Agenda
Advisory Committee on
Model Civil Jury Instructions
January 11, 2021
4:00 to 6:00 p.m.
Via Webex

Welcome to meeting		Ruth Shapiro, Chair
-Farewell to departing Chairman Judge Andrew Stone -Introduction of incoming Chairwoman Ruth Shapiro and incoming committee member Judge Kent Holmberg		Chief Justice Matthew B. Durrant
Approval of minutes	Tab 1	Ruth Shapiro, Chair
Subcommittees and subject area timelines	Tab 2	Ruth Shapiro
Products Liability	Tab 3	Tracy Fowler and Paul Simmons
CV 632. Threshold	Tab 4	Alyson McAllister
Other business		Ruth Shapiro

Committee Web Page

Published Instructions

Meeting Schedule: Monthly on the 2nd Monday at 4pm

Tab 1

MINUTES

Advisory Committee on Model Civil Jury Instructions
October 26, 2020
4:00 p.m.

Present: Honorable Andrew H. Stone (chair), Nancy J. Sylvester (staff), Marianna Di Paolo, Joel Ferre, Honorable Keith A. Kelly, Alyson McAllister, Douglas G. Mortensen, Ruth A. Shapiro, Lauren A. Shurman, ,
Samantha Slark, Ruth Shapiro, Randy Andrus, Ricky Shelton.
Also present: Tracy Fowler. Paul M. Simmons

Excused:

1. *Welcome.*

Judge Stone welcomed everyone to the meeting and asked all committee members to introduce themselves.

2. *Approval of Minutes.*

Judge Stone asked for a motion on the February meeting minutes. The minutes were unanimously approved.

3. *Subcommittees and Subject Area Timelines.*

Judge Stone suggested creating subcommittees for the subject areas of easements and boundary lines and asked for names of those who have handled these issues and who could join these subcommittees. Preferably a committee of four evenly split between plaintiffs and defendants. These issues go to trial occasionally and are to be decided by the jury. Judge Kelly agreed that these issues should be clarified via jury instructions.

Judge Stone suggested instructions on civil jury trials during the pandemic. We might need short instructions re distancing, mask wearing, etc. We could look to other jurisdictions who have already prepared these types of instructions.

Still no timeline on when criminal jury trials can start. Civil jury trials will follow.

4. *Discussion of Product Liability Instructions.*

CV10 01

Mr. Simmons spoke to the plaintiff group's proposal and Mr. Fowler spoke to the defense group's proposal.

Mr. Fowler recognized the fundamental differences in opinion on proposed instructions between plaintiffs and defendants. As a result, the most recent version of the

instructions were not shortened much and included alternative definitions to allow for both perspectives.

Mr. Shelton asked whether it would be helpful to first inform the jury of the difference between negligence and strict liability. Mr. Fowler opined that the more language you add on the issue, the less clear it becomes. He argued that the difference is spelled out sufficiently throughout the instructions.

Mr. Fowler clarified that the plaintiff group's introduction in CV1001 is consistent with the court's ruling in *Bylsma v. R.C. Willey*, but objected to its use in the instructions as unnecessary. He argued that the leaner the instruction, the better.

Judge Kelly argued that it is important for the jury to understand the difference between strict liability claims and that the introduction language in the plaintiff's proposal outlined out a fairly clear road marker. If this introduction paragraph does not contradict the court's decision in *Blysma v. R.C. Willey*, 2017 UT 85, 416 P.3d 595, he suggested it may be helpful to the jury. Mr. Fowler responded that there are words in the introduction that could create confusion on the part of the jury.

Ms. Di Paolo stated her concern about the necessity of the plaintiff group's introduction paragraph and the use of language that may confuse a jury. She argued that if we keep the introduction paragraph, it should be restructured to be more easily understandable. She argued that it is too dense as written. If it is *not* necessary language, she opined that it should be omitted. Mr. Fowler agreed. Mr. Simmons offered to re-write the introduction paragraph to make it simpler because clarification is, he argued, necessary. Ms. McAllister agreed. Ms. Sherman suggested that perhaps one or two simple sentences explaining the difference between strict liability and negligence may be helpful, but not much more than that. She further recommended citing directly to relevant court precedent. Mr. Simmons agreed to make amendments to the introduction paragraph in consideration of the committee's concerns.

