Agenda
Policy and Planning Committee

November 13, 2006
4:00 to 6:00 p.m.

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

Employer and employee rights.	Jathan Janove Bob Wilde
Product Liability.	Tracy Fowler

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

December 11, 2006
January 8, 2007
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
October 16, 2006
4:00 p.m.

Present: Ralph L. Dewsnup, Marianna Di Paolo, Phillip S. Ferguson, L. Rich Humpherys, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, Robert H. Wilde, and John L. Young (chair)

Excused: Honorable William W. Barrett, Jr., Paul M. Belnap, Juli Blanch, Francis J. Carney, Tracy H. Fowler, Jathan Janove, Jonathan G. Jemming, Colin P. King, David E. West

Draft Instructions

The committee continued its review of the employment instructions.

1. *1911. Breach of employment contract. Just cause.* Mr. Wilde presented a revised instruction 1911, which was rewritten in light of *Uintah Basin Medical Center v. Hardy,* 2005 UT App 92, 110 P.3d 168. Mr. Ferguson reported that Karra J. Porter of his office thought that the revised instruction improperly put the burden of proof on the employer to prove just cause, rather than requiring the plaintiff to prove that he was terminated without just cause. She suggested rewriting the instruction to place the burden on the plaintiff to show the lack of just cause. The committee debated who has the burden to show that a termination was or was not for just cause. Mr. Wilde thought that Utah courts would follow the burden-shifting analysis of the *McDonald-Douglas* case, analogizing an employee whose employment contract requires just cause for termination to an employee in a protected class. Thus, if he shows that his contract requires just cause for termination and that he was terminated, he has established a prima facie case, and the burden should shift to the employer to provide a legitimate reason for the termination. If he does not, the employer loses, but if he does, the burden then shifts back to the employee to show that the proffered reason is pretextual. Mr. Ferguson (and Ms. Porter) thought that just cause for a termination was not an affirmative defense and that to establish a prima facie case the plaintiff must show that he was terminated for something other than just cause. Mr. Young read the comparable California instructions (CACI 2404 and 2405), which appear to say that, if the employee makes out a prima facie case of wrongful termination, the burden shifts to the employer to justify the termination. The employee can then show that the asserted justification is pretextual. Mr. Wilde thought that Utah would follow the California approach, since the California case cited as authority (*Cotran v. Rollins Hudig Hall Int'l, Inc.,* 948 P.2d 412 (Cal. 1998)) was cited with approval in the *Uintah Basin* case. Messrs. Young and Simmons suggested leaving the instruction as is but with a committee note saying that it should only be given after the court determines that the plaintiff has made out a prima facie case of wrongful termination. Mr. Humpherys asked, If the burden shifts and the employer does not put on any evidence, does that mean the plaintiff is entitled to a directed verdict? The committee asked whether Ms. Porter had authority for her position. Mr. Humpherys called Ms. Porter, and she explained her views to the committee by telephone. In her opinion, breach of contract cases are

different from Title VII cases. The plaintiff has the burden of proving a breach of contract, which means proving that he was terminated for a reason other than just cause. He can do this by proving that the asserted reason for his termination was pretextual, but the burden never shifts to the employer to establish just cause. There is no Utah authority adopting either approach. The committee decided to draft a note stating that it had discussed differences between statutory title VII cases and common law claims, and it is not clear which approach the Utah Supreme Court would adopt.

Messrs. Shea and Wilde will draft a committee note explaining the issue.

2. *1913. Fiduciary duty.* Mr. Ferguson reported that Ms. Porter thought that there should be a committee note stating that some relationships are fiduciary as a matter of law. The committee debated whether to use the term "fiduciary" in the instruction, since it is not a term familiar to jurors. Mr. Dewsnup suggested "relationship of trust." Mr. Young thought that the title should refer to fiduciary duties so that lawyers and judges will understand what the instruction is intended to cover. He suggested calling the instruction, "Special duty of trust (fiduciary duty)." Mr. Young also questioned whether the term "fidelity" would be understood. Mr. Dewsnup suggested "faithfulness" or "loyalty." Mr. Humpherys expressed concern with referring to the duty as a special duty of trust and then defining it using other words.

