Agenda
Advisory Committee on Model Civil Jury Instructions

April 16, 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

Introduction	Tim Shea
Product Liability.	Tracy Fowler

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

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
March 12, 2007
4:00 p.m.

Present: John L. Young (chair), Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Jonathan G. Jemming, Colin P. King, Timothy M. Shea, Paul M. Simmons, and Kamie F. Brown

Excused: Tracy H. Fowler

The committee continued its review of the products liability instructions.

1. *1003. Strict liability. Definition of "design defect" and "unreasonably dangerous."* Mr. Simmons proposed an alternative to subparagraph (2) of the definition of design defect, which Mr. Shea thought was more easily understood. Ms. Brown insisted that the definition include the concepts of technical and economic feasibility and availability. Mr. Simmons thought these concepts were not required in every case and were best left for argument. Mr. Young thought that jurors would not understand the phrase "practicable under the circumstances." At Mr. Shea's suggestion, instruction 1003 was divided into two instructions: 1003 (definition of "design defect") and 1005 (definition of "unreasonably dangerous"). Subparagraph (2) of the instruction 1003 was revised to read:

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

As modified, the instruction was approved.

Mr. King joined the meeting.

2. *[New] 1005. Strict liability. Definition of "unreasonably dangerous."* Mr. Simmons proposed an alternative instruction based on Utah Code Ann. § 78-15-6(2). Dr. Di Paolo asked what the difference was between alternative A and alternative B. Ms. Brown, Mr. Shea, and Mr. Simmons explained that under alternative A the jury considers the product's characteristics and the user's knowledge separately, and, if the user knew or should have known of the dangers associated with the product, it is not unreasonably dangerous as a matter of law; the user's knowledge can only work against him and never help him. Under alternative B, the jury considers all of the factors listed, but it is up to the jury to decide what weight or effect to give them; the user's knowledge of a product does not necessarily mean that the product was not unreasonably dangerous. Dr. Di Paolo thought that alternative B was not as understandable as alternative A. At Dr. Di Paolo's suggestion, the phrase *that were* was added to subparagraph (1) of alternative A between *uses* and *foreseeable.* The introductory phrase to each alternative was revised to read, "A [product] with a [design/manufacturing] defect was unreasonably dangerous if . . ." Mr. King moved to reverse the order of the alternatives, placing alternative B (the statutory definition) first. Mr. Simmons and Mr. Carney seconded the motion. Ayes: Messrs.

Young, Carney, King, and Simmons. Nays: Ms. Blanch, Dr. Di Paolo, and Ms. Brown. The motion carried. The instruction was approved as modified.

Mr. Shea will add a statement to the introduction to the effect that the order of alternative instructions is not meant to be significant.

3. *1004. Strict liability. Definition of "manufacturing defect."* The alternatives were taken out of instruction 1004 and are now covered by instruction 1005. As so modified, the instruction was approved.

Mr. Shea will divide up the references and advisory committee notes to correspond to the new instructions 1003, 1004, and 1005.

4. *[New] 1006. Strict liability. Elements of claim for failure to adequately warn.* Dr. Di Paolo thought that subparagraph (2) was awkward. Mr. Carney suggested replacing *at the time* in subparagraph (2) with *when.* Mr. Simmons suggested revising it to say, "the product had an inadequate warning when it was [manufactured/distributed/sold]." Mr. King suggested combining subparagraphs (1) and (2).

Mr. Jemming joined the meeting.

