Advisory Committee on Model Civil Jury Instructions

Agenda

November 8, 2021
4:00 to 6:00 p.m.
Via Webex

Welcome and approval of minutes	Tab 1	Ruth Shapiro, Chair
Subcommittees and subject area timelines	Tab 2	Ruth Shapiro
Products Liability • The Committee has worked through 1020 in the proposed product liability instructions. • The committee has worked through 1058 in the proposed affirmative defenses instructions. • The subcommittee had assignments on 1002, 1057, and 1058. • There are several other loose ends in the proposed liability instructions that also need some follow up work by the subcommittee. Those are indicated in the document.	Tab 3	Tracy Fowler and Paul Simmons
Easements and Boundary Lines	Tab 4	Robert Cummings / Adam Pace
Other business - Annual Report to Judicial Council; Committee Member Terms		Ruth Shapiro

Committee Web Page

Published Instructions

Meeting Schedule: Monthly on the 2nd Monday at 4:00 p.m.

Next meeting: December 13, 2021 at 4:00 p.m.

Tab 1

MINUTES
Advisory Committee on Model Civil Jury Instructions
October 25, 2021
4:00 p.m.

Present: Ruth A. Shapiro (chair), Judge Keith A. Kelly, Stacy Haacke (staff), Gage Hansen (staff), Marianna Di Paolo, Douglas G. Mortensen, Randy Andrus, Ricky Shelton, Joel Ferre, Alyson McAllister, Adam D. Wentz (recording secretary).
Also present: Tracy Fowler

Excused: Samantha Slark, Lauren A. Shurman, Judge Kent Holmberg, Paul Simmons

1. *Welcome.*

Ruth Shapiro welcomed everyone to the meeting.

2. *Approval of Minutes.*

Ruth Shapiro asked for a motion on the June meeting minutes. Minutes unanimously approved.

3. *Timeline.*

Tracy Fowler provided background of the subcommittee's work on strict liability instructions. Suggested that we start this month with CV 1060.

4. Discussion of Product Liability Instructions.

CV1060 (Enhanced Injury):
Marianna and Alyson expressed concern that the "over and above" language is included in both the introduction and element sections. Committee agreed that using both "increased" and "enhanced" in the introduction is also redundant. Tracy suggested that if we are to use the "over and above" language only once, it should be in the element section and not the introduction as we want the jury focused on the elements. Judge Kelly agreed. Tracy explained that defense members initially thought that the "over and above" should be used in all three places in the instruction. Plaintiff members struck it from the element section and final paragraph with no explanation.
Alyson suggested striking the second sentence of the introduction and keeping the "over and above" language in both the element section and final paragraph, but only if that language is consistent with precedent.

The committee discussed at length whether the "over and above" language is consistent with precedent. Committee discussed whether the phrase from precedent "beyond that which would have resulted from other causes" is better than the "over and above the harm that would have resulted" language.

Committee suggested to remove the second sentence of the introduction. Committee suggested to revise the second element to replace the "over and above" language to "beyond the harm that would have otherwise resulted from the event." Committee suggested to revise the final paragraph as follows:

"If you find that a product defect was a substantial factor in increasing the harm [name of plaintiff] experienced, beyond the harm that would have otherwise resulted from the event, then you must apportion the harm caused by the defect and other harms caused by the event."

Committee approved above-suggested changes.

CV10__ (Implied Indemnity - Introduction):

With regard to the indemnity-related instructions in the context of product liability, Tracy pointed out that there were a few members of the plaintiff subcommittee who did not believe these instructions should be included because indemnification issues rarely, if ever, come up in product liability. Tracy countered that it is important to be prepared for any such contingency and that relevant instructions should be available to juries when applicable.

The committee discussed whether indemnification instructions should be included elsewhere or if appropriate here in the context of product liability specifically.

The committee considered the possibility of including specific introductory or committee note instructions as to when to apply indemnification instructions.

The committee concluded that it would be best to revisit these issues at a later meeting when more members of the subcommittee are present.

5. *Adjournment.*

The meeting concluded at 5:38 p.m.

Tab 2

Subject	Sub-C in place?	Sub-C Members	Projected Starting Month	Projected Finalizing Month	Comments Back/Notes
Caselaw updates	-	-	*Ongoing*	*Ongoing*	
Products Liability Updates	Yes	Tracy Fowler, Paul Simmons, Nelson Abbott, and Todd Wahlquist	October-20	October 2021	
Implicit Bias	TBD	Judge Su Chon (chair)	May 2021	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>	November 2021	December 2021	
Pandemic	No	Judge Chiara			
Implicit Bias	TBD	Judge Su Chon (chair)	TBD	TBD	
Assault/ False Arrest	Yes	Rice, Mitch (chair); McAllister, 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

PRODUCT LIABIITY INSTRUCTIONS

Table of Contents

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], or [in the way that its users were warned.] To succeed on [name of plaintiff]'s claim, [name of plaintiff] must prove that: 1. There was a defect in the [product], 2. The defect in the [product] made it unreasonably dangerous, 3. The defect was present at the time of the [product]'s sale, and 4. The defect was a cause of [name of plaintiff]'s injuries. I will now explain what [name of plaintiff] is required to prove to satisfy these claims and 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	**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.**

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). 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:

CV1002 Strict liability. Definition of "design defect." **[Alternative A.] INFORMALLY APPROVED 2/8/2021.** [Name of plaintiff] claims that the product had a design defect. 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.] [Name of plaintiff] claims that the product had a design defect. 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	**Alternative A represents the Plaintiff group proposal; Alternative B represents the Defense group proposal.**

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
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.	
CV1003 Strict liability. Definition of "manufacturing defect." The [product] had a manufacturing defect if it differed from [(1) the manufacturer's design or specifications] or [(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. *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.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**
CV1004 Strict liability. Definition of "unreasonably dangerous." INFORMALLY APPROVED 1/2021.	**NOTE TO COMMITTEE:** **Alternative A is Plaintiff group proposal; Alternative B is Defense group proposal. Plaintiff group would make this**

[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. **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.	**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.