Dr. Di Paolo joined the meeting.

Mr. Dewsnup thought that, by the end of the case, the jury would understand what the term fiduciary means. Mr. Humpherys, however, thought that the term would only be used by the lawyers and not be explained by the evidence. Dr. Di Paolo thought it is okay to use specialized terms if they are defined up front. Mr. Young suggested reversing the order of the first two sentences. Mr. Ferguson thought the first sentence was okay but that the second sentence should start out, "A fiduciary duty means . . ." Mr. Dewsnup thought that the instruction as written adequately defined fiduciary duty. Mr. Shea pointed out that the second paragraph uses the term "extraordinary relationship," rather than "fiduciary duty" (or "relationship"), without defining it. Mr. Humpherys suggested using one term consistently. Mr. Shea asked whether there is a difference between a fiduciary duty and a fiduciary relationship. Mr. Simmons questioned whether the existence of a fiduciary duty was a question for the court or the jury. The committee thought that it may depend on the facts, in which case it would present a jury question. Mr. Dewsnup suggested revising the second sentence of the instruction to read: "To prevail on this claim, [name of defendant] must prove that [name of plaintiff] both had and violated an extraordinary duty of fidelity, confidentiality, honor, trust and dependability." At Dr. Di Paolo's suggestion, "fidelity" was moved to follow "trust." Messrs. Nebeker and Shea thought the instruction did not adequately tell the jury what the effect is if it finds a breach of fiduciary duty. Mr. Young asked whether there were any defenses to a breach of fiduciary duty, or, once a breach

is found, the case is over. Mr. Ferguson thought that comparative fault is a defense. The committee agreed that the effect of a finding of breach may depend on the pleadings and the evidence. Messrs. Dewsnup and Humpherys thought that the instruction should say as much. Mr. Young thought that the matter could be handled by the special verdict form. After further discussion, the committee agreed to add a comment to the effect that a claim of breach of fiduciary duty may arise in several ways--for example, as an affirmative defense, as a counterclaim, or as a claim for a setoff--and that the court and the parties will need to fashion a follow-up instruction telling the jury the appropriate remedy if it finds a breach, based on the pleadings and the evidence.

3. *1914. Contract damages.* Mr. Shea noted that he had combined former instructions 1914 through 1916 into one instruction and had incorporated instruction 2002 on proof of damages. Mr. Humpherys thought the first two sentences were redundant, and Mr. Wilde pointed out that the instruction relates only to contract damages, not to damages for wrongful termination in violation of public policy. Accordingly, the first two sentences were revised to read:

> If you find that [name of defendant] breached the contract with [name of plaintiff], then you may award damages--
>
> (1) for the salary and other benefits that [name of plaintiff] would have received . . . .

Mr. Young suggested adding a committee note specifying the other benefits that are possible, such as medical benefits, retirement benefits, etc. The committee note should also explain that for other employment claims, other damages are available, and cross-reference applicable instructions. For example, tort damages are available for wrongful termination in violation of public policy (instruction 1917), and statutory damages are available for a title VII violation.

Mr. Wilde will prepare such a note.

At Mr. Dewsnup's suggestion, the phrase "reasonably certain" was changed to "reasonably likely." Mr. Dewsnup also suggested adding "also" to the fourth paragraph, so that it reads, "To be entitled to damages, [name of plaintiff] must also prove two points," since the plaintiff must first prove liability. Dr. Di Paolo noted that the fifth and sixth paragraphs seemed to say the same thing, that neither the fact of damage nor the amount of damage can be left to speculation. Mr. Humpherys suggested deleting the phrase "not just speculation" from both paragraphs. Mr. Nebeker noted that the word "fault" at the end of the fifth paragraph should be changed, since the instruction deals with breach of contract, not a tort. Mr. Dewsnup suggested replacing it with "defendant's conduct." Mr. Young suggesting reversing the order of the sentences in paragraph six, to read: "Although the law does not require damages to be proved to a mathematical

certainty, there must be evidence that gives a reasonable estimate of the amount of damages. The level of evidence required to prove the *amount* of damages is not as high as what is required to prove the *occurrence* of damages." Mr. Shea asked if instruction 2002 should be amended to conform to the changes to instruction 1914. The committee did not think it needed to be modified.

