Agenda
Advisory Committee on Model Civil Jury Instructions

May 21, 2007
4:00 to 6:00 p.m.

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

Approval of minutes	John Young
Product Liability	Tracy Fowler

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

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

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

June 11, 2007
July 9, 2007
August 13, 2007
September 10, 2007
October 15, 2007 (3d Monday)
November 19, 2007 (3d Monday)
December 10, 2007

MINUTES

Advisory Committee on Model Civil Jury Instructions
April 16, 2007
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Francis J. Carney, Phillip S. Ferguson, Tracy H. Fowler, Colin P. King, Timothy M. Shea, and Paul M. Simmons

Excused: John L. Young (chair)

1. Mr. Shea circulated with the meeting materials a revision of the introduction that included a new paragraph explaining why alternative instructions were sometimes included. The committee approved the new paragraph.

2. The committee then continued its review of the products liability instructions.

a. *1007. Strict liability. Definition of "adequate warning."* Mr. Shea had rewritten this instruction in light of the article on Nevada law regarding the adequacy of warnings discussed at the last meeting. Mr. Simmons noted that the law the Nevada Supreme Court relied on was identical to the law quoted by the Utah Court of Appeals in *House v. Armour of America*, 8886 P.2d 542, 551 (1994). Messrs. Ferguson and Fowler thought the first element (that the warning "catch the user's attention") was misleading. The warning may not catch the user's attention for reasons that do not have to do with the adequacy of the warning. This element was changed to read, "(1) be designed to reasonably catch the user's attention." Mr. Ferguson thought the phrase "ordinary knowledge common to foreseeable users" in the second element was cumbersome. At Mr. Shea's suggestion, the second element was revised to read, "(2) be understandable to foreseeable users." Mr. Ferguson thought that the third element was misleading in that it suggested that a manufacturer may have a duty to warn about dangers that could arise from unforeseeable uses of its product. He suggested changing it to read, "(3) identify dangers from the [product]'s foreseeable use." Mr. Carney suggested revising it to read simply, "(3) identify the specific danger." The committee noted that the phrase "identify the specific danger from the [product] or from its foreseeable use" was meant to require warnings for products that could be dangerous without being used and those that were only dangerous when used; it was not meant to require warnings of dangers that arose only from unforeseeable uses. Mr. King noted that "hazard," "risk," and "danger" were sometimes used interchangeably and suggested that we use one term consistently. Mr. Shea noted that the instructions use "danger." Mr. Shea asked whether the third element should say "identify" or "indicate." The committee did not have a strong preference for one word over the other. Based on the authority cited for the instruction, the third element was revised to read, "(3) fairly indicate the danger from the [product] or its foreseeable use." Mr. Fowler thought that the word "intense" in the fourth element was inapt. At his suggestion, it was changed to "conspicuous." At Mr. Ferguson's and Mr.

Shea's suggestion, the last paragraph of the instruction was deleted, and the third paragraph was made new instruction 1008.

b. *1008 [renumbered 1009]. Strict liability. Definition of "unreasonably dangerous" in failure-to-warn cases.* Mr. Ferguson asked whether the instruction should say that a product "was" unreasonably dangerous or "is" unreasonably dangerous. Mr. Shea noted that he had tried to use the past tense throughout the instructions because it fit better in most cases. Mr. Shea noted that alternative A was the regular instruction on "unreasonably dangerous," based on Utah Code section 78-15-6(2); the first paragraph of alternative B was based on the Utah Supreme Court's decision in *House,* 929 P.2d 340 (Utah 1996), and the second paragraph was based on *Brown v. Sears, Roebuck & Co.,* 328 F.3d 1274 (10th Cir. 2003). Mr. King questioned the need for a separate definition of "unreasonably dangerous" for failure-to-warn cases. Mr. Fowler noted that, if *House* established a new standard for failure-to-warn cases, the instruction did not capture it because the instruction was not substantially different from instruction 1005. Mr. King proposed doing away with instruction 1008 and having a single instruction (1005) defining "unreasonably dangerous." The phrase "[or inadequate warning]" could be added to the introductory sentences of alternatives A and B in instruction 1005.

Mr. Shea will revise instruction 1005, and the committee will review the revised version and compare it to instruction 1008 at the next meeting.