Judge Stone stated his preference for an introduction paragraph similar to that spelled out in the plaintiff group's version as, he argued, the difference between negligence and strict liability is not intuitive. Ms. Slark agreed that an introduction would be helpful and noted that breaking out the different types of defects would help with clarity.

The committee discussed whether to cite Tenth Circuit precedent in the instructions. Mr. Mortensen contended that it should be omitted as it is not binding. Mr. Fowler countered that it is nevertheless relevant and should be made available to practitioners. Judge Stone expressed no concern with citing federal precedent interpreting Utah law.

Mr. Fowler suggested that he and Mr. Simmons re-work the language of CV1001 since the plaintiff and defense groups may be close to agreement. Mr. Simmons agreed. The committee determined to discuss any such changes at a later date.

5. *Adjournment.*

The meeting concluded at 5:47 P.M.

6. *Next Meeting.*

To be determined.

Tab 2

Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back/Notes
Caselaw updates	-	-	*Ongoing*	*Ongoing*	
Trespass and Nuisance	Yes	Hancock, Cameron; Beckstrom, Ryan	November-18	October-19	Have been posted but not circulated for comment
Uniformity	Yes	Judge Keith Kelly (chair), Alyson McAllister, Lauren Shurman	February-19	February-21	Have been posted but not circulated for comment
Products Liability Updates	Yes	Tracy Fowler, Paul Simmons, Nelson Abbott, and Todd Wahlquist	October-20	February 2021	
Easements and boundary lines	No	Adam Pace (amp@scmlaw.com) Robert Cummings (rbc@scmlaw.com); Robert J. Fuller (rob@fullerattorney.com); "Farr, Doug" <dfarr@swlaw.com>			
Pandemic	No	Judge Chiara			
Implicit Bias	TBD	Judge Su Chon (chair)	TBD	TBD	
Assault/False Arrest	Yes	Rice, Mitch (chair); Carter, Alyson; Wright, Andrew (D); Cutt, David (P)	TBD	TBD	
Insurance	Yes	Johnson, Gary (chair); Pritchett, Bruce; Ryan Schriever, Dan Bertch, Andrew Wright, Rick Vazquez; Stewart Harman (D); Ryan Marsh (D)	TBD	TBD	
Unjust Enrichment	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Abuse of Process	No (instructions from David Reymann)	David Reymann	TBD	TBD	
Directors and Officers Liability	Yes	Call, Monica;Von Maack, Christopher (chair); Larsen, Kristine; Talbot, Cory; Love, Perrin; Buck, Adam	TBD	TBD	

Wills/Probate	No	Barneck, Matthew (chair); Petersen, Rich; Tippet, Rust; Sabin, Cameron	TBD	TBD	Much of this is codified in statute. There may not be enough instructions to dedicate an entire instruction area.
Civil Rights: Set 2	Yes	Ferguson, Dennis (D); Mejia, John (P); Guymon, Paxton (P); Stavors, Andrew (P); Burnett, Jodi (D); Plane, Margaret (D); Porter, Karra (P); White, Heather (D)	TBD	TBD	
Sales Contracts and Secured Transactions	Yes	Cox, Matt (chair); Boley, Matthew; Maudsley, Ade	TBD	TBD	
Easements and boundary lines	No	Adam Pace (amp@scmlaw.com) Robert Cummings (rbc@scmlaw.com); Robert J. Fuller (rob@fullerattorney.com); "Farr, Doug" <dfarr@swlaw.com>			Handful of instructions at most

Tab 3

Defense Group Proposal	Plaintiff Group Proposal (if different)
CV1001 Strict liability. Introduction and Elements of the Claim. [Name of plaintiff] seeks to recover damages based on a claim that [s/he/it] was injured by a defective product. [Name of defendant] may be liable even if [name of defendant] has exercised all possible care in the development and sale of the product. A product may be defective [in the way that it was designed.] [in the way that it was manufactured.] [in the way that its users were warned.] To succeed on plaintiff's claim, [name of plaintiff] must prove that: 1. A defect in the product made it unreasonably dangerous; 2. The defect was present at the time of the product's sale; and 3. The defect was a cause of the plaintiff's injuries. I will now explain what [name of plaintiff] is required to prove to satisfy these elements. **References** *Burningham v. Wright Med. Tech., Inc.*, 2019 UT 56, 448 P.3d 1283. Bylsma v. R.C. Willey, 2017 UT 85, ¶¶ 23, 81, 416 P.3d 595. Gudmundson v. Del Ozone, 2010 UT 33, ¶ 53, 232 P.3d 1059 Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, ¶ 16, 79 P.3d 922. House v. Armour of America, 929 P.2d 340 (Utah 1996). 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).	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.** **NOTE TO COMMITTEE: The deleted portion of the prior committee note was resolved in *Egbert v. Nissan Motor Co., Ltd.*, 2010 UT 8, ¶¶9-21 – no disagreement that the question of the constitutionality of the UPLA has been resolved.**

