Agenda
Advisory Committee on
Model Civil Jury Instructions

June 11, 2007
4:00 to 6:00 p.m.

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

Approval of minutes	John Young
Product Liability	Tracy Fowler

Committee Web Page: http://www.utcourts.gov/committees/muji/

Published Instructions: http://www.utcourts.gov/resources/muji/

Meeting Schedule: Matheson Courthouse, 4:00 to 6:00 p.m.

September 10, 2007
October 15, 2007 (3d Monday)
November 19, 2007 (3d Monday)
December 10, 2007

MINUTES
Advisory Committee on Model Civil Jury Instructions
May 21, 2007
4:00 p.m.

Present: Juli Blanch, Francis J. Carney, Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, L. Rich Humpherys, Colin P. King, Timothy M. Shea, Paul M. Simmons, and John L. Young (chair). Also present: Kamie F. Brown and John A. Anderson

1. *Committee Members*. Mr. Young noted that the committee will be losing two of its members--Paul M. Belnap and Ralph L. Dewsnup--who will be leaving to preside over missions for the Church of Jesus Christ of Latter-day Saints. Mr. Young asked committee members to come to the next meeting with suggestions for attorneys who could replace Messrs. Belnap and Dewsnup on the committee. The new members do not necessarily have to have the same specialties as Messrs. Belnap and Dewsnup and do not necessarily have to take over their subcommittee assignments as well.

2. *Summer Schedule*. The committee agreed to cancel the meetings scheduled for July 9 and August 13, 2007. The June 11 meeting will be held as planned. The next meeting after that will be September 10, 2007.

3. *Products Liability Instructions*. Mr. Fowler introduced Mr. Anderson, who serves on the products liability subcommittee. The committee continued its review of the products liability instructions. Mr. Fowler and Ms. Brown distributed proposed revisions to instructions 1006 through 1010:

a. *1006. Strict liability. Duty to warn*. Mr. Fowler and Ms. Brown thought that a preliminary instruction was necessary so that the jury could first determine whether a warning was even necessary under the facts of the case, before determining whether any warning was adequate. Mr. Ferguson and Mr. Simmons questioned whether the jury should be instructed on the "duty to warn," since the question of duty is a question of law for the court to decide. Mr. Fowler thought that it was a mixed question of law and fact and that the jury may need to find the underlying facts giving rise to a duty to warn. Mr. Young asked whether the instruction was appropriate only where the defendant had failed to provide a warning, since, if the defendant provided a warning, he may have implicitly acknowledged that he had a duty to warn. Mr. Young suggested adding a committee note saying that the instruction should not be given if a warning was in fact given.

Mr. Fowler will draft a proposed committee note saying that the court should consider whether the parties' claims and the facts of the case require the instruction.

Mr. Carney asked what the difference was between a danger "from the product" and one "from its foreseeable use." The committee thought that "foreseeable use" was sufficient to cover all dangers for which a warning is required.

Mr. Shea will review other instructions to see that they are worded consistently.

At Dr. Di Paolo's suggestion, as modified by the committee, the instruction was revised to read:

> . . . You must first decide if [name of defendant] was required to provide a warning.
>
> a. [Name of defendant] was required to warn about a danger from the [product]'s foreseeable use of which [he] knew or reasonably should have known and that a reasonable user would not expect.
>
> b. [Name of defendant] was not required to warn about a danger from the foreseeable use of the [product] that is generally known and recognized.

Mr. Carney asked whether the phrase "generally known and recognized" was necessary. The committee thought it was. Mr. Carney then suggested shortening the phrase to "generally known." Dr. Di Paolo thought that this was a case where redundancy was not bad and that saving two words may not make the instruction more understandable to jurors. Mr. Humpherys asked whether there was a difference between the concepts of foreseeability and expectation in subparagraph a. The committee thought there was and that the terms were used appropriately in subparagraph a ("foreseeable" for the defendant and "expect" for the user).

b. *1007. Strict liability. Elements of claim for failure to adequately warn.* Mr. Fowler noted that new instruction 1007 was the same as the former instruction 1006 except for the first sentence, which is now covered by the first sentence of new 1006. The committee approved the instruction.