At Mr. Shea's suggestion, the phrase *of a danger involved in its foreseeable use* was dropped from the introductory paragraph. Mr. Shea asked whether the instruction should be revised to cover inadequate instructions as well as inadequate warnings. The committee thought that a sentence could be added to the advisory committee notes to the effect that the terms *instruct* and *instructions* could be substituted for *warn* and *warnings* in an appropriate case. Mr. Carney thought that the last paragraph of the instruction was argument and should not be included. Mr. King and Mr. Simmons agreed. Mr. Young questioned whether it stated a specific defense for failure-to-warn cases. Ms. Brown thought so. Mr. King pointed out that it was not an affirmative defense but simply negated an element of the plaintiff's prima facie case (causation) and therefore did not justify an instruction, since the jury will have already been instructed on the elements of a prima facie case. The paragraph was deleted from instruction 1006, with the understanding that the committee could revisit the issue later. At Mr. Simmons's suggestion, a sentence was added to the end of the instruction. The revised instruction reads:

> [Name of plaintiff] claims that [he] was injured by a [product] that was defective and unreasonably dangerous because it lacked an adequate warning. You must decide whether:
>
> (1) [name of defendant] failed to provide an adequate warning at the time the product was manufactured;

> (2) the lack of an adequate warning made the [product] defective and unreasonably dangerous; and
>
> (3) the lack of an adequate warning was a cause of [name of plaintiff]'s injuries.
>
> I will now explain what the terms "defective" and "unreasonably dangerous" mean.

Judge Barrett joined the meeting.

5. *1006 [new 1007]. Strict liability. Failure to warn. Definition of adequate warning and defect.* Ms. Brown circulated a new proposed instruction 1006 defining an inadequate warning. The elements were taken from *House v. Armour of America.* Mr. Carney noted that *House* was quoting a federal case and that the committee was not limited to the exact language from *House.* Ms. Blanch suggested that the phrase *justified by the magnitude of the danger* be replaced with *commensurate with the danger.* Mr. Carney suggested *proportionate to the danger.* Dr. Di Paolo suggested *equal to* or *matches* or *that corresponds to the level of the danger.* At Mr. King's suggestion, *designed so that it can* was deleted from subsection (1), and *consumer* was replaced with *user.* Mr. Carney suggested deleting *be comprehensible and* from subsection (2), since if a warning was not comprehensible it would not give a fair indication of the danger involved. Mr. Young suggested replacing *comprehensible* with *reasonably understandable.* Mr. Carney suggested the following language, taken from a monograph explaining Nevada warning law:

> To be adequate, a warning must catch the user's attention, be understandable, indicate the specific risks of using the product, and be sufficiently intense to match the magnitude of the risk.

Ms. Brown wanted to review the proposed language and compare it with *House* before approving it. Mr. King asked how the California model instructions handled the adequacy of a warning. Mr. Shea and Mr. Carney noted that California does not have a specific instruction explaining how to determine the adequacy of a warning. Dr. Di Paolo asked what the phrase *members of the community who use the product* in the second paragraph meant. She suggested alternatives: *who ordinarily use the product, foreseeable users of the product,* or *expected users of the product.* Mr. Carney noted that the concept was that a manufacturer does not have to warn the whole world but only those likely to come in contact with the product. He suggested *people who use the product.* Dr. Di Paolo thought that *people* was too broad. Dr. Di Paolo suggested making the second paragraph element (4), but Ms. Brown noted that it modifies elements (1) through (3) and needs to stand alone. Mr. Simmons suggested revising the third paragraph to read, "A product that has an inadequate warning is defective," since a defective product (not a defective warning)

is an element of the claim. At Mr. Jemming's suggestion, the order of the paragraphs was reversed, so the instruction now reads:

> A product that has an inadequate warning is defective.
>
> The adequacy of the warning given must be judged in light of the ordinary knowledge common to foreseeable users of the product.
>
> To be adequate, a warning must catch the user's attention, be understandable, indicate the specific risks of using the product, and be sufficiently intense to match the magnitude of the risk.

Ms. Blanch thought the instruction was misleading because it did not address other elements of the claim, such as causation. Mr. Simmons pointed out that the instruction was not meant to state the elements of the claim but just to define one of those elements (an inadequate warning that makes the product defective). The elements are explained in new instruction 1006.