Utah Code Section 78B-6-701, et seq. **Committee Notes** Instruct the jury only as to the type of claim(s) that is relevant to the case (e.g., design defect, manufacturing defect, warning). The jury should be instructed on each of the three elements that are in dispute. 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 fourth element: "whether … 4. [Name of defendant] was engaged in the business of selling the [product]." 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.	
NOTE TO COMMITTEE: **Defense group's position is that the separate instructions setting out the elements for design/manufacturing defect, CV1002, and failure to warn, CV1008, should be retained to provide clarity for the jury on the exact elements required for the given type of defect claim at issue and because not every case involves all three types of claimed defects. There would not be duplication or confusion because CV1001 would be retained in its current form such that the elements would be provided only in the instruction for the applicable type of defect claim as set out in CV1002 and CV1008.** **CV1002 Strict liability. Elements of claim for a [design]**	**NOTE TO COMMITTEE:** **Plaintiff group would delete this instruction -CV1002 Strict liability. Elements of claim for a [design] [manufacturing] defect.- entirely.** **Plaintiff group proposes moving the definition of unreasonably dangerous, currently CV1006, to be the new CV1002.** **Plaintiff group's position is that because a product is only defective as defined by statute, the statutory definition for a defective product, CV1006, should be given next. Individual instructions defining a design/manufacturing/warning defect would then follow as needed, eliminating the repetition and confusion engendered by offering two instructions on each of the individual theories**

[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. To establish a [design] [manufacturing] defect claim, [name of plaintiff] must prove all of the following: (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** *Bylsma v. R.C. Willey*, 2017 UT 85, 416 P.3d 595. 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 Instruction** 12.1.	**(design/manufacture/warn).**
CV1003 Strict liability. Definition of "design defect."	**<u>NOTE TO COMMITTEE:</u>** **Alternative A represents the Plaintiff group proposal; Alternative B**

[Alternative A.] [Name of plaintiff] claims that the product had a design defect. "Design defect" means that the product was designed in a way that failed to eliminate a hazard or that it lacked features that would have reduced the risk of harm associated with the hazard. [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** Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981). Straub v. Fisher and Paykel Health Care, 1999 UT 102, 19, 990 P.2d 384. 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(b), comment (d). Gudmundson v. Del Ozone, 2010 UT 33, ¶49 & n.13, 232 P.3d 1059. **MUJI 1st Instruction**	**represents the Defense group proposal.**

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); Tingey v. Radionics, 193 Fed. Appx. 747 (10th Cir. 2006); Herrod v. Metal Powder Products, 413 Fed. Appx. 7 (10th Cir. 2010). 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.	
CV1004 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** Niemela v. Imperial Mfg., Inc., 2011 UT App 333, 20, 263 P.3d 1191.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

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 Instruction** 12.2. **Committee Notes** Instruct the jury only with the descriptions from (1) or (2) that are relevant to the case.	
CV1006 Strict liability. Definition of "unreasonably dangerous." [Alternative A.] A [product] was unreasonably dangerous if it was more dangerous than an ordinary and prudent buyer, consumer, or user of that [product] would expect considering the [product]'s characteristics, propensities, risks, dangers, and uses, together with any actual knowledge, training, or experience that the particular buyer, consumer, or 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 and prudent buyer, consumer, or user of the [product] would expect considering the [product]'s characteristics, propensities, risks, dangers, and 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.	**NOTE TO COMMITTEE:** **Alternative A is Plaintiff group proposal; Alternative B is Defense group proposal. Plaintiff group would make this instruction CV1002.** In support of their Alternative A, Plaintiff group offers the follow: *Brown v. Sears, Roebuck & Co.* did not say that the knowledge, training, and experience of the user is a complete defense. It only said that the user's actual knowledge, training, or experience may increase the extent of the perceived danger beyond that contemplated by the ordinary and prudent person, making it more likely that a jury might find the product not unreasonably dangerous, but it is still up to the jury to decide how much the plaintiff's subjective understanding of the danger affects whether or not the product is unreasonably dangerous. (*Brown*'s discussion of this issue was dicta, since the plaintiff had failed to show that the product was more dangerous than an ordinary user would expect, making the actual user's knowledge irrelevant.) *Niemela v. Imperial Manufacturing, Inc.*, did not "adopt" the 10th Circuit's reading of the statute in *Brown* but merely explained the *Brown* court's reasoning. Rather, the court applied the statute as written.