Committee Notes Alternative A is based on Utah Code Section 78B-6-702. Alternative B is based on *Brown v. Sears, Roebuck & Co.*, 328 F.3d 1274 (10th Cir. 2003), cited by the Utah Court of Appeals in *Niemela v. Imperial Mfg., Inc.*, 2011 UT App 333.	
CV1005 Strict liability. Duty to warn. INFORMALLY APPROVED 2/8/2021. [Name of plaintiff] claims that [he/she/it] 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 not required to warn about a danger from the [product]'s foreseeable use that is generally known and recognized.] [In other words,] [Name of defendant] was required to warn about a danger from the [product]'s foreseeable use of which [he/she/it] knew or reasonably should have known and that a reasonable user would not expect. **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**	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

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 bracketed 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'." [REVISIT THIS COMMITTEE NOTE BEFORE FINAL VOTE.]	
NOTE TO COMMITTEE: **Defense group's position is that this instruction should be retained. See Note to Committee in CV1002 above.** **CV1006 Strict liability. Elements of claim for failure to adequately warn. DEFER CONSIDERATION BASED ON**	**NOTE TO COMMITTEE:** **Plaintiff group would delete this instruction entirely. See Note to Committee in CV1002 above.**

CV1001. SUBCOMMITTEE WILL REVIEW.

[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 "warnings."	
CV1007 Strict liability. Definition of "adequate warning." INFORMALLY APPROVED 2/8/2021. 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." [REVISIT THIS FOR NUMBERING] 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,	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

detailing format headings and order of warning for particular drugs and medical devices.	
CV1008 Failure to warn. No adequate warning; Rebuttable presumption that an adequate warning would have been read and followed. INFORMALLY APPROVED 2/8/2021. 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 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"	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

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.	
CV1009 Failure to warn. Presumption that a warning will be read and followed. TRACY WILL DRAFT A FEW SENTENCES IN THE COMMITTEE NOTE. SHOULD "ADEQUATE" ALWAYS BE IN HERE? If you find that [name of defendant] gave an adequate warning, [name of defendant] could reasonably presume that the warning would be read and followed. A product bearing a 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**	**NOTE TO COMMITTEE:** **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.**

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. There is some disagreement among committee members as to whether the word "adequate" should appear in the instruction. This instruction is applicable to both negligence and strict product liability claims.	
CV1010 Strict liability. Component part manufacturer. Part defective only as incorporated into finished product. Informally approved March 8, 2021. [Name of defendant] [designed/manufactured/distributed/sold] a component part of the [product], namely, [describe component part.] If you find that the component part was not defective as [designed/manufactured/distributed/sold], but only became	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.** NEED SEPARATE INSTRUCTION ON WHAT IS COMPONENT PART VS. OTHER PARTS. ALSO NEED TO DRAFT COMMITTEE NOTE. Deal with integration issue in the contention instruction. Integration includes installation, incorporation, or the use of the component part in the finished product?

defective as a result of the way it was integrated into the final 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 final product; (2) The integration of the component part into the final product made the final 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 final 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** *Gudmundson v. Del Ozone*, 2010 UT 33, 232 P.3d 1059.	
NOTE TO COMMITTEE:	**PLAINTIFF GROUP DOES NOT BELIEVE THIS INSTRUCTION SHOULD BE INCLUDED AT ALL –**

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. **CV1011 Strict liability. Component part manufacturer. Defective part incorporated into finished product.** [Name of defendant] [designed/manufactured/distributed/sold] a component part of the [product]. [Name of plaintiff] claims that the component part of the [product] rendered the final product defective. If you find each of the following: (1) the component part was defective as [designed/manufactured/distributed/sold], (2) the defective part made the final 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 final product, liable to [name of plaintiff].	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. **SUBCOMMITTEE EITHER COMES UP WITH BETTER LANGUAGE TO EXPLAIN CV1011 OR INCORPORATES THE INSTRUCTION INTO A COMMITTEE NOTE TO CV1010 (BRING BOTH OPTIONS).**

References Utah Code Sections 78B-5-817 to 78B-5-823. Bylsma v. R.C. Willey, 416 P.3d 595 (2017) 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 final 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.	
CV1012 No design defect in FDA approved drugs. Informally approved March 8, 2021. 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**	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

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 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	**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

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.	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."
CV1013 – 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]. TOO MANY NEGATIVES **References** 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).	SUBCOMMITTEE PROPOSES 2 ALTERNATIVES: DISCUSS INSTRUCTION FURTHER (COMPROMISE) AND COMMENT LANGUAGE ON PRIOR INSTRUCTION. (LOOK AT OTHER JURISDICTIONS)

The case law doesn't define "clear evidence." This instruction is applicable to both negligence and strict product liability claims.	

CV1014 Sophisticated user. Informally approved 4/12/2021. [Name of defendant] claims that [name of plaintiff] was a sophisticated user of the [product]. To establish that [name of plaintiff] was a sophisticated user, [name of defendant] must prove that [name of plaintiff] either: (1) had special knowledge or expertise about [the dangerous or unsafe characteristic of the product]; or (2) belonged to a group or profession that generally knows about [the dangerous or unsafe characteristic 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.**
CV1015 Conformity with government standard. Informally approved 5/10/21.) 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 creates the presumption that the [product] is not defective.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

However, [name of plaintiff] may overcome this presumption by proving by a preponderance of evidence that the [product] was defective even though the manufacturer followed government laws, standards, or regulations. **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.	