c. *1009. Strict liability. Failure to warn. Heeding presumption.* Judge Barrett questioned whether jurors would understand the word "heeding." The committee noted that the presumption is referred to as the "heeding presumption" in the case law but suggested synonyms for "heeded," including "followed" and "obeyed." Mr. King noted that he agreed with the substance of the instruction but questioned whether it needed to be given at all since the issue rarely comes up. Mr. King also suggested revising the first sentence of the advisory committee note to say, "This instruction is appropriate only if it cannot be demonstrated what the plaintiff would have done if he had been adequately warned." Mr. Simmons thought that a plaintiff should have the benefit of the presumption where he could not say what he would have done, since he had been deprived of the opportunity to know what he would have done by not having been given an adequate warning; any testimony as to what the plaintiff would or would not have done would be speculative. Other committee members thought that if the plaintiff could not say what he would have done, he could not meet his burden of proof and that the presumption only applied where the plaintiff was unable to say what he would have done because of the nature of his injuries (such as where he had lost his memory or was dead). Mr. Shea noted that the instruction required "some extreme mental gymnastics" because of its structure--three conditional "if" clauses, one of which negates the other two. Mr. Carney questioned whether the first clause was necessary. Mr. King suggested revising

the instruction to read, "You can presume that if [name of defendant] had provided an adequate warning, [name of plaintiff] would have heeded it." Mr. Fowler noted that that version assumes that the warning was not adequate. Mr. Shea suggested revising the instruction to read, "If you find that [name of defendant] did not provide an adequate warning, you can presume that [name of plaintiff] would have followed an adequate warning." Mr. King suggested another alternative: "In this case, there is no evidence of what the plaintiff would have done if [name of defendant] provided an adequate warning. Therefore, you should presume that [name of plaintiff] would have followed an adequate warning." Mr. Ferguson asked whether there were other instructions that explained to the jury what a presumption was and its effect. Committee members were not aware of any. Mr. Simmons noted that the law is not clear on the effect of a presumption. He read passages from *House v. Armour of America,* 886 P.2d 542, 552 (Utah Ct. App. 1994), which says the heeding presumption "shifts the plaintiff's burden on causation," and from *Mecham v. Allen,* 1 Utah 2d 29, 262 P.2d 285, 290-91 (1953), which suggests that a presumption meets the plaintiff's burden of establishing a prima facie case but disappears when contrary evidence is presented. He concluded from these cases that the effect of the presumption may vary, depending on whether the presumption just establishes a prima facie case, in which case it disappears as soon as the other side comes forward with contrary evidence, and the jury should not be instructed on the presumption, or whether it shifts the burden of proof, in which case, the jury should probably be instructed on the changed burden of proof. Mr. King suggested that the committee re-read the two decisions in *House v. Armour of America,* 886 P.2d 542 (Utah Ct. App. 1994), and 929 P.2d 340 (Utah 1996), before the next committee meeting.

3. *Next Meeting.* The next meeting will be Monday, May 14, 2007, at 4:00 p.m.

The meeting concluded at 6:00 p.m.

Model Utah Jury Instructions

Second Edition

Working Draft

May 15, 2007

1001. Strict liability. Introduction.

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

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

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

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

References

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

MUJI 1st References

Committee Notes

Instruct the jury only with the descriptions from (1), (2) and (3) that are relevant to the case.

Utah's Product Liability Act is codified at Utah Code Ann. §§ 78-15-1 to 78-15-7. Section 78-15-3 of the Utah Product Liability Act was declared unconstitutional in Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985). Following the Berry decision, the Utah legislature repealed former sections 78-15-2 (legislative findings) and 78-15-3 (the unconstitutional statute of repose), and enacted a new section 78-15-3 (statute of limitations). The legislature did not repeal, amend or otherwise change sections 78-15-1, 78-15-4, or 78-15-6, which were held to be not severable from the portions of the statute declared unconstitutional in Berry. Although Utah courts have consistently cited and relied upon the Product Liability Act as codified since the legislature's action, some committee members believe those sections are invalid. This argument has been rejected by the Utah Federal District Court. See Henrie v. Northrop Grumman Corp., 2006 U.S. LEXIS 23621 (D. Utah 2006) (rejecting Plaintiffs' argument that §78-15-6 is unconstitutional).

In drafting instructions for a particular case, note that when the term "manufacturer" is used, the terms "retailer," "designer," "distributor," may be substituted, if appropriate, as the circumstances of the case warrant.

Staff Notes

Status

Aproved for use: 2/12/2007

1002. Strict liability. Elements of claim for a [design] [manufacturing] defect.

[Name of plaintiff] claims that [he] was injured by a [product] that had a [design] [manufacturing] defect that made the [product] unreasonably dangerous. You must decide whether:

(1) there was a [design] [manufacturing] defect in the [product];

(2) the [design] [manufacturing] defect made the [product] unreasonably dangerous;

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

(4) the [design] [manufacturing] defect was a cause of [name of plaintiff]'s injuries.

I will now explain what the terms ["design] ["manufacturing] defect" and "unreasonably dangerous" mean.

References

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)).

Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).

Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003).

Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003).

Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993).

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

MUJI 1st References

12.1.

Committee Notes

Section 402A of the Restatement (Second) of Torts, which the Utah Supreme Court adopted in Ernest W. Hahn, Inc., requires that the defendant be engaged in the business of selling the product. Occasional sellers are not liable in product liability actions. See Louis R. Frumer & Melvin I. Friedman, Product Liability. Section 5.04 (1997). In most cases, there will be no dispute as to whether the defendant was engaged in the business of selling the product. If the defendant was not, the court will dismiss any strict products liability claim before trial. If there is evidence from which reasonable minds could disagree, however, the court should add a fifth element: "whether … (5) [Name of defendant] was engaged in the business of selling the [product]."