References Utah Code Section 78B-6-702. Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280-82 (10th Cir. 2003). Restatement (Second) of Torts § 402A (1963 & 1964). Gudmundson v. Del Ozone, 2010 UT 33, ¶ 47, 232 P.3d 1059. Niemela v. Imperial Mfg., Inc., 2011 UT App 333, ¶ 9, 263 P.3d 1191. **MUJI 1st Instruction** 12.1; 12.14. **Committee Notes** Alternative A is a restatement of Utah Code Section 78B-6-702, 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), as adopted by the Utah Court of Appeals in *Niemela v. Imperial Mfg., Inc.*, 2011 UT App 333, in which the knowledge, training, and experience of the user are a complete defense.	
CV1007 Strict liability. Duty to 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 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	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

[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 Instruction** 12.6; 12.7. **Committee Notes** This instruction may not be appropriate if the manufacturer provided a warning, if the manufacturer does not dispute that it had a duty to warn the plaintiff of a particular danger, or if the Court determines as a matter of law that a warning was required. But even where the manufacturer provided a warning, the adequacy of the warning is a question of fact for the jury to decide. *Feasel v. Tracker Marine LLC*, 2020 UT App 28, ¶ 22, 460 P.3d 145, *cert. granted*, Order, Case No. 20200327-SC (Utah June 26, 2020). The last paragraph of this instruction should not be given when the danger is capable of being economically alleviated. *House v. Armour of America, Inc.*, 929 P.2d 340, 344 (Utah 1996). 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." If this instruction is not appropriate for the case, proceed to CV1008 "Strict liability. Elements of claim for failure to adequate warn" and CV1009 "Strict liability. Definition of 'adequate warning'."	
<u>NOTE TO COMMITTEE:</u> **Defense group's position is that this instruction should be retained. See Note to Committee in CV1002 above.**	**<u>NOTE TO COMMITTEE:</u>** **Plaintiff group would delete this instruction entirely. See Note to**

CV1008 Strict liability. Elements of claim for failure to adequately warn. [If you find that a warning was required,] [[Name of plaintiff] claims that he was injured by a [product] that was defective and unreasonably dangerous because it lacked an adequate warning,] to establish a failure to warn claim, [name of plaintiff] must prove all of the following: (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, meaning had an adequate warning been provided, [name of plaintiff] would have altered [his] use of the [product] or taken added precautions to avoid the injury. 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). Kirkbride v. Terex, 798 F.3d 1343, 1350 (10th Cir. 2015). **MUJI 1st Instruction** 12.6; 12.7. **Committee Notes** Which set of bracketed language in the first paragraph should be given depends on whether the jury must decide whether there was a duty to warn. 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	**Committee in CV1002 above.**

"warnings."	
CV1009 Strict liability. Definition of "adequate warning." A warning is adequate if, in light of the ordinary knowledge common to members of the community who use the [product], the warning: (1) was designed to reasonably catch the user's attention; (2) was understandable to foreseeable users; (3) fairly indicated the danger from the [product]'s foreseeable use; and (4) was sufficiently conspicuous to match the magnitude of the danger. **References** House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340 (Utah 1996). Feasel v. Tracker Marine LLC, 2020 UT App 28, cert granted 466 P.3d 1072. **Committee Notes** This instruction should be followed by Instruction 1006. 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.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**
CV1010 Failure to warn. No adequate warning; Rebuttable presumption that an adequate warning would have been read and followed. If you find [name of defendant] did not provide an adequate warning, you must presume that [name of plaintiff] would have read and followed an adequate warning unless [name of defendant] proves that [name of	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