c. *1008. Strict liability. Definition of "adequate warning."* Mr. Fowler and Ms. Brown added a sentence to the end of the instruction that reads: "The overall adequacy of the warning given must be judged in light of the ordinary knowledge common to members of the community who use the product." Dr. Di Paolo thought that this sentence should precede the elements of

an adequate warning. Mr. Humpherys expressed concern that it gave the jury an out to find a warning inadequate that met all of the elements of an adequate warning. Mr. Young questioned whether the last sentence contradicted the statute (Utah Code Ann. § 78-15-6(2)), which makes the user's subjective knowledge relevant. Ms. Brown pointed out that the statute defines "unreasonably dangerous," whereas this instruction is meant only to explain how the jury is to judge the adequacy of a warning. Mr. Anderson thought that the instruction on the adequacy of a warning should also incorporate the user's knowledge. Mr. Simmons disagreed. He pointed out that, under the statute and the Tenth Circuit's interpretation of the statute, the user's subjective knowledge goes only to whether a product was unreasonably dangerous, which is covered in another instruction (1005). It is not a hurdle that the plaintiff should have to jump over twice. Mr. Anderson conceded that he did not have any authority for his position. Mr. Humpherys thought that the user's knowledge is best handled as part of the causation analysis. Mr. Young noted that the user's knowledge is also covered in the instruction on the sophisticated user defense (1049), which he thought would be given in every case where the effect of the user's knowledge was an issue. Mr. Humpherys agreed. Mr. Anderson pointed out that it is the plaintiff's burden to show that a warning was not adequate, and the sophisticated user defense is an affirmative defense on which the defendant has the burden of proof. Dr. Di Paolo noted that the last sentence of 1008 was inconsistent with a sophisticated user defense. Mr. Ferguson noted that the test for the adequacy of a warning cannot be a subjective test, or no warning could be found adequate.

Mr. Anderson will propose a comment stating his view that it may be appropriate to instruct on the user's subjective knowledge of the product's dangers in a particular case.

Mr. Humpherys pointed out that the instruction could be misread as requiring the defendant to prove that a warning was adequate, not as requiring the plaintiff to prove that a warning was inadequate. After further discussion the instruction was revised to read:

> A [product] with an adequate warning is defective.
>
> A warning is inadequate if, in light of the ordinary knowledge common to members of the community who use the product, it:
>
> (1) was not designed to reasonably catch the user's attention;
>
> (2) was not understandable to foreseeable users;

> (3) did not fairly indicate the danger from the [product]'s foreseeable use; or
>
> (4) was not sufficiently conspicuous to match the magnitude of the danger.

Mr. Fowler noted that he and Ms. Brown had also added a new paragraph to the end of the advisory committee note.

d. *1009. Strict liability. Failure to warn: Heeding presumption (presumption in favor of plaintiff).* Mr. Fowler noted that the instruction tells the jurors that in the right circumstances they can presume that an instruction would have been read and heeded. Mr. Carney asked whether there was a general instruction on presumptions. (There is not.) Mr. Shea asked whether the instruction should indicate that it is only to be used where there is no evidence going to the issue of whether the plaintiff would have read and heeded a warning. Mr. Fowler thought the committee note covered that. Mr. King noted that the presumption gives plaintiffs a disincentive to put on relevant but weak evidence as to whether the plaintiff read and heeded warnings. Mr. Humpherys asked if the presumption would apply where there was conflicting evidence. Mr. Fowler and Ms. Brown noted that the effect of the presumption is to substitute for evidence, and if there is any evidence, then there is no presumption. Mr. Humpherys asked whether a plaintiff could still rely on the presumption if he chose not to put on evidence in his case-in-chief but rebutted the defendant's contrary evidence. Mr. King thought that the first paragraph of the note was confusing. At Mr. Simmons's suggestion, the phrase "In that case," was added to the beginning of the second sentence of that paragraph.

> **Mr. Shea will revise the note to try to eliminate the phrase, "Some members of the subcommittee do not believe . . ."**

Mr. Simmons asked whether the jury is instructed on the effect of a presumption (that is, what it means to say, "You can presume . . ."). Mr. Fowler and Ms. Brown thought it may be impractical to do so since the effect of a presumption may vary. Mr. Shea asked whether we needed a separate instruction on the learned intermediary doctrine (discussed in the second paragraph of the note). The committee noted that there is little Utah law on the subject. Mr. Simmons asked whether, where no warning is given to a learned intermediary, there should be a presumption that the learned intermediary would have read the warning and passed it on to his patient, particularly where the learned intermediary may not

be available to testify. Mr. King thought that direct advertising of prescription drugs to consumers has undermined the learned intermediary doctrine.