4. *1917. Damages for wrongful termination in violation of public policy.* At Mr. Humpherys' suggestion, the first paragraphs were revised in accordance with the changes to instruction 1914. They now read:

> If you find that [name of defendant] wrongfully terminated [name of plaintiff], then you may award economic damages to [name of plaintiff]--
>
> (1) for the salary and other benefits that [name of plaintiff] would have received . . . .
>
> (2) for other items of damage.

The language "that you find were contemplated by the parties or reasonably foreseeable . . ." was deleted, since it states a standard for contract damages and not tort damages.

> **Mr. Wilde will provide Mr. Shea with a list of other items of damage that are recoverable for wrongful termination.**

Mr. Wilde noted that punitive damages may also be available. Mr. Humpherys noted that "noneconomic damages" are only meaningful to the extent they are contrasted with "economic damages." Mr. Dewsnup noted that someone had questioned the use of the terms "economic" and "noneconomic" damages at a recent CLE presentation because all damages are economic in the sense that they are monetary compensation. Dr. Di Paolo noted that she was also troubled by the use of the terms and asked where they came from. The committee noted that they are used in Utah's medical malpractice statute and in California's new jury instructions. Mr. Young thought use of the terms would not be a problem for jurors because they will be defined in the jury instructions. The bigger question is whether by substituting "economic" and "noneconomic" for "special" and "general" damages (or "general" and "consequential" damages), we are changing the law or creating two different vocabularies--one for juries and one for other areas of the law. If so, use of the terms may have unintended consequences. Mr. Young noted that in drafting pleadings and other legal papers, it would probably be a good idea to use both terms, for example, "The plaintiff prays for economic (general) and noneconomic (special) damages."

The meeting concluded at 6:10 p.m.

Next Meeting. The next meeting will be Monday, November 13, 2006, at 4:00 p.m.

Model Utah Jury Instructions
Second Edition
Working Draft
November 8, 2006

1911. Breach of employment contract. Just cause.

[Name of plaintiff] claims [his] termination was not for just cause. To establish that a termination was for just cause [name of defendant] must prove that the termination was made for an objective good faith reason supported by facts reasonably believed by [him] to be true.

MUJI 1st References.

References.

Uintah Basin Medical Center v. Hardy, 2005 UT App 92, 110 P.3d 168, 174-75.

Advisory Committee Notes.

Though no Utah appellate court has yet ruled on the issue, as it relates to breach of an employment contract, it is the Committee's sense that the burden shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973), applies if there is a claim that an employee has been terminated without just cause under an employment contract which requires just cause for termination, unless there is direct evidence that the termination was not for just cause. Using that framework, the employee must first establish a prima facie case that s/he was employed under an employment contract containing a just cause provision, that the employer terminated him/her, and that the termination was not for just cause. If the employee presents a prima facie case the employer may rebut that case with evidence showing the termination was for just cause. If the employer presents rebuttal evidence the employee may still prevail by showing that the employer's proffered reason is pretextual or unworthy of belief. Viktron/Lika v. Labor Comm'n, 38 P.2d 993, 995 (Utah App. 2001).

Staff Notes.

Status. Changes from: 9/11/2006

1913. Special duty of trust. (Fiduciary duty.)

[Name of defendant] claims that [name of plaintiff] breached a fiduciary duty to [name of defendant]. To prevail on this claim, [name of defendant] must prove that [name of plaintiff] both had and violated an extraordinary duty of confidentiality, honor, trust, fidelity and dependability.

MUJI 1st References.

References.

Prince, Yeates & Geldzahler v. Young, 2004 UT 26.
Semenov v. Hill, 982 P.2d 578 (Utah 1999).
Margulies ex rel. Margulies v. Upchurch, 696 P.2d 1195 (Utah 1985).
Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981).
Renshaw v. Tracy Loan & Trust Co., 87 Utah 364, 49 P2.d 403, 404 (Utah 1935).
C&Y Corp. v. General Biometrics, 896 P.2d 47, 54 (Utah App. 1995).
Envirotech Corporation v. Callahan, 872 P.2d 487 (Utah App. 1994).
Black's Law Dictionary 640 (7th Ed. 1999).