CV1016 Product misuse. Informally approved 5/10/21. [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.**
CV1017 Product alteration. Informally approved 5/10/21. [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	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

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~~ has proved these points~~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.	

CV1018 Unreasonable use. (Assumption of a known risk.) **Informally approved 5/10/21.** [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 (4) that a reasonably prudent person would not have used the [product] under the circumstances. ~~If~~ If you find that[name of defendant] ~~proves~~ has proved these ~~things~~points, 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	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

CV1019 Comparative fault of Plaintiff. **Informally approved 5/10/21.**
[Name of defendant] claims that [name of plaintiff] ~~was~~ has~~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 decide that [name of plaintiff] has fault, you must decide how much fault. 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 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

NOTE TO COMMITTEE:

The two groups agree on this instruction.

CV211 Allocation of fault. [Name of party] claims that more than one person's fault was a cause of the harm. If you decide that more than one person is at fault, you must decide each person's percentage of fault that caused the harm. This allocation must total 100%. You may also decide to allocate a percentage to the plaintiff. [Name of plaintiff]'s total recovery will be reduced by the percentage that you attribute to [him]. If you decide that [name of plaintiff]'s percentage is 50% or greater, [name of plaintiff] will recover nothing. When you answer the questions on damages, do not reduce the award by [name of plaintiff]'s percentage. I will make that calculation later.

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).	

CV1020 Allocation Between Strict Liability Defendants, ~~and~~ Other at Fault Parties/Third Parties, and Plaintiff. Informally approved 5/10/21. [Name of party] claims that [name of other defendants/third-parties/plaintiff(s)] [was/were] [at fault] and that [their fault] was a cause of [name of plaintiff]'s harm. [Name of party] has the burden of proving that the fault of [name of other defendants/third-parties/plaintiff(s)]~~'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)/plaintiff(s)] [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 defendants/third-parties/plaintiff(s)]. 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.	**NOTE TO COMMITTEE:** **The two groups agree on this instruction.**

Allocation of Fault.

CV1021 Product unavoidably unsafe. START HERE NEXT MONTH (AND CV1055).

In response to [name of plaintiff]'s claim that the [product] was defective in design, [name of defendant] claims that the [product] was unavoidably unsafe and that it is therefore not at fault. Some products cannot be made safe for their intended use, but their benefits are great enough to justify their risks of harm. A knife is an example, since a knife blade must be sharp to serve its purpose, but the sharp blade poses a risk of injury.

To establish the defense that the [product] was unavoidably unsafe, [name of defendant] must prove that:

(1) when the [product] was made, it could not be made safe for its intended use even applying the best available testing and research; and

(2) the benefits of the [product] justified its risk.

[This defense is unavailable if the plaintiff proves that the product was improperly manufactured or contained inadequate directions or warnings.]

References

Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991).
Restatement (Second) of Torts §402A, cmt. k.
Burningham v. Wright Medical Technology, Inc. 2019 UT 56.
Wankier v. Crown Equipment Co., 353 F.3d 862 (10th Cir. 2003).

Allen Minnstar, Inc., 8 F.3d 1470 (10th Cir. 1993).

Committee Notes
Some committee members believe that the jury should be permitted to consider whether the safety features are cost prohibitive in determining whether the product was unavoidably unsafe.

The bracketed sentence may be omitted if there is no manufacturing or warning claim presented to the jury.

CV1022 Learned intermediary.
A [designer] [manufacturer] of [prescription drugs] [medical devices] has a duty to warn only the [prescribing] [implanting] physician , not the patient, of the risks associated with the [drug] [medical device]. If you find that the [designer] [manufacturer] gave appropriate warnings to the physician, you must find that the [designer] [manufacturer] fulfilled its duty to warn.

References
Schaerrer v. Stewart's Plaza Pharmacy, Inc., 79 P.3d 922 (Utah 2003).
Tingey v. Radionics, 193 Fed. Appx. 747, 757 n.4 (10th Cir. 2006).

Committee Notes
Note, the learned intermediary rule does not preclude a negligence claim against a pharmacist for dispensing drug that has been withdrawn from the market. -*See Downing v Hyland Pharmacy*, 2008 UT 65.

CV1023 Product liability – No Duty to Make a Safe Product Safer~~.~~.

[Name of defendant] may market a non-defective product even if a safer model is available. There is no duty to make a safe product safer. [Name of defendant] has no duty to inform the consumer of the availability of the safer model.

Reference

Slisze v. Stanley-Bostitch, 1999 UT 20, ¶¶ 10 & 13, 979 P.2d 317

Committee Note

It is undecided whether this instruction is applicable to strict liability claims; but is clear it applies to negligence claims.

CV1024 Later remedial measures.

Any evidence you have heard about design changes with respect to the [product] made after the [accident] [injury] [product was designed/manufactured] cannot be considered to prove negligence, culpable conduct, a defect in the product, a defect in the [product]'s design, or a need for a warning or instruction. However, you may consider such evidence for other purposes, such as proof of [ownership] [control] [the feasibility of precautionary measures] or to impeach a witness's testimony.

References

~~Utah Code Section 78B-6-703.~~

Misener v. General Motors, 924 F. Supp. 130, 132-33 (D. Utah 1996).

Utah R. Evid. 407.