plaintiff] would not have read or followed such a warning. If [name of defendant] proves that [name of plaintiff] would not have read or followed such a warning, you must find the lack of an adequate warning was not a cause of [name of plaintiff]'s injuries. **References** House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340, 347 (Utah 1996). Kirkbride v. Terex, 798 F.3d 1343, 1351 (10th Cir. 2015). Rule 301. Utah Rules of Evidence. **Committee Notes** This instruction is appropriate when it cannot be demonstrated whether the injured party would have read and followed an adequate warning. See House v. Armour of America, 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340, 347 (Utah 1996). 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). This instruction is applicable to both negligence and strict product liability claims.	
CV1011 Failure to warn. Presumption that a warning will be read and followed. If you find that [name of defendant] gave a[n adequate] warning, [name of defendant] could reasonably presume that the warning would be read	**<u>NOTE TO COMMITTEE:</u>** **The two groups continue to disagree about whether an "adequate" warning is required for CV1011 to apply, which disagreement is reflected in the bracketed language and committee note.**

and followed.

A product bearing a[n adequate] warning, which is safe for use if it is followed, is not in a defective condition, nor is it 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).
Kirkbride v. Terex, 798 F.3d 1343, 1351 (10th Cir. 2015).

MUJI 1st Instruction
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.

This instruction is applicable to both negligence and strict product liability claims.

CV1012 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 for [name of defendant] to be liable, [name of plaintiff] must prove all of the following: (1) [Name of defendant] substantially participated in the integration of the component part into the finished product; (2) The integration of the component part into the finished product made the finished product defective; and, (3) The defect in the [product] created by the integration of the component part was a cause [name of Plaintiff]'s harm. To substantially participate, [name of defendant] must have had some control over the decision-making process of the final product or system. Knowledge of the ultimate design of the finished product, by itself, does not amount to substantial participation. A component part [designer/manufacturer/distributor/seller] does not have a duty to foresee all the dangers that may result from the use of a final product which contains its component part and does not have a duty to analyze or anticipate the design of the finished product or system of which its component is a part. However, if the specifications for the component part are obviously unreasonably dangerous, [name of defendant] may be deemed to have control over the product and to have substantially participated. **References**	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

Gudmundson v. Del Ozone, 2010 UT 33, 232 P.3d 1059.	
NOTE TO COMMITTEE: The defense group thinks this instruction is a necessary counterpart to instruction CV1012 so that the jury is instructed on both of the two scenarios—whether the component part was defective in isolation or not. And while not directly addressed by Bylsma, it is a logical application of Bylsma to hold all upstream sellers of a defective product (component part product or otherwise) liable for injuries caused by that product. **CV1013 Strict liability. 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 each of the following: (1) the component part was defective as [designed/manufactured/distributed/sold], (2) the defective part made the finished product unreasonably dangerous, and (3) the defect in the [product] created by the integration of the component part was a cause of [name of plaintiff]'s injuries, then you must 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 78B-5-817 to 78B-5-823. Bylsma v. R.C. Willey, 416 P.3d 595 (2017)	**PLAINTIFF GROUP DOES NOT BELIEVE THIS INSTRUCTION SHOULD BE INCLUDED AT ALL –** The Plaintiff group would omit this instruction. Utah appellate courts have not yet decided whether or how liability should be apportioned between the manufacturer of a defective component part and the manufacturer of a product that may have been defective even without the component part. Under *Bylsma*, determining fault among various defendants downstream from a defective product is irrelevant and inappropriate. "The relative culpability of the defendants does not factor into the jury's allocation at all." *Bylsma v. R.C. Willey*, 2017 UT 85, ¶ 81, 416 P.3d 595. Until Utah courts decide the issue, the Plaintiff group thinks the instruction is premature, speculative, and not supported by Utah law.

Restatement (Third) of Torts: Apportionment of Liability § 13. **Committee Notes** The Utah Supreme Court has not yet determined the liability of the manufacturer of a component part that is defective and made the finished product defective. In *Bylsma,* the Utah Supreme Court held that strictly liable defendants who are liable for breaching the same duty by selling a dangerously defective product be treated as a unit, and each can be strictly liable for the plaintiff's harm. *See Bylsma v. R.C. Willey,* 2017 UT 85, ¶ 15, 416 P.3d 595. The same rationale is likely to apply to the manufacturer of a component part and the manufacturer of the finished product where both the component part and the finished product are defective and the plaintiff is injured by the defective product.	
CV1014 No design defect in FDA approved drugs. If a drug product conformed with the United States Food and Drug Administration (FDA) standards in existence at the time the product was sold, the product is free of any design defect. However, [name of plaintiff] may still prove 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 Instruction** 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	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