Advisory Committee Notes.

Give this instruction if the jury must decide whether a fiduciary duty existed. If the judge decides that a fiduciary duty existed as a matter of law, such as an attorney-client duty or a physician-patient duty, modify the instruction to focus the jury on whether a party violated the duty.

The consequences of violating a fiduciary duty change with the circumstances of the case: for example, if the beach of the fiduciary duty is alleged as an affirmative defense, as a counterclaim, or as a claim for a setoff. After this instruction, the judge should instruct on the consequences of finding a violation of fiduciary duty based upon the claims and defenses of the parties, such as: "If you find that [name of plaintiff] both had and violated an extraordinary duty of confidentiality, honor, trust, fidelity and dependability, then …."

Breach of an employment contract entitles the nonbreaching party to traditional types of contract damages. These include the benefit of the bargain and any other damages which were reasonably foreseeable including incidental and consequential damages. They also include the employee's attorney fees in prosecuting the breach of employment contract action. Specific varieties of losses which are compensable include back wages, lost benefits and perquisites, lost retirement, and front pay. Punitive damages are not available for breach of an employment contract. Heslop v. Bank of Utah, 839 P.2d 828, 840-41 (Utah 1992); Christiansen v. Holiday Rent-A-Car, 845 P.2d 1316, 1320 (Utah App. 1992); 22 Am.Jur. 2d Damages §101.

Staff Notes.

Status. Changes from: 10/16/2006

1914. Contract damages.

If you find that [name of defendant] breached the contract with [name of plaintiff], then you may award damages:

(1) for the salary and other benefits that [name of plaintiff] would have received from [name of defendant] during the period you find the employment was reasonably likely to have continued; and

(2) for [list other items of damage] that you find were contemplated by the parties or reasonably foreseeable by the parties at the time the contract was made.

To be entitled to damages, [name of plaintiff] must also prove two points:

First, that damages occurred. There must be a reasonable probability that [name of plaintiff] was damaged by [name of defendant]'s conduct.

Second, the amount of damages. Although the law does not require damages to be proved to a mathematical certainty, there must be evidence that gives a reasonable estimate of the amount of damages. The level of evidence required to prove the <I>amount</I> of damages is not as high as what is required to prove the <I>occurrence</I> of damages.

In other words, if [name plaintiff] has proved that [he] has been damaged and has established a reasonable estimate of those damages, [name of defendant] may not escape liability because of some uncertainty in the amount of damages.

MUJI 1st References.

18.12.

References.

Kraatz v. Heritage Imports, 2003 UT App 201, 48-49, 53-54, 71 P3d. 188, 199-201.
Mahmood v. Ross, 1999 UT 104, 19, 990 P.2d 933, 937.
Berube v. Fashion Centre, Ltd., 771 P.2d 1033 (Utah 1989).
Beck v. Farmers Ins. Exch., 701 P.2d 795, 801 (Utah 1985).
Prince v. Peterson, 538 P.2d 1325, 1328 (Utah 1975).
Erickson v. PI, 73 Cal. App. 3d 850 (1977).
Parker v. Twentieth Century Fox Film Corp., 3 Cal. 3d 176 (1970).

Advisory Committee Notes.

The committee recommends against using the phrases “general” and “consequential” damages. Paragraph (1) includes the traditional concept of general

damages. Loss or diminution of salary and benefits, from common sense and experience, would naturally be expected to result from wrongful termination. The judge might describe the benefits more specifically depending on the evidence: such as retirement benefits, medical and dental insurance, disability insurance, or the use of an automobile. If there are other items that meet the test for general contract damages, include them here.

Paragraph (2) includes the traditional concept of consequential damages: those damages that were contemplated by or were reasonably foreseeable by the parties at the time the contract was made. Include in this paragraph only those items for which there is evidence.

If the plaintiff claims tort damages for wrongful termination in violation of a public policy, give Instruction 1917. In addition, there may be statutory damages for violating Title VII.