Committee Notes

This instruction should only be given if evidence of later remedial measures is admitted at trial. Some committee members believe that the relevant time frame for consideration of subsequent remedial measures is based on the date the accident occurred. See Misener v. General Motors, 924 F. Supp. 130, 132-33 (D. Utah 1996). Other committee members believe that the relevant time frame for consideration of product defect according to Utah's Product Liability Act is when the product was designed or manufactured; therefore, subsequent remedial measures that occurred after the design or manufacture are irrelevant. See Utah Code Section 78B-6-703. Two alternatives are presented to reflect these viewpoints.

CV1025 Allergic reaction or hypersensitivity.

The [manufacturer] [designer] of a [product] is entitled to assume that the [product] will be put to "normal use" by a "normal person." If you find that [name of plaintiff]' s injuries in this case resulted from an allergy or physical hypersensitivity that most people do not have and [name of defendant] did not know about, then [name of defendant] cannot be liable for [name of plaintiff]'s injuries.

References

Bennett v. Pilot Products Co., 235 P.2d 525 (Utah 1951).
Restatement 3d Torts: Product ~~Liaiblity~~Liability § 2, cmt. k.

CV1026 Enhanced Injury Instruction.

[Name of plaintiff] has brought what is called an enhanced injury claim. An enhanced injury occurs if an injury caused by some other event is increased or enhanced over and above the harm that would have otherwise resulted from the event, as a result of a defective product.

To establish an enhanced injury claim, [name of plaintiff] must prove all of the following:

(1) The product had a [design] [manufacturing] [warning] defect that made it unreasonably dangerous; and

(2) That defect was a substantial factor in increasing the harm [name of plaintiff] experienced~~, over and above the harm that would have otherwise resulted from the event~~.

If you find that a product defect was a substantial factor in increasing the harm [name of plaintiff] experienced, ~~over and above the harm that would have otherwise resulted from the event,~~ then you must apportion the harm caused by the defect and the harm caused by the other event.

References

Egbert v. Nissan North America, 2007 UT 64, ¶ 19.
Egbert v. Nissan Motor Co., Ltd., 2010 UT 8, ¶¶ 23, 37 & 40.
Bylsma v. R.C. Willey, 2017 UT 85.
Restatement (Third) of Torts: Products Liability § 16(a).

CV1027 Implied Indemnity - Introduction

One who [is required to pay] [may be required to pay] [has paid] damages for causing injury to another may be reimbursed for that sum from another party in certain circumstances, which will be explained to you in the following instructions.

This is known as indemnity.

References

Bylsma v. R.C. Willey, 2017 UT 85.
Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes

Though it had been thought that the Liability Reform Act abolished implied indemnity claims, the Utah Supreme Court explained this was not the case in Bylsma v. R.C. Willey, 2017 UT 85, noting implied indemnity was the "only place where culpability factors into the products liability equation at all." Id. at ¶32. "Implied indemnity is a doctrine applying in a limited number of scenarios that shifts the entire burden of a plaintiff's loss from a non-culpable party to a culpable party." Id. "This right of implied indemnification is accorded to a retailer against the manufacturer of an alleged defective product regardless of whether the seller is found liable to the purchaser under a strict liability theory in tort or that of breach of warranty." Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443, 446 (Utah Ct. App. 1988). There may be instances where a manufacturer seeks indemnity from a retailer, such as when the manufacturer delegates some aspect of manufacture, e.g. final assembly or inspection, to a subsequent seller. Bylsma at ¶34, n. 62 (quoting RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. c (AM. LAW INST. 1998)).

CV1028 Elements of Indemnity Claim

[Claimed indemnitee] claims that [s/he/it] is entitled to indemnity from [alleged indemnitor]. [Claimed indemnitee] must prove [alleged indemnitor]'s conduct in the [design] [manufacture] [warning] [distribution] of the [product] is more culpable than [claimed indemnitee]'s conduct.

References

Bylsma v. R.C. Willey, 2017 UT 85.
Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes

CV1029 Considerations for Determining the More Culpable Party.

When considering whether [alleged indemnitor] was the more culpable party in causing [underlying plaintiff's] [injuries][damages], you may consider:

[who designed or manufactured the [product];]

[who participated in the design, manufacture, or assembly of the [product];]

[who was charged with conducting a final inspection of the [product];]

[whether any party was aware of the alleged defect at the time the [product] was sold;]

[whether [claimed indemnitee] was negligent in failing to discover the defect prior to distribution;]

[whether the [product] was defective when it left [claimed indemnitor]'s possession;]

[whether [claimed indemnitee] breached its warranty to [plaintiff];]

[the relative knowledge and specialization of the parties;] and

[insert any other factors regarding the parties' knowledge, control, and/or conduct as the case warrants.]

The difference in the conduct of the parties must be a difference in quality or nature, rather than in quantity.

References

Bylsma v. R.C. Willey, 2017 UT 85.
Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).
Restatement (Third) of Torts: Apportionment Liab. § 22 (2000).

Committee Notes

"[T]he purpose of implied indemnity is to shift the burden from an individual passive retailer—who bears no fault in the usual sense of the word—onto the party responsible for the defect, the manufacturer." Bylsma v. R.C. Willey, 2017 UT 85, ¶33. The factors identified above should be adjusted to account for the particular facts and circumstances of the case. Additional factors may be appropriate.

CV1030 Nature of the Indemnity Case

[Alternative 1]

[1] In addition to [plaintiff]'s claim[s] against [name of defendants] in this case, [cross-claimant] claims [s/he/it] is entitled to indemnity from [name of cross-defendant] for any sum [cross-claimant] may become liable to pay [plaintiff].