included claims of misrepresentation on the FDA in this instruction. CV1014 does not apply to medical devices approved by the FDA under the § 510(k) process. *Burningham v. Wright Med. Tech., Inc.*, 2019 UT 56, 448 P.3d 1283. Whether such a device is unavoidably unsafe may be raised as an affirmative defense and determined as a question of fact on a case-by-case basis. *See* CV1054. This instruction is applicable to both negligence and strict product liability claims.	
NOTE TO COMMITTEE: The defense group would include this instruction because, as a result of federal preemption, this federal law applies in all warnings claims for FDA approved drugs, even such claims brought in state court. The defense group recommends the plaintiff group concerns that *Cerveny* left open the question of whether such a determination is a question of fact or law, be addressed in the committee note. **CV10-- – Failure to warn claims for FDA approved drugs.** Prescription drug [labels] [warnings] are regulated by the United States Food and Drug Administration ("FDA"). [Name of plaintiff] maintains [drug product] did not include an adequate warning. If [name of defendant] proves by clear evidence that the FDA would have rejected [name of plaintiff]'s proposed [label] [warning], [name of defendant] is not liable to [name of plaintiff] for not including the information on the [label][warning]. **References**	**NOTE TO COMMITTEE:** The Plaintiff group would omit this instruction. It involves a preemption defense, which is generally a question of law--federal law. The only authority for it, *Cerveny v. Aventis, Inc.*, 855 F.3d 1091 (10th Cir. 2017), recognizes that there is a question as to whether the "clear evidence" test in the instruction involves a question of fact or law, and the court doesn't resolve that issue. 855 F.3d at 1098-99. Nor does the court define "clear evidence."

Cerveny v. Aventis, Inc., 855 F.3d 1091 (10th Cir. 2017). **Committee Notes** In 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. Applicable caselaw analyzing preemption of such claims holds a state law failure to warn claim is preempted by federal law "if a pharmaceutical company presents clear evidence that the FDA would have rejected an effort to strengthen the label's warnings." *Cerveny v. Aventis, Inc.*, 855 F.3d 1091 (10th Cir. 2017) (citing *Dobbs v. Wyeth Pharm.*, 606 F.3d 1269, 1269 (10th Cir. 2010). This instruction is applicable to both negligence and strict product liability claims.	
CV1047 Sophisticated user. [Name of defendant] claims that [name of plaintiff] was a sophisticated user of the [product]. To establish this defense, [name of defendant] must prove that [name of plaintiff] either: (1) had special knowledge or expertise about the dangerous or unsafe character of the [product]; or (2) belonged to a group or profession that generally knows about the dangerous or unsafe character of the [product]. If you find that [name of defendant] has proved 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). Henrie v. Northrop Grumman Corp., 502 F.3d 1228 (10th Cir. 2007).	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

CV1048 Conformity with government standard. If you find that the manufacturer of a [product] complied with federal or state laws, standards or regulations for the industry, regarding proper design, inspection, testing, or manufacture that were in effect when it made the [product], it is presumed that the [product] is not defective. However, if you find that [name of plaintiff] has proved, by a preponderance of evidence, that the [product] was defective even though the manufacturer followed government laws, standards or regulations, then the presumption that the product is not defective no longer applies. **References** Utah Code Section 78B-6-703(2). Egbert v. Nissan, 2007 UT 64, ¶14. Niemela v. Imperial Mfg., Inc., 2011 UT App 333. **MUJI 1st Instruction** 12.1.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**
CV1049 Product misuse. [Name of defendant] claims that [name of plaintiff] misused the [product] and that the misuse was a cause of [name of plaintiff]'s harm. To establish this defense, [name of defendant] must prove that: (1) [name of plaintiff] used [the product] in a way that the manufacturer did not intend and could not have reasonably anticipated; and (2) the misuse was a cause of [name of plaintiff]'s harm. If you find that [name of defendant] has proved these points, you must consider [name of plaintiff]'s misuse of the [product] in allocating fault on the Special Verdict form. **References** Bylsma v. R.C.Willey, 416 P.3d 595 (2017) **MUJI 1st Instruction** 12.39.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