> **Mr. Shea will revise the instruction in light of the committee's discussion, and the committee will review the revised instruction at a later meeting.**

6. *1007 [new 1008]. Strict liability. Failure to warn. Definition of unreasonably dangerous.* Ms. Brown circulated a new proposed instruction 1007 defining "unreasonably dangerous" in a failure-to-warn claim. Several committee members thought that the phrase *beyond that which would be contemplated* in the subparagraph (1) was awkward. Mr. King suggested deleting *characteristics or* from that subparagraph. Mr. Carney suggested substituting *a danger from the product's foreseeable use* or *unexpected danger.* Mr. King noted that the concept was that the danger must be greater than an ordinary person would know about. Mr. Young and Dr. Di Paolo suggested *involved with the product's foreseeable use that a reasonable user would not expect.* Mr. Jemming noted that the danger may not arise from the use of the product but from its storage or mere presence, such as asbestos or some other product that emits toxins. Mr. King and Mr. Carney suggested *involved with the product* (or *involved with the product or its foreseeable use).* Ms. Brown, Mr. Young, Mr. King, and Mr. Jemming thought it was important to include the concept of foreseeable use. Dr. Di Paolo asked whether one harmed by the mere presence of a product is a "user" of the product. Ms. Brown thought that *user* would be the proper term for most cases, but the advisory committee note could mention that *user* may have to be replaced with another term in certain cases. Mr. Simmons thought that subparagraph (2) was not part of the definition of "unreasonably dangerous." As the elements are stated, the product must be both "defective" and "unreasonably dangerous," and, under new proposed instruction 1007, the inadequacy of the warning goes to defect, not unreasonable danger. In other words, the jury must first determine whether the warning was inadequate. If it

was, the product was defective. It then must determine whether the inadequacy of the warning made the product unreasonably dangerous. For the second step, it should not have to determine the adequacy of the warning again. Mr. Carney asked why a separate definition of "unreasonably dangerous" for failure-to-warn cases was even necessary when there is a statutory definition of "unreasonably dangerous." Mr. Simmons noted that some subcommittee members thought the instruction was unnecessary for that very reason. What instruction 1007 adds is that the manufacturer must have known or should have known of the danger he was required to warn of. Also, there may need to be alternative instructions, along the lines of new instruction 1005, in light of the Tenth Circuit's decision in *Brown* interpreting the Utah statute. The committee deferred further discussion of instruction 1007 till a later meeting.

7. *Next Meeting.* The next meeting will be Monday, April 9, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Model Utah Jury Instructions
Second Edition
Working Draft
April 3, 2007

Introduction to the Model Utah Jury Instructions, Second Edition.

The Supreme Court has two advisory committees, one for civil instructions and one for criminal instructions, working to draft new and amended instructions to conform to Utah law. The Court will not promulgate the instructions in the same manner as it does the rules of procedure and evidence; rather the Court relies on its committees and their subcommittees, consisting of lawyers of varied interests and expertise, to subject the model instructions to a full and open critical appraisal.

The Utah Supreme Court approves this Second Edition of the Model Utah Jury Instructions (MUJI 2d) for use in jury trials. An accurate statement of the law is critical to instructing the jury, but accuracy is meaningless if the statement is not understood - or is misunderstood - by jurors. MUJI 2d is intended to be an accurate statement of the law using simple structure and, where possible, words of ordinary meaning. Using a model instruction, however, is not a guarantee of legal sufficiency. MUJI 2d is a summary statement of Utah law but is not the final expression of the law. In the context of any particular case, the Supreme Court or Court of Appeals may review a model instruction.

Sometimes the law itself is unclear. There might be no controlling statutes or cases. The statutes or cases might be incomplete, internally inconsistent, or inconsistent with each other. In such cases, an instruction might have two or more alternatives. The alternatives are different statements of the law based on differing authority. The order of the alternatives does not imply preference.

For civil instructions, MUJI 2d eventually will replace the original MUJI published by the Utah State Bar. For criminal instructions, MUJI 2d represents the first published compilation of instructions in Utah.