Staff Notes.

Status. Approved for use: 5/8/2006
Changes from: 10/16/2006

1917. Damages for wrongful termination in violation of public policy.

If you find that [name of defendant] wrongfully terminated [name of plaintiff], then you may award economic damages to [name of plaintiff]:

(1) for the salary and other benefits that [name of plaintiff] would have received from [name of defendant] during the period you find the employment was reasonably likely to have continued; and

(2) for [list other items of damage].

You may award the amount of money that will fairly and adequately compensate [name of plaintiff] for noneconomic damages.

Noneconomic damages are the amount of money that will fairly and adequately compensate [name of plaintiff] for losses other than economic losses.

Noneconomic damages are not capable of being exactly measured, and there is no fixed rule, standard or formula for them. Noneconomic damage must still be awarded even though they may be difficult to compute. It is your duty to make this determination with calm and reasonable judgment. The law does not require the testimony of any witness to establish the amount of noneconomic damages.

In awarding noneconomic damages, among the things that you may consider are:
(1) the nature and extent of injuries;
(2) the pain and suffering, both mental and physical;
(3) the extent to which [name of plaintiff] has been prevented from pursuing [his] ordinary affairs;
(4) the extent to which [name of plaintiff] has been limited in the enjoyment of life; and
(5) whether the consequences of these injuries are likely to continue and for how long.

While you may not award damages based upon speculation, the law requires only that the evidence provide a reasonable basis for assessing the damages but does not require a mathematical certainty.

I will now instruct you on particular items of economic and noneconomic damages presented in this case.

MUJI 1st References.

18.11.

References.

Peterson v. Browning 832 P.2d 1280 (Utah 1992).

3 Devitt, Blackmar & Wolf, Federal Jury Practice and Instructions, Section 104.6 (4th Ed. 1987).

Block v. R.H. Macy & Co., 712 F.2d 1241, 1245 (8th Cir., 1983).

E.E.O.C. Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act (B.N.A., 1992) at II(A)(2), as modified.

Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985).

Advisory Committee Notes.

Wrongful termination in violation of public policy is a tort. A wrongfully terminated employee is entitled to both economic and non-economic damages, see instructions 2003 and 2004. Specific varieties of losses which are compensable include back wages, lost benefits and perquisites, lost retirement, front pay, damages for . Punitive damages are available for the breach of an employment contract. Peterson v. Browning, 832 P.2d 1280, 1282 (Utah 1992).

Staff Notes.

Status. Changes from: 10/16/2006

1918. Duty to mitigate damages.

[Name of defendant] claims that [name of plaintiff] has failed to mitigate damages.

An employee who has lost wages as a result of termination has a duty to make reasonable efforts to find comparable employment, but the employee is not required to make every effort possible to avoid the damages.

If [name of plaintiff] found comparable employment, deduct the amount earned from any damages awarded. If [name of plaintiff] through reasonable efforts could have found comparable employment, deduct from any damages the amount that [he] could have earned.

[Name of defendant] has the burden of proving that [name of plaintiff] obtained or reasonably could have obtained comparable employment and the amount that [he] could have earned.

MUJI 1st References.

18.13.

References.

Angelos v. First Interstate Bank of Utah, 671 P.2d 772 (Utah 1983).
Pratt v. Board of Education of Uintah County School District, 564 P.2d 294 (Utah 1977).

Advisory Committee Notes.

Staff Notes.

Status. Approved for use: 5/8/2006
Changes from: 9/11/2006

1919. Special damages. Unemployment compensation.

If you decide to award damages for financial losses, such as lost wages, lost benefits, medical expenses, and other out-of-pocket expenses, do not reduce the amount of those damages by the amount that [name of plaintiff] may have received payment from such sources as unemployment insurance, workers' compensation, social security or disability benefits.

MUJI 1st References.

27.3.

References.

Gibbs M. Smith, Inc. v. US Fidelity, & Guaranty Co., 949 P.2d 337, 345 (Utah 1997).
Suniland Corp. v. Radcliffe, 576 P.2d 847, 849 (Utah 1978).
Green v. Denver & Rio Grande Western R. Co., 59 F.3d 1029, 1032 (10th Cir. 1995).
Whatley v. Skaggs Companies, Inc., 707 F.2d 1129, 1138 (10th Cir. 1983).