CV1050 Product alteration. [Name of defendant] claims that the [product] was modified or altered by someone else. To prove this defense, [name of defendant] must prove that: (1) the [product] was altered or modified after [name of defendant] sold the [product]; (2) the alteration or modification changed the manufacturer's intended purpose, use, construction, function, design, or manner of use of the [product]; and (3) the modification or alteration was a cause of [name of plaintiff]'s harm. If [name of defendant] proves these things, you must consider this defense when allocating fault on the Special Verdict form. **References** Utah Code Section 78B-6-705. Bylsma v. R.C.Willey, 416 P.3d 595 (2017) **MUJI 1st Instruction** 12.11.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**
CV1051 Unreasonable use. (Assumption of a known risk.) [Name of defendant] claims that, if the [product] was defective, [name of plaintiff] knew about the defect and voluntarily proceeded to use the [product]. To establish this defense, [name of defendant] must prove that [name of plaintiff]: (1) knew about the defect; (2) knew the defect could cause injury; (3) proceeded to use the [product] despite this knowledge; and	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

(4) that a reasonably prudent person would not have used the [product] under the circumstances. If [name of defendant] proves these things, you must consider this defense when allocating fault on the Special Verdict form. **References** Bylsma v. R.C.Willey, 2017 UT 85, 416 P.3d 595 Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981). Jacobsen Constr. Co. v. Structo-Lite Eng'g Inc., 619 P.2d 306 (Utah 1980). Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979). Restatement (Second) of Torts § 402A cmt. n (1963 & 1964). **MUJI 1st Instruction** 12.40	
CV1052 Comparative fault of Plaintiff. [Name of defendant] claims that [name of plaintiff] was at fault and that [name of plaintiff]'s fault caused or contributed to the harm. This is called comparative fault. Comparative fault is [negligence] [misuse] [alteration] [assumption of risk] [or other misconduct] by [name of plaintiff] that causes or contributes to the harm. [Name of defendant] has the burden of proving [name of plaintiff]'s comparative fault by a preponderance of the evidence. If you allocate 50% or more of the total fault to [name of plaintiff], then [name of plaintiff] will recover nothing. If you allocate less than 50% of the total fault to [name of plaintiff], then I will reduce [name of plaintiff]'s total damages you have determined by the percentage of fault you attribute to [name of plaintiff]. You should not make this reduction	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

on the special verdict form. I will make the calculated reduction later. **References** Bylsma v. R.C. Willey, 2017 UT 85, ¶ 78. Utah Code Section 78B-5-817 et seq. **MUJI 1st Instruction** 12.9; 12.10. **Committee Notes** "Fault" is defined in Instruction CV201, Fault defined. If nonparties are alleged to be at fault and will be listed on the verdict form, the instruction may have to be broadened to include nonparties as well as the plaintiff and defendants. The definition of "comparative fault" in the second paragraph should include only those forms of comparative fault that are at issue in the case. The court should give separate instructions defining the particular type of misconduct involved (e.g., misuse or unreasonable use).	
CV1053 Allocation Between Strict Liability Defendants and Other at Fault Parties/Third Parties. [Name of party] claims that [name of other defendants/third-parties] were [at fault] and that [their fault] was a cause of [name of plaintiff]'s harm. [Name of party] has the burden of proving [name of other defendants/third-parties]'s [fault] was a cause of [name of plaintiff]'s harm. If you determine that the [product] was defective and that any such defect was a cause of [plaintiff]'s harm, and that [name of other defendant(s)/third party (parties)] [was/were] also at fault and that [his/her/its/their] fault was a cause of [name of plaintiff]'s harm, then you also must determine what percentage of [name of plaintiff]'s harm was caused by the defective product as compared to what percentage of [name of plaintiff]'s harm was caused by the [fault] of [name of other	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

defendants/third-parties]. Your allocation of percentages must add up to 100%. **References** Bylsma v. R.C. Willey, 2017 UT 85, ¶ 78. Utah Code Section 78B-5-817 et seq. **MUJI 1st Instruction** 12.9; 12.10. **Committee Notes** Allocation of fault is covered generally in Instruction CV211. Allocation of Fault.	

Tab 4

Utah State Courts

Nancy Sylvester <nancyjs@utcourts.gov>

Updating MUJI

3 messages

Alyson McAllister <alyson@sykesmcallisterlaw.com> Thu, May 16, 2019 at 10:19 AM
To: Nancy Sylvester <nancyjs@utcourts.gov>

I found one of the instructions I was thinking of:

CV632 Threshold.
[Name of defendant] claims that [name of plaintiff] has not met the threshold injury requirements and therefore cannot recover non-economic damages.