e. *1010. Strict liability. Failure to warn: Presumption that warning will be read and followed (presumption in favor of defendant).* The phrase "you are instructed that" was deleted from the first sentence, and a typographical error (*it* for *if)* was corrected in the second sentence. Messrs. King and Simmons thought that *adequate* should be added before *warning*. They thought no presumption should arise if the warning was not likely to have been seen and understood (for example, because it was too small, in the wrong place, or in the wrong language). Mr. Fowler and Ms. Brown thought that if the warning was adequate, there would be no need for the presumption because there would be no liability. But the adequacy of the warning will generally be a question of fact for the jury to decide. They noted that the instruction tracks the language of comment *j* to Restatement (Second) of Torts § 402A. Messrs. Humpherys, King, and Simmons thought the instruction could confuse the jury. For example, Mr. Humpherys noted, a literal reading of the instruction would allow the jury to presume that a warning would be read and followed even though the warning was so general as to be useless (e.g., "Don't do anything dumb."). Mr. Humpherys also questioned whether a comment should be added similar to the comment to 1009 that the instruction should not be given if there is any evidence going to the issue. Mr. King asked in what circumstances the instruction would be given. He thought that once the plaintiff introduces evidence of the inadequacy of any warning, the jury should not be instructed on any "reading" presumption. Mr. Anderson agreed that it would apply in only limited circumstances, but he thought it would apply where, for example, a manufacturer warns about X and Y but not about Z, and the accident could have been prevented if the plaintiff had read and heeded the warning about X and Y. Mr. Young suggested that the instruction needs an extensive committee note. He thought there was a significant question as to whether it should even be included in the products liability instructions. Mr. Ferguson suggested combining instructions 1009 and 1010. Dr. Di Paolo agreed that the instructions were confusing. She thought that jurors would not understand the relationship between instruction 1008 and 1010 and would argue over which one should govern. The committee reserved further discussion on instruction 1010 for a later meeting.

4. *Next Meeting*. The next meeting will be Monday, June 11, 2007, at 4:00 p.m.

The meeting concluded at 6:15 p.m.

Model Utah Jury Instructions

Second Edition

Working Draft

June 5, 2007

1001. Strict liability. Introduction.

[Name of plaintiff] seeks to recover damages based upon a claim that [he] was injured by a defective and unreasonably dangerous [product]. A product may be defective and unreasonably dangerous

[(1) in the way that it was designed.]

[(2) in the way that it was manufactured.]

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

References

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

MUJI 1st References

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

Aproved 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.

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).

MUJI 1st References

12.1.

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

Aproved 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.

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.

MUJI 1st References

12.3; 12.4; 12.5

Committee Notes

Whether the second prong of the design defect definition in Alternative B - 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

Aproved 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.]

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).

MUJI 1st References

12.2.

Committee Notes

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

Staff Notes

Status

Aproved for use: 3/12/2007

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

Alternative A.

A [product] with [a design defect] [a manufacturing defect] [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 [a design defect] [a manufacturing defect] [an inadequate warning] 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.

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).

MUJI 1st References

12.1; 12.14

Committee Notes

Alternative A is a restatement of Utah Code Section 78-15-6, in which the knowledge, training, and experience of the user are among the factors 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 are a complete defense.

Staff Notes

Status

Changes from: 4/16/2007

1006. Strict liability. Duty to warn.

[Name of plaintif] claims that he was injured by a product that was defective and unreasonably dangerous because it lacked an adequate warning.

You must first decide if [name of defendant] was required to provide a warning.

[Name of defendant] was required to warn about a danger from the [product]'s foreseeable use of which [he] knew or reasonably should have known and that a reasonable user would not expect.

[Name of defendant] was not required to warn about a danger from the [product]'s foreseeable use that is generally known and recognized.

References

House v. Armour of America, Inc., 929 P.2d 340, 344 (Utah 1996).

Restatement (Second) of Torts § 402A comment j (1963 & 1964).

MUJI 1st References

12.6; 12.7.

Committee Notes

Mr. Fowler will draft a proposed committee note saying that the court should consider whether the parties' claims and the facts of the case require the instruction.

Staff Notes

Status

Aproved for use: 5/21/2007

1007. Strict liability. Elements of claim for failure to adequately warn.

If you find that a warning was required, you must next 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.

References

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

Restatement (Second) of Torts § 402A (1963 & 1964).

MUJI 1st References

12.6; 12.7.

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

Status

Aproved for use: 3/12/2007

1008. Strict liability. Definition of "adequate warning."

A [product] with an inadequate warning is defective.

A warning is inadequate if, in light of the ordinary knowledge common to members of the community who use the [product], the warning:

(1) was not designed to reasonably catch the user's attention;

(2) was not understandable to foreseeable users;

(3) did not fairly indicate the danger from the [product]'s foreseeable use; or

(4) was not sufficiently conspicuous to match the magnitude of the danger.