[2] [cross-claimant] claims that if [s/he/it] is found liable to [plaintiff], [cross-claimant] is entitled to indemnity because [cross-defendant]'s conduct was more culpable in [designing] [manufacturing] [distributing] the [product] in causing the [injuries] [damages] to [plaintiff], if any, than [cross-claimant]'s conduct in distributing the [product] to [plaintiff].

[3] [Insert brief description of cross-defendant's defenses.]

[Alternative 2]

[1] In addition to [plaintiff]'s claim[s] against [defendant(s)] in this case, [third party plaintiff] claims [s/he/it] is entitled to indemnity from [third party defendant] for any sum [third party plaintiff] may become liable to pay [plaintiff] because [third party defendant] [manufactured] [designed] [distributed] the [product].

[2] [Third party plaintiff] claims that if [s/he/it] is found liable to [plaintiff], [third party plaintiff], is entitled to indemnity because [third party defendant]'s conduct was more culpable in [designing] [manufacturing] [distributing] the [product] in causing the [injuries] [damages], if any, to [plaintiff] than [third-party plaintiff]'s conduct in distributing the [product] to

[plaintiff].

[3] [Insert brief description of third party defendant's defenses.]

[Alternative 3]

[1] In a separate legal proceeding, [claimed indemnitee] was required to pay money to respond to allegations that [product] was defective and caused [injuries] [damages] to [name of underlying plaintiff]. [Claimed indemnitee] now seeks indemnity for that sum [plus attorneys fee] from [alleged indemnitor] because [alleged indemnitor]'s actions in [designing] [manufacturing] [distributing] the [product] are more culpable in causing [underlying plaintiff]'s [injuries] [damages] than [claimed indemnitee]'s conduct in distributing the [product] to [underlying plaintiff].

[2] [Insert brief description of claimed indemnitor's defenses.]

References
Bylsma v. R.C. Willey, 2017 UT 85.

Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes
Alternative 1 is to be given when indemnitee and indemnitor are identified as tortfeasors in the plaintiff's complaint.

Alternative 2 is to be given when indemnitor is not charged as a tortfeasor in the plaintiff's complaint and the claim for implied indemnity is tried concurrently.

Alternative 3 is to be given when the indemnitor was not party to the action in which the third-party plaintiff incurred liability,

attorneys' fees, and costs. Due to the factors discussed in Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988), Alternative 3 is provided as a basic template and should be adapted to account for the specific circumstances of the case, e.g. whether a judgment has been entered or if there is a finding in the prior action that the product was defective. Id.

There are other procedural postures under which an implied indemnity case may be presented to the jury. These instructions may be modified to address those situations.

CV1031 Absence of Liability to Original Plaintiff

If you decide [claimed indemnitee] is not liable to [plaintiff], you will have no occasion to consider the question of indemnity.

References

Bylsma v. R.C. Willey, 2017 UT 85.
Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes

This instruction is to be used when the question of indemnity is tried concurrently with the underlying plaintiff's claims.

AFFIRMATIVE DEFENSES AND INDEMNITY INSTRUCTIONS

CV1054 Product unavoidably unsafe. Informally approved 5/10/21.

In response to [name of plaintiff]'s claim that the [product] was defective in design, [name of defendant] claims that the [product] was unavoidably unsafe and that it is therefore not at fault. Some products cannot be made safe for their intended use, but their benefits are great enough to justify their risks of harm. A knife is an example since a knife blade must be sharp to serve its purpose, but the sharp blade poses a risk of injury.

To establish the defense that the [product] was unavoidably unsafe, [name of defendant] must prove that:

(1) when the [product] was made, it could not be made safe for its intended use even applying the best available testing and research; and

(2) the benefits of the [product] justified its risk.

[This defense only applies to design defect claims. It does not apply to plaintiff's separate claims that the product was improperly manufactured or contained inadequate directions or warnings.]

References

Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991).
Restatement (Second) of Torts §402A, cmt. k.
Burningham v. Wright Medical Technology, Inc. 2019 UT 56.

Wankier v. Crown Equipment Co., 353 F.3d 862 (10th Cir. 2003).

Allen Minnstar, Inc., 8 F.3d 1470 (10th Cir. 1993).

Committee Notes

Some committee members believe that the jury should be permitted to consider whether the safety features are cost prohibitive in determining whether the product was unavoidably unsafe.

The bracketed sentence may be omitted if there is no manufacturing or warning claim presented to the jury.

CV1055 Learned intermediary. START WITH THIS NEXT TIME.

A [designer] [manufacturer] of [prescription drugs] [medical devices] has a duty to warn only the [prescribing] [implanting] physician, not the patient, of the risks associated with the [drug] [medical device]. If you find that the [designer]

[manufacturer] gave appropriate warnings to the physician, you must find that the [designer] [manufacturer] fulfilled its duty to warn.

References

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 79 P.3d 922 (Utah 2003).

Tingey v. Radionics, 193 Fed. Appx. 747, 757 n.4 (10th Cir. 2006).

Committee Notes

Note, the learned intermediary rule does not preclude a negligence claim against a pharmacist for dispensing drug that has been withdrawn from the market. -*See Downing v Hyland Pharmacy*, 2008 UT 65.

CV1057 Product liability – No Duty to Make a Safe Product Safer.

[Name of defendant] may market a non-defective product even if a safer model is available. There is no duty to make a safe product safer. [Name of defendant] has no duty to inform the consumer of the availability of the safer model.

Reference

Slisze v. Stanley-Bostitch, 1999 UT 20, ¶¶ 10 & 13, 979 P.2d 317

Committee Note

It is undecided whether this instruction is applicable to strict liability claims; but is clear it applies to negligence claims.