A person may recover non-economic damages resulting from an automobile accident only if [he] has:

[(1) permanent disability or permanent impairment based on objective findings.] or

[(2) permanent disfigurement.] or

[(3) reasonable and necessary medical expenses in excess of $3,000.]

References
Utah Code Section 31A-22-309(1)(a).
Committee Notes
Neither the statute nor case law has provided clear boundaries on the definitions of disability and impairment. It is also undecided whether the plaintiff or the defendant who asserts the defense carries the burden of proof or burden of moving forward.

I had saved this note when the court of appeals ruled in the Pinney case on the definitions on disability and impairment. However, it is my understanding that the defense in that case has appealed and the Utah Supreme Court is going to hear the case, so this may be premature. I think there is also a case on appeal right now (Geneva Rock?) that defines permanent disfigurement. I don't think the instruction needs to be changed, but I think depending on what the court does the committee note should be changed.

Sent from my iPad

Nancy Sylvester <nancyjs@utcourts.gov> Thu, May 16, 2019 at 12:09 PM
To: Alyson McAllister <alyson@sykesmcallisterlaw.com>

Thanks for passing this along, Alyson. It sounds like we may just need to keep an eye out for both *Pinney* and *Geneva Rock* in the Supreme Court cases. I created a Westlaw alert using the code section. If that gives us too many unhelpful things, I'll turn it off.
[Quoted text hidden]
--
Nancy J. Sylvester
Associate General Counsel
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, Utah
84114-0241
Phone: (801) 578-3808
Fax: (801) 578-3843
nancyjs@utcourts.gov

Alyson McAllister <alyson@sykesmcallisterlaw.com> Thu, May 16, 2019 at 1:30 PM
To: Nancy Sylvester <nancyjs@utcourts.gov>

Thanks!

Alyson Carter McAllister

Sykes McAllister Law Offices

801-533-0222

alyson@sykesmcallisterlaw.com

[Quoted text hidden]

Date of Printing: August 12, 2019 09:02:18 AM CDT
Last Run: August 05, 2019 09:03:38 AM CDT

KEYCITE ALERT

§ 31A-22-309. Limitations, exclusions, and conditions to personal injury protection, UT ST § 31A-22-309

Results Narrowed by:

History References
Detail Level: Most Detail

Citing References
Detail Level: Most Detail

History

No references satisfied your KeyCite Alert History request.

Citing References

Citing References (1)

Title	Date	NOD Topics	Type
1. 59 Am. Jur. Trials 347, Litigating the No-Fault Serious-Injury Threshold Am. Jur. Trials "No-fault" automobile insurance systems are statutory schemes to provide automobile accident victims with compensation for certain expenses arising out of personal injuries... ... her life, that the herniated disc would not go away on its own, and that motorist would not be able to regain all bodily function. Utah Code Ann. § 31A-22-309(1)(a)(iii)Pinney v. Carrera, 2019 UT App 12, 438 P.3d 902 (Utah Ct. App. 2019) [Top ...	2019	—	Other Secondary Source

Motorist who suffered a herniated disc in her back following car accident met the tort threshold injury requirement of permanent impairment under no-fault statute, and, thus, could seek general damages for her personal injuries in action brought against other driver who allegedly failed to stop at a stop sign and struck injured motorist's car; treating chiropractor testified that based on the examinations, treatment, and MRI, that injured motorist had suffered a permanent impairment, and chiropractor further testified that motorist would be plagued by the injury for the rest of her life, that the herniated disc would not go away on its own, and that motorist would not be able to regain all bodily function. Utah Code Ann. § 31A-22-309(1)(a)(iii). *Pinney v. Carrera*, 2019 UT App 12, 438 P.3d 902 (Utah Ct. App. 2019).

59 Am. Jur. Trials 347 (Originally published in 1996)

CV632 Threshold.

[Name of defendant] claims that [name of plaintiff] has not met the threshold injury requirements and therefore cannot recover non-economic damages.

A person may recover non-economic damages resulting from an automobile accident only if [he] has:

[(1) permanent disability or permanent impairment based on objective findings.] or

[(2) permanent disfigurement.] or

[(3) reasonable and necessary medical expenses in excess of $3,000.]

References

Utah Code Section 31A-22-309(1)(a).

Committee Notes

Neither the statute nor case law has provided clear boundaries on the definitions of disability and impairment. It is also undecided whether the plaintiff or the defendant who asserts the defense carries the burden of proof or burden of moving forward.