MUJI 2d is a continual work in progress, with new and amended instructions being published periodically on the state court web site. Although there is no comment period for jury instructions as there is for rules, we encourage lawyers and judges to share their experience and suggestions with the advisory committees: experience with these model instructions and with instructions that are not yet included here. Judges and lawyers who draft a clearer instruction than is contained in these model instructions should share it with the appropriate committee.

If there is no Utah model instruction, the judge must nevertheless instruct the jury. The judge's task is to further the jurors' understanding of the law and their responsibility though accuracy, clarity and simplicity. To assist in this task, links on this page lead to principles for plain-language drafting and to the pattern instructions of some other jurisdictions.

Judges should instruct the jurors at times during the trial when the instruction will most help the jurors. Many instructions historically given at the end of the trial may be given at the beginning or during the trial so that jurors know what to expect. The fact

that an instruction is not organized here among the opening instructions does not mean that it cannot be given at the beginning of the trial. Instructions relevant to a particular part of the trial should be given just before that part. A judge might repeat an instruction during or at the end of the trial to help protect the integrity of the process or to help the jurors understand the case and their responsibilities.

When preparing written instructions, judges and lawyers should include the title of the instruction. This information helps jurors organize their deliberation and decision-making. Judges should provide a copy of the written instructions to each juror. This is permitted under the rules of procedure and is a sound practice because it allows each juror to follow the instructions as they are read and to refer to them during deliberations.

MUJI 2d is drafted without using gender-specific pronouns whenever reasonably possible. However, sometimes the simplest, most direct statement requires using pronouns. The criminal committee uses pronouns of both genders as its protocol. In the trial of criminal cases, often there will not be time to edit the instructions to fit the circumstances of a particular case, and the criminal instructions are drafted so that they might be read without further concern for pronoun gender. The civil committee uses masculine pronouns as its protocol. In the trial of civil cases there often is more time to edit the instructions. Further, in civil cases, the parties are not limited to individual males and females but include also government and business entities and multiple parties. Judges and lawyers should replace masculine with feminine or impersonal pronouns to fit the circumstances of the case at hand. Judges and lawyers also are encouraged in civil cases to use party names instead of "the plaintiff" or "the defendant." In these and other circumstances judges and lawyers should edit the instructions to fit the circumstances of the case.

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.

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."

Alternative A.

The [product] had a design defect if as a result of its design, the [product] failed to perform as safely as an ordinary user would expect when the [product] was used in a manner reasonably foreseeable to the manufacturer.

Alternative B.

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] was used in a manner reasonably foreseeable to the manufacturer; and

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

MUJI 1st References.

12.3; 12.4; 12.5

References.

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.

Staff Notes.

Status. Approved for use: 3/12/2007

1004. Strict liability. Definition of "manufacturing defect."

The [product] had a manufacturing defect if it differed from

[(1) the manufacturer's design or specifications.]

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

MUJI 1st References.

12.2.

References.

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.

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

Staff Notes.

Status. Approved for use: 3/12/2007

1005. Strict liability. Definition of "unreasonably dangerous."

Alternative A.

A [product] with a [design] [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.

Alternative B.

A [product] with a [design] [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 that were 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 danger from the [product] or from its use.

MUJI 1st References.

12.1; 12.14

References.

Utah Code Section 78-15-6(2).
Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280-82 (10th Cir. 2003).
Restatement (Second) of Torts § 402A (1963 & 1964).

Advisory Committee Notes.

Alternative A is a restatement of Utah Code Section 78-15-6, in which the knowledge, training, and experience of the user is just one factor for the jury to consider in deciding whether the product was unreasonably dangerous. Alternative B is a restatement of Brown v. Sears, Roebuck & Co., 328 F.3d 1274 (10th Cir. 2003), in which the knowledge, training, and experience of the user is a complete defense.

Staff Notes.