Comment [A1]: This instruction is inappropriate. Duty is generally a question of law. If negligence, the court will have already granted an MSJ on the issue of whether the mfg. owed a duty to provide a safer product or to inform consumer of same. If strict liability, it is inappropriate to import a negligence based defense and, further, Slisze does not support giving the instruction.

Comment [A2]: Existing instruction. no change in the law, and Slisze states: We have never, nor has any other jurisdiction, recognized a duty on the part of a manufacturer to refrain from marketing a non-defective product when a safer model is available, or a duty to inform the consumer of the availability of the safer model.

Slisze v. Stanley-Bostitch, 1999 UT 20, ¶ 10, 979 P.2d 317, 320, Prod. Liab. Rep. (CCH) P 15463, 364 Utah Adv. Rep. 52, 1999 WL 112299

Comment [A3]: Plaintiffs disagree. It is not clear as noted in above comment.

CV1057 Later remedial measures.

Any evidence you have heard about design changes with respect to the [product] made after the [accident] [injury] [product was designed/manufactured] cannot be considered to prove negligence, culpable conduct, a defect in the product, a defect in the [product]'s design, or a need for a warning or instruction. However, you may consider such evidence for other purposes, such as proof of [ownership] [control] [the feasibility of precautionary measures] or to impeach a witness's testimony.

References

~~Utah Code Section 78B-6-703.~~

Misener v. General Motors, 924 F. Supp. 130, 132-33 (D. Utah 1996).

Utah R. Evid. 407.

Committee Notes

This instruction should only be given if evidence of later remedial measures is admitted at trial. Some committee members believe that the relevant time frame for consideration of subsequent remedial measures is based on the date the accident occurred. See Misener v. General Motors, 924 F. Supp. 130, 132-33 (D. Utah 1996). Other committee members believe that the relevant time frame for consideration of product defect according to Utah's Product Liability Act is when the product was designed or manufactured; therefore, subsequent remedial measures that occurred after the design or manufacture are irrelevant. See Utah Code Section 78B-6-703. Two alternatives are presented to reflect these viewpoints.

CV1058 Allergic reaction or hypersensitivity.

The [manufacturer] [designer] of a [product] is entitled to assume that the [product] will be put to "normal use" by a "normal person." If you find that [name of plaintiff]' s

Comment [A4]: This instruction should not be given. There is no recent Utah law in support and the instruction is contrary to other Utah cases. *Bennett* was decided before Utah adopted strict products liability, and it doesn't seem to square with the cases that say a defendant takes a plaintiff as he finds him (the so-called thin skull or eggshell plaintiff doctrine), which Utah follows. *See Harris v. Shopko Stores, Inc.*, 2013 UT 34, ¶ 23, 308 P.3d 449.

injuries in this case resulted from an allergy or physical hypersensitivity that most people do not have and [name of defendant] did not know about, then [name of defendant] cannot be liable for [name of plaintiff]'s injuries.

References

Bennett v. Pilot Products Co., 235 P.2d 525 (Utah 1951).

Restatement 3d Torts: Product ~~Liaiblity~~Liability § 2, cmt. k.

CV1060 Enhanced Injury Instruction.

[Name of plaintiff] has brought what is called an enhanced injury claim. An enhanced injury occurs if an injury caused by some other event is increased or enhanced over and above the harm that would have otherwise resulted from the event, as a result of a defective product.

To establish an enhanced injury claim, [name of plaintiff] must prove all of the following:

(1) The product had a [design] [manufacturing] [warning] defect that made it unreasonably dangerous; and

(2) That defect was a substantial factor in increasing the harm [name of plaintiff] experienced~~, over and above the harm that would have otherwise resulted from the event~~.

If you find that a product defect was a substantial factor in increasing the harm [name of plaintiff] experienced, ~~over and above the harm that would have otherwise resulted from the event,~~ then you must apportion the harm caused by the defect and the harm caused by the other event.

Comment [A5]: *k. Warnings: adverse allergic or idiosyncratic reactions.* Cases of adverse allergic or idiosyncratic reactions involve a special subset of products that may be defective because of inadequate warnings. Many of these cases involve nonprescription drugs and cosmetics. However, virtually any tangible product can contain an ingredient to which some persons may be allergic. Thus, food, nonprescription drugs, toiletries, paint, solvents, building materials, clothing, and furniture have all been involved in litigation to which this Comment is relevant. Prescription drugs and medical devices are also capable of causing allergic reactions, but they are governed by § 6. The general rule in cases involving allergic reactions is that a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic. The degree of substantiality is not precisely quantifiable. Clearly the plaintiff in most cases must show that the allergic predisposition is not unique to the plaintiff. In determining whether the plaintiff has carried the burden in this regard, however, the court may properly consider the severity of the plaintiff's harm. The more severe the harm, the more justified is a conclusion that the number of persons at risk need not be large to be considered "substantial" so as to require a warning. Essentially, this reflects the same risk-utility balancing undertaken in warnings cases generally. But courts explicitly impose the requirement of substantiality in cases involving adverse allergic reactions.
The ingredient that causes the allergic reaction must be one whose danger or whose presence in the product is not generally known to consumers. When both the presence of an allergenic ingredient in the product and the risks presented by such ingredient are widely known, instructions and warnings about that danger are unnecessary. When the presence of the allergenic ingredient would not be anticipated by a reasonable user or consumer, warnings concerning its presence are required. Similarly, when the presence of the ingredient is generally known to consumers, but its dangers are not, a warning of the dangers must be given.

