should be deleted. He further suggested deleting the whole first paragraph of the note. Dr. Di Paolo was not comfortable with the instruction itself. The first sentence says the jury can make the presumption, but the second sentence suggests there are circumstances when it cannot. At Mr. Simmons's suggestion, the instruction was revised to read:

> You can presume that if [name of defendant] had provided an adequate warning, [name of plaintiff] would have read and followed it unless the evidence shows that [name of plaintiff] would not have read or followed such a warning.

Mr. Simmons expressed concerns about whether a heeding presumption should apply in the case of a learned intermediary, a situation addressed in the second paragraph of the committee note. At Mr. Young's suggestion, the last three sentences of the committee note were deleted.

d. *1010. Strict liability. Failure to warn. Presumption that a warning will be read and followed.* Dr. Di Paolo asked how instructions 1009 and 1010 were related. Mr. Fowler explained that 1009 is a presumption in favor of the plaintiff, whereas 1010 is a presumption in favor of the defendant. Dr. Di Paolo asked whether they could both be given in the same case. The committee thought not, since the heeding presumption (1009) arises where an adequate warning is *not* given, and the so-called reading presumption (1010) arises where an adequate warning *is* given. Mr. West and Mr. Simmons thought the last sentence of the instruction was misleading, since a product may still be defective in manufacture or design, even if it contains an adequate warning. Ms. Brown suggested adding "for failure to warn" to the end of the sentence. Ms. Blanch suggested revising it to say that a product "cannot be defective on the basis of a failure to warn; however, it can still be defective based on a manufacturing or design defect." Mr. Young asked whether the clarification would be better handled by a committee note. He also suggested revising the last sentence to read, "With respect only to plaintiff's claim of failure to warn, a [product] that contains an adequate warning is not defective or unreasonably dangerous." At Mr. Shea's suggestion, the sentence was deleted from instruction 1010 and moved to the beginning of instruction 1008 (defining "adequate warning"). Mr. West and Mr. Simmons thought that merely moving the sentence to 1008 did not satisfy their concerns. As modified, instruction 1008 was approved, subject to the subcommittee submitting a further comment.

Based on a staff note, Mr. Simmons thought that instruction 1010 was unnecessary. The instruction says that a seller who gives a warning may presume that it will be read and followed. The presumption goes to the issue of causation (whether the plaintiff should have read and followed a warning that was given). A product that contains an adequate warning is not defective, so the jury does not have to reach the question of causation (i.e., it does not have to decide whether the plaintiff should have read and followed the warning) if it finds that an adequate warning was given. Mr. Fowler thought the instruction was necessary because a form of it was included in MUJI 1st, and it is taken from comment *j* to Restatement (Second) of Torts § 402A. In addition, Mr. Simmons's argument only applies if the warning must be adequate for the presumption to apply, and Mr. Fowler did not think that the adequacy of the warning is a prerequisite for the presumption to apply. Mr. Simmons disagreed that a so-called reading presumption arises where the warning is inadequate, that is, where it is not

reasonably calculated to catch the user's attention. Mr. Young suggested that the subcommittee review the issue further.

e. *1013. Strict liability. Defective condition of FDA approved drugs.* The first sentence was revised to read, "If a drug product conformed with the United States Food and Drug Administration (FDA) standards . . . ." Mr. Simmons noted that the presumption only applies to design claims and suggested revising the last part of the sentence to read, "the product is presumed to be free of any design defect." Ms. Brown suggested, "the product is not defectively designed." Dr. Di Paolo suggested, "the product is free of any design defect." Mr. Simmons asked what the effect of the presumption was. If it is a rebuttable presumption, then the instruction should not say that the product is free from any design defect because the plaintiff may be able to rebut the presumption. Mr. Young suggested revising the next sentence to read, "However, [name of plaintiff] may still prove that the product was defective and unreasonably dangerous due to a manufacturing defect or an inadequate warning." Dr. Di Paolo questioned whether the second sentence was necessary. Mr. Carney asked what the source of the instruction was--a statute or case law. The committee agreed that the instruction was based on *Grundberg v. Upjohn Co.,* 813 P.2d 89 (Utah 1991), and not on any statute. Mr. Carney did not think that the FDA approval process was adequate to warrant the presumption.

f. *1014. Strict liability. Defect not implied from injury alone.* Mr. Young asked if anyone was in favor of keeping instruction 1014. Ms. Blanch and Mr. Fowler were. They thought that there was a significant difference between a strict products liability claim and a negligence claim such as the claims involved in *Green v. Louder,* 2001 UT 62, 29 P.3d 638, and *Randle v. Allen,* 862 P.2d 1329 (Utah 1993), in which the Utah Supreme Court disapproved of nearly identical instructions. They thought that lay people are more likely to infer a product defect from the mere happening of an accident than they are to infer negligence. Mr. Simmons noted that the Liability Reform Act treats both negligence and strict products liability as "fault." He read from *Green,* in which the supreme court said, "we explicitly direct trial courts to abandon the use of this instruction ['The mere fact that an accident or injury occurred does not support a conclusion that the defendant or any other party was at fault or was negligent.'] hereafter." Mr. Young thought that the court's reasoning in *Green* applied equally to negligence and products liability claims. (Mr. Jemming was excused.) Mr. West moved to delete instruction 1014. Mr. Simmons seconded the motion. The motion carried, with Messrs. Carney, Simmons, and West voting to delete the instruction, and Mr. Fowler voting to keep it.

g. *1046. Prefactory comment.* This instruction was deleted. It is now covered by the comment to instruction 1001.

h. *1049. Sophisticated user.* Mr. Simmons thought the instruction was inconsistent with the Tenth Circuit opinion in *Brown v. Sears, Roebuck.* Mr. Young questioned whether the instruction would be given if the court gave alternative B of instruction 1005. Messrs. Simmons and West thought that the knowledge or sophistication of the user should be part of the comparative fault equation and not a complete defense. But Mr. Simmons conceded that the *House* opinion said that there was no duty to warn a sophisticated user. At the suggestion of Dr. Di Paolo and Mr. Shea, the instruction was revised to read:

> In this case, [name of defendant] claims that [name of plaintiff] was a sophisticated user of the product.
>
> To prove this defense, [name of defendant] must prove that [name of plaintiff] either:
>
> (1) had special knowledge, sophistication or expertise about the dangerous or unsafe character of the product; or
>
> (2) belonged to a group or profession that reasonably should have had general knowledge, sophistication or expertise about the dangerous or unsafe character of the product. . . .

3. *New Committee Members.* Mr. Young noted that he had received the following suggestions to replace Mr. Belnap: Gary Johnson or Joe Minnock. Mr. Johnson has expressed interest in serving but will not be available until October 2007. Mr. Young asked for suggestions to replace Mr. Dewsnup. Mr. Carney suggested Pete Summerill, and Mr. West suggested Roger Hoole. Mr. Young asked that, if committee members have any other suggestions, to e-mail them to him.

4. *Summer Schedule.* The committee agreed to cancel the meetings scheduled for July 9 and August 13, 2007.

5. *Next Meeting.* The next meeting will be Monday, September 10, 2007, at 4:00 p.m.

The meeting concluded at 5:55 p.m.