Status. Approved for use: 3/12/2007

1006. 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. You must decide whether:

(1) [name of defendant] failed to provide an adequate warning at the time the product was [manufactured/distributed/sold];

(2) the lack of an adequate warning made the product defective and unreasonably dangerous; and

(3) the lack of an adequate warning was a cause of [name of plaintiff]'s injuries.

I will now explain what the terms “adequate warning” and “unreasonably dangerous” mean.

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.

A case might raise the issue of the adequacy of the product's instructions, rather than the adequacy of the warnings, in which case the judge would properly substitute "instruct" and "instructions" for "warn" and "warnings."

Staff Notes.

Simply substituting "instructions" for "warnings" in 1007 and 1008 probably is not an accurate statement of the law.

Status. Approved for use: 3/12/2007

1007. Strict liability. Definition of "adequate warning."

A [product] with an inadequate warning is defective.

To be adequate a warning must:

(1) catch the user's attention;
(2) be understandable in light of the ordinary knowledge common to foreseeable users;
(3) identify the specific danger from the [product] or from its foreseeable use; and
(4) be sufficiently intense to match the magnitude of the danger.

If the danger from the [product] or from its foreseeable use is generally known and cannot economically be eliminated, then [name of defendant] is not required to warn about that danger.

However, if [name of defendant] knew or reasonably should have known of a danger from the [product] or from its foreseeable use that a reasonable user would not expect, [name of defendant] must warn of that danger, even though the danger is obvious.

MUJI 1st References.

References.

House v. Armour of Am., Inc., 886 P.2d 542 (Utah Ct App 1994).

Advisory Committee Notes.

Staff Notes.

The last two paragraphs are leftovers from what were Instructions 1006 and 1009 in the March materials. Those instructions have otherwise been subsumed into what are now 1006-1008. I've left the paragraphs here because I didn't want to lose them, but they seem more appropriate as a separate "duty to warn" instruction.

Status. Changes from: 3/12/2007

1008. Strict liability. Definition of "unreasonably dangerous" in failure-to-warn cases.

Alternative A.

A [product] with an inadequate warning 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.

Alternative B.

A [product] with an inadequate warning was unreasonably dangerous if:

(1) [name of defendant] knew or reasonably should have known of a danger from the [product] or from its foreseeable use that a reasonable user would not expect; and

2) [name of user] did not have actual knowledge, training, or experience sufficient to know the danger from the [product] or from its use.

MUJI 1st References.

References.

Utah Code Section 78-15-6(2).
House v. Armour of Am., 929 P.2d 340 (Utah 1996).
Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280-82 (10th Cir. 2003).
Restatement (Second) of Torts § 402A & comment j (1965).

Advisory Committee Notes.

Alternative A is a restatement of Utah Code Section 78-15-6, in which the knowledge, training, and experience of the user is just one factor for the jury to consider in deciding whether the product was unreasonably dangerous.

Alternative B is limited to failure-to-warn cases.

Alternative B, Paragraph (1) is based on House v. Armour of America, 929 P.2d 340 (Utah 1996). Some members of the committee thought that House established the duty to warn and not a special definition of "unreasonably dangerous." Under this analysis, the definition of "unreasonably dangerous" in Instruction 1005 should be given in failure-to-warn cases.

Alternative B, Paragraph (2) is a restatement of Brown v. Sears, Roebuck & Co., 328 F.3d 1274 (10th Cir. 2003), in which the knowledge, training, and experience of the user is a complete defense.

Staff Notes.

Status. Changes from: 3/12/2007

1009. 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.

This instruction will require some extreme mental gymnastics by the jurors. There are three conditional "if" clauses, one of which negates ("however") the other two.

The second advisory committee note seems substantive enough that we should develop an instruction for "learned intermediary" cases.

Status. Changes from: 1/8/2007

1010. 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.

Except for the concept of heeding or following the warning (which might be better integrated into 1009), the second paragraph of both A and B appear to be the corollary to the first sentence of 1007.

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

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] 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. 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

1013. 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

1014. 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. Assumption 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.