Comment [A6]: Defendants disagree to removing this language. It is present in both Egbert cases.

Comment [A7]: Same comment as above.

References

Egbert v. Nissan North America, 2007 UT 64, ¶ 19.

Egbert v. Nissan Motor Co., Ltd., 2010 UT 8, ¶¶ 23, 37 & 40.

Bylsma v. R.C. Willey, 2017 UT 85.

Restatement (Third) of Torts: Products Liability § 16(a).

CV10--- Implied Indemnity - Introduction

One who [is required to pay] [may be required to pay] [has paid] damages for causing injury to another may be reimbursed for that sum from another party in certain circumstances, which will be explained to you in the following instructions.

This is known as indemnity.

References

Bylsma v. R.C. Willey, 2017 UT 85.

Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes

Though it had been thought that the Liability Reform Act abolished implied indemnity claims, the Utah Supreme Court explained this was not the case in Bylsma v. R.C. Willey, 2017 UT 85, noting implied indemnity was the "only place where culpability factors into the products liability equation at all." Id. at ¶32. "Implied indemnity is a doctrine applying in a limited number of scenarios that shifts the entire burden of a plaintiff's loss from a non-culpable party to a culpable party." Id. "This right of implied indemnification is accorded to a retailer against the manufacturer of an alleged defective product regardless of whether the seller is found liable to the purchaser under a strict liability theory in tort or that of breach of warranty." Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443, 446 (Utah Ct. App. 1988). There may be instances where a manufacturer seeks indemnity from a retailer, such as when the manufacturer delegates some aspect of manufacture, e.g. final assembly or inspection, to a subsequent seller. Bylsma at ¶34, n. 62 (quoting RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. c (AM. LAW INST. 1998)).

CV10--- Elements of Indemnity Claim

[Claimed indemnitee] claims that [s/he/it] is entitled to indemnity from [alleged

Comment [A8]: Any claim for indemnity from a co-defendant is entirely premature at this stage because no liability has been established. These instructions, and the decisions by fact-finders, have no place in a product liabiltiy case.
The implied indemnity claim may not even be part of the same case. (*See* Nature of the Indemnity Case, Alternative 3, *infra.)*
Moreover, the law of implied indemnity in products liability has not been developed yet. *Bylsma* left a lot of questions unresolved, as evidenced by Justice Lee's concurring opinion in that case. Instructions on these issues should be developed through the adversarial process, rather than speculative guesswork by the MUJI committee as to which way the law will flow. None of the following instructions are currently supported by Utah law.

Comment [A9]: Bylsma, Para. 82: " That party would then have
the right to assert an indemnification claim against the manufacturer or other entities responsible for the defect in the product either as a cross-claim or a third-party claim in the original action or, if it so elects, in a separate proceeding altogether."

indemnitor]. [Claimed indemnitee] must prove [alleged indemnitor]'s conduct in the [design] [manufacture] [warning] [distribution] of the [product] is more culpable than [claimed indemnitee]'s conduct.

References

Bylsma v. R.C. Willey, 2017 UT 85.

Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes

CV10--- Considerations for Determining the More Culpable Party.

When considering whether [alleged indemnitor] was the more culpable party in causing [underlying plaintiff's] [injuries][damages], you may consider:

[who designed or manufactured the [product];]

[who participated in the design, manufacture, or assembly of the [product];]

[who was charged with conducting a final inspection of the [product];]

[whether any party was aware of the alleged defect at the time the [product] was sold;]

[whether [claimed indemnitee] was negligent in failing to discover the defect prior to distribution;]

[whether the [product] was defective when it left [claimed indemnitor]'s possession;]

[whether [claimed indemnitee] breached its warranty to [plaintiff];]

[the relative knowledge and specialization of the parties;] and

[insert any other factors regarding the parties' knowledge, control, and/or conduct as the case warrants.]

The difference in the conduct of the parties must be a difference in quality or nature, rather than in quantity.

References

Bylsma v. R.C. Willey, 2017 UT 85.

Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Restatement (Third) of Torts: Apportionment Liab. § 22 (2000).

Committee Notes

"[T]he purpose of implied indemnity is to shift the burden from an individual passive retailer—who bears no fault in the usual sense of the word—onto the party responsible for the defect, the manufacturer." Bylsma v. R.C. Willey, 2017 UT 85, ¶33. The factors identified above should be adjusted to account for the particular facts and circumstances of the case. Additional factors may be appropriate.

CV10--- Nature of the Indemnity Case

[Alternative 1]

[1] In addition to [plaintiff]'s claim[s] against [name of defendants] in this case, [cross-claimant] claims [s/he/it] is entitled to indemnity from [name of cross-defendant] for any sum [cross-claimant] may become liable to pay [plaintiff].

[2] [cross-claimant] claims that if [s/he/it] is found liable to [plaintiff], [cross-claimant] is entitled to indemnity because [cross-defendant]'s conduct was more culpable in [designing] [manufacturing] [distributing] the [product] in causing the [injuries] [damages] to [plaintiff], if any, than [cross-claimant]'s conduct in distributing the [product] to [plaintiff].

[3] [Insert brief description of cross-defendant's defenses.]

[Alternative 2]

[1] In addition to [plaintiff]'s claim[s] against [defendant(s)] in this case, [third party plaintiff] claims [s/he/it] is entitled to indemnity from [third party defendant] for any sum [third party plaintiff] may become liable to pay [plaintiff] because [third party defendant] [manufactured] [designed] [distributed] the [product].