Advisory Committee Notes.

Staff Notes.

Status. Changes from: 5/8/2006

1000. Product Liability.

MUJI 1st References.

References.

Advisory Committee Notes.

Staff Notes.

Status.

1001. Product liability. Introduction.

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

A product may be defective because of a defect in [manufacture] [or] [design] [or] [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 recognized and relied upon the Product Liability Act as codified since the legislature's action, a minority of 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, please 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.

1002. Strict liability. Elements of claim for manufacturing defect.

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

A defect in the manufacture of a product exists 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 the following:

(1) that a defect made the product unreasonably dangerous;

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

(3) that the defect caused the 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 or not 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.

1003. Strict liability. Elements of claim for design defect.

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

A product is defective in design 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 design defect claim, [name of plaintiff] must prove each of the following:

(1) that a defect made the product unreasonably dangerous;

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

(3) that the defective condition caused the plaintiff's injuries; and

[(4) 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. Although no Utah state courts have 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.

1004. Strict liability. Exercise of due care is no defense.

If you find each of these elements, then [name of defendant] can be liable to [name of plaintiff] even though [name of defendant] exercised reasonable care or even the utmost care in [manufacturing/inspecting/distributing] the product.

But, strict liability is not absolute liability, and no manufacturer is an insurer of its product and its use. The law recognizes that no product is or can be made absolutely safe or accident proof.

MUJI 1st References.

12.1.

References.

Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).
Restatement (Second) of Torts § 402A (1963 & 1964).
Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981).

Advisory Committee Notes.

The subcommittee removed language from the earlier instruction (MUJI 12.1) explaining that the lack of privity between the consumer and the manufacturer or seller would not bar the consumer from bringing a claim against that manufacturer or seller. This language was removed because lack of privity will rarely, if ever, be an issue in a products liability case.

Some subcommittee members thought that the second paragraph was unnecessary, since, if the plaintiff does not prove the elements of a strict products liability claim, the plaintiff loses. These members believe if there is sufficient evidence of a product defect to submit the case to the jury, the jury should reach the correct result by a proper application of the instructions on the elements of a strict products liability claim and the burden of proof. These members thought instructions like the last paragraph can mislead the jury and constitute an improper comment on the evidence. Cf. Green v. Louder, 2001 UT 62, 18, 29 P.3d 638; Randle v. Allen, 862 P.2d 1329, 1334-36 (Utah 1993) (disapproving of a “mere fact of an accident” instruction and an unavoidable accident instruction respectively).

Some subcommittee members thought that the language in the second paragraph “and no manufacturer is an insurer of its product” should not be used in cases where the manufacturer provided an express warranty, since a warranty may guarantee the safety of a product, and jurors may not understand any distinction between an insurer and a guarantor or warrantor of a product.

Staff Notes.

Status.

1005. Definition of "unreasonably dangerous."

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.

If you find that the product was not more dangerous than an ordinary user of the product would expect considering its characteristics, risks, dangers, and uses, you do not have to also consider the plaintiff's actual knowledge, training, or experience.

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). A minority of 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. A minority of the

subcommittee 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.

1006. Strict liability. Elements of claim for failure to warn.

[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.

To prevail on a failure to warn claim, plaintiff must show:

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

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

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.

Status.

1007. Definition of "unreasonably dangerous" for failure to warn claim.

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 1005 and not instruction 1007 should be given in failure-to-warn cases.

Staff Notes.

Status.

1008. 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 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 importantly, 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.

1009. 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 1006.

Staff Notes.

Status.

1010. 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 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.

Status.

1011. 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/she/it] 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.

1012. Strict liability in tort. Component part manufacturer. Defective part 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 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.

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. Therefore, these members disagree with the language of this instruction indicating liability is to be apportioned. These members proposed that the second sentence of the instruction read: “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].”

Staff Notes.

Status.

1013. Defective condition of FDA approved drugs.

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.

1014. 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.

Status.