A [product] that contains an adequate warning is not defective or unreasonably dangerous.

References

House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340 (Utah 1996).

MUJI 1st References

Committee Notes

This instruction should be followed by Instruction 1005. Definition of "unreasonably dangerous."

This instruction may not be appropriate if a regulatory body, such as the Food and Drug Administration, directs that a specific warning must be given for a product. See, e.g., 21 CFR 201.57, detailing format headings and order of warning for particular drugs and medical devices.

Mr. Anderson will propose a comment stating his view that it may be appropriate to instruct on the user's subjective knowledge of the product's dangers.

Staff Notes

The last sentence is from Tracy's revised draft of 1010, but I recommend that it be part of the definition instruction rather than the presumption instruction.

Status

Changes from: 5/23/2007

1009. Strict liability. Failure to warn. Presumption that a warning would have been read and followed.

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

References

House v. Armour of America, Inc., 929 P.2d 340, 347 (Utah 1996).

Rule 301. Utah Rules of Evidence.

MUJI 1st References

Committee Notes

This instruction is appropriate only if it cannot be demonstrated whether the injured party would have read and followed an adequate warning (e.g., the injured party cannot testify due to death or incompetence). See House v. Armour of America, 929 P.2d 340, 346-47 (Utah 1996). If the injured party can testify, the plaintiff retains the burden to prove by a preponderance of the evidence the likelihood that he or she would have complied with an adequate instruction or warning.

Some members of the committee do not believe this instruction is appropriate in cases in which the "learned intermediary doctrine" applies. See Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2000 Utah 43, 16, 79 P.3d 922 (citation omitted). While the FDA regulates the labeling of prescription pharmaceuticals and medical devices, it does not regulate the practice of medicine, including the prescribing practices of physicians. See 59 FR 59820-04, 1994 WL 645925 (1994). A physician may, for example, prescribe a medication for an unapproved use or use a medical device in an unapproved manner. Id. Accordingly, warnings accompanying pharmaceuticals and medical devices must be evaluated from the perspective of the learned intermediary rather than that of an average consumer. More important, no heeding presumption should apply because the learned intermediary, in exercising his or her professional judgment, may choose to ignore, entirely or in part, a warning accompanying a pharmaceutical or medical device.

Staff Notes

Status

Changes from: 5/21/2007

1010. Strict liability. Failure to warn. Presumption that a warning will be read and followed.

If you find that [name of defendant] gave a[n adequate] warning, [he] could reasonably presume that the warning would be read and followed.

A [product] that contains an adequate warning is not defective or unreasonably dangerous.

References

Restatement (Second) of Torts § 402A comment j (1963 & 1964).

House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340 (Utah 1996).

MUJI 1st References

12.6; 12.7.

Committee Notes

The unbracketed language in the first sentence is based on Comment j to Section 402A, which states: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous." Restatement (Second) of Torts § 402A cmt. j (1964). This language from Comment j was recognized in House v. Armour of Am., 886 P.2d 542 (Utah Ct. App. 1994), affirmed 929 P.2d 340 (Utah 1996), and incorporated in the first version of the Model Utah Jury Instructions in instructions 12.6 and 12.7.

Although the word "adequate" does not appear in this language of Comment j, some members of the committee believe that a defendant is entitled to the presumption only if the warning was adequate. These members suggest that the word "adequate" precede the word "warning" in this instruction to achieve uniformity with other instructions on warnings.

Staff Notes

If the second sentence is a true statement of the law, then if the jury finds that the defendant gave an adequate warning, is that not the end of the analysis? There is no need for a presumption. The product is not defective.

The second sentence appears more properly to be part of the definition in 1008.

Status

Changes from: 5/21/2007

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.

References

MUJI 1st References

12.8.

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].

References

Utah Code Sections 78-27-37 to 78-27-43.

MUJI 1st References

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.

References

Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991).

MUJI 1st References

12.13.

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.

References

Burns v. Cannondale Bicycle, Co., 876 P.2d 415, 418 (Utah 1994).

MUJI 1st References

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.

References

MUJI 1st References

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

References

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

Smith v. Frandsen, 94 P.3d 919 (Utah 2004).

MUJI 1st References

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.

References

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

MUJI 1st References

12.1.

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.

References

MUJI 1st References

12.39.

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.

References

Utah Code Section 78-15-5.

MUJI 1st References

12.11.

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.

References

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

MUJI 1st References

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.

References

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

MUJI 1st References

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.

References

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

MUJI 1st References

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