[2] [Third party plaintiff] claims that if [s/he/it] is found liable to [plaintiff], [third party plaintiff], is entitled to indemnity because [third party defendant]'s conduct was more culpable in [designing] [manufacturing] [distributing] the [product] in causing the [injuries] [damages], if any, to [plaintiff] than [third-party plaintiff]'s conduct in distributing the [product] to [plaintiff].

[3] [Insert brief description of third party defendant's defenses.]

[Alternative 3]

[1] In a separate legal proceeding, [claimed indemnitee] was required to pay money to respond to allegations that [product] was defective and caused [injuries] [damages] to [name of underlying plaintiff]. [Claimed indemnitee] now seeks indemnity for that sum [plus attorneys fee] from [alleged indemnitor] because [alleged indemnitor]'s actions in [designing] [manufacturing] [distributing] the [product] are more culpable in causing [underlying plaintiff]'s [injuries] [damages] than [claimed indemnitee]'s conduct in distributing the [product] to [underlying plaintiff].

[2] [Insert brief description of claimed indemnitor's defenses.]

References

Bylsma v. R.C. Willey, 2017 UT 85.

Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes

Alternative 1 is to be given when indemnitee and indemnitor are identified as tortfeasors in the plaintiff's complaint.

Alternative 2 is to be given when indemnitor is not charged as a tortfeasor in the plaintiff's complaint and the claim for implied indemnity is tried concurrently.

Alternative 3 is to be given when the indemnitor was not party to the action in which the third-party plaintiff incurred liability, attorneys' fees, and costs. Due to the factors discussed in Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988), Alternative 3 is provided as a basic template and should be adapted to account for the specific circumstances of the case, e.g. whether a judgment has been entered or if there is a finding in the prior action that the product was defective. Id.

There are other procedural postures under which an implied indemnity case may be presented to the jury. These instructions may be modified to address those situations.

CV10--- Absence of Liability to Original Plaintiff

If you decide [claimed indemnitee] is not liable to [plaintiff], you will have no occasion to consider the question of indemnity.

References

Bylsma v. R.C. Willey, 2017 UT 85.

Hanover Ltd. v. Cessna Aircraft Co., 758 P.2d 443 (Utah Ct. App. 1988).

Committee Notes

This instruction is to be used when the question of indemnity is tried concurrently with the underlying plaintiff's claims.

Tab 4

CV___ Boundary by Acquiescence

[Plaintiff] and [Defendant] are adjoining landowners. [Plaintiff] claims that a visible [fence, monument, building, or natural features treated as a boundary] between [Plaintiff's] property and [Defendant's] property is a "boundary by acquiescence," that should be recognized as the legal boundary between the properties.

For you to find that [Plaintiff] has established the boundary by acquiescence that [he or she] claims, you must be satisfied that [Plaintiff] has proved each of the following elements by clear and convincing evidence:

1. There is a visible line between [Plaintiff's] property and [Defendant's] property that is marked by a [fence, monument, building, or natural features treated as a boundary;]

2. The past or present owners of [Plaintiff's] property occupied [Plaintiff's] property up to the visible line in a manner that would give a reasonable landowner notice that the past or present owners of [Plaintiff's] property were using the line as a boundary;

3. The past or present owners of [Plaintiff] and [Defendant's] properties mutually acquiesced in the line as a boundary between the properties;

4. For a continuous period of at least 20 years.

References:
Anderson v. Fautin, 2016 UT 22, ¶ 8, 379 P.3d 1186
RHN Corp. v. Veibell, 2004 UT 60, ¶ 23, 96 P.3d 935
Martin v. Lauder, 2010 UT App 216, ¶ 5, 239 P.3d 519
Q-2, LLC v. Hughes, 2014 UT App 19, ¶ 8, 319 P.3d 732
Ault v. Holden, 2002 UT 33, ¶ 18, 44 P.3d 781

CV118 Clear and convincing evidence.

Some facts in this case must be proved by a higher level of proof called "clear and convincing evidence." When I tell you that a party must prove something by clear and convincing evidence, I mean that the party must persuade you, by the evidence, to the point that there remains no serious or substantial doubt as to the truth of the fact. Proof by clear and convincing evidence requires a greater degree of persuasion than proof by a preponderance of the evidence but less than proof beyond a reasonable doubt.

I will tell you specifically which of the facts must be proved by clear and convincing evidence.

References

Essential Botanical Farms, LC v. Kay, 2011 UT 71.
Jardine v. Archibald, 279 P.2d 454 (Utah 1955).
Greener v. Greener, 212 P.2d 194 (Utah 1949).
See also, Kirchgestner v. Denver & R.G.W.R. Co., 233 P.2d 699 (Utah 1951).

CV____ Mutual Acquiescence

Acquiescence means the same thing as indolence or consent by silence. Direct evidence of a landowner's subjective belief concerning the boundary is not required to show acquiescence. Acquiescence may be inferred from the evidence.

You may consider the landowner's actions, or lack of actions, as evidence that the landowner impliedly consented, or acquiesced, in the visible line as the boundary between the properties.

References:
Anderson v. Fautin, 2016 UT 22, ¶¶ 24, 30, 379 P.3d 1186
RHN Corp. v. Veibell, 2004 UT 60, ¶ 23, 96 P.3d 935
Martin v. Lauder, 2010 UT App 216, ¶ 5, 239 P.3d 519
Q-2, LLC v. Hughes, 2014 UT App 19, ¶ 8, 319 P.3d 732
Ault v. Holden, 2002 UT 33, ¶ 18, 44 P.3d 781

Points for Discussion

1) Should we include a more specific instruction of "visible line" or "occupation"?
2) Should we include an instruction about a defendant's silence not being evidence of acquiescence where the defendant could not access the property?