Staff Notes

Status

Aproved for use:: 2/12/2007

1003. Strict liability. Definition of "design defect."

Alternative A.

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

Alternative B.

The [product] had a design defect if:

(1) as a result of its design, the [product] failed to perform as safely as an ordinary user would expect when the [product] was used in a manner reasonably foreseeable to the manufacturer; and

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

References

Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280-82 (10th Cir. 2003).

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)).

Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).

Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993).

Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003).

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

Restatement (Third) of Torts § 2, notes.

MUJI 1st References

12.3; 12.4; 12.5

Committee Notes

Whether the second prong of the design defect definition in Alternative B - a safer alternative design - is an element of a design defect claim may be an open question. No Utah state appellate court has considered whether proving the existence of a safer alternative design is required, but the federal district courts in Utah and the Tenth Circuit have required this element as essential to a design defect claim. See Allen v. Minnstar, Inc., 8 F.3d 1470, 1472 (10th Cir. 1993); Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280 (10th Cir. 2003); Wankier v. Crown Equipment Corp., 353 F.3d 862, 867-68 (10th Cir. 2003).

On the issue of availability, the court in Allen v. Minnstar recognized that plaintiff must prove the safer alternative design was "commercially available" or "commercially feasible." However, later pronouncements by the Tenth Circuit in Brown v. Sears, Roebuck & Co., and Wankier v. Crown Equipment Corp. have simply used the term "available." Whether the timeframe for the safer alternative design is at the time of

design or manufacture or the date of sale will be determined by the particular facts of the case.

Staff Notes

Status

Aproved for use: 3/12/2007

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

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

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

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

References

Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280-82 (10th Cir. 2003).

Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2003 UT 43, 16, 79 P.3d 922 (citing Interwest Constr. v. Palmer, 923 P.2d 1350, 1356 (Utah 1996)).

Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).

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

MUJI 1st References

12.2.

Committee Notes

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

Staff Notes

Status

Aproved for use: 3/12/2007

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

Alternative A.

A [product] with [a design defect] [a manufacturing defect] [an inadequate warning] was unreasonably dangerous if it was more dangerous than an ordinary user of the [product] would expect considering the [product]'s characteristics, risks, dangers, and uses, together with any actual knowledge, training, or experience that the user had.

Alternative B.

A [product] with [a design defect] [a manufacturing defect] [an inadequate warning] was unreasonably dangerous if:

(1) it was more dangerous than an ordinary user of the [product] would expect considering the [product]'s characteristics, uses that were foreseeable to the manufacturer, and any instructions or warnings; and

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

References

Utah Code Section 78-15-6(2).

Brown v. Sears, Roebuck & Co., 328 F.3d 1274, 1280-82 (10th Cir. 2003).

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

MUJI 1st References

12.1; 12.14

Committee Notes

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

Staff Notes

Status

Changes from: 4/16/2007

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

[Name of plaintiff] claims that [he] was injured by a [product] that was defective and unreasonably dangerous because it lacked an adequate warning. You must decide whether:

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

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

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

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

References

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

Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152 (Utah 1979).

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

MUJI 1st References

12.6; 12.7.

Committee Notes

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

Staff Notes

Status

Aproved for use: 3/12/2007

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

A [product] with an inadequate warning is defective.

To be adequate a warning must:

(1) be designed to reasonably catch the user's attention;

(2) be understandable to foreseeable users;

(3) fairly indicate the danger from the [product] or from its foreseeable use; and

(4) be 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).

MUJI 1st References

Committee Notes

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

Staff Notes

Status

Aproved for use: 4/16/2007

1008. Strict liability. Duty to warn.

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

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

References

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

MUJI 1st References

Committee Notes

Staff Notes

In the April meeting the committee decided to have a separate instruction on "open and obvious" dangers. Further, they thought that the special instruction on the definition of "unreasonably dangerous" in failure-to-warn cases really was no different from the regular definition in 1005. This proposal, which the committee did not suggest, combines the two to describe the duty to warn.

Status

Changes from: 4/16/2007

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

In this case, there has been no evidence about whether [name of plaintiff] would have followed an adequate warning. If you find that [name of defendant] did not provide an adequate warning, you can presume that [name of plaintiff] would have followed an adequate warning.

References

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

MUJI 1st References

Committee Notes

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

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

Staff Notes

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

Status

Changes from: 4/16/2007

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

Alternative A.

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

A [product] that contains a warning, and would be safe if the warning were followed, is not defective or unreasonably dangerous.

Alternative B.

If you find that [name of defendant] gave an adequate warning, then [he] could reasonably assume that the warning would be read and followed.

A product that contains an adequate warning and would be safe if the warning were followed is not defective or unreasonably dangerous.

References

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

CACI 1205.

MUJI 1st References

12.6; 12.7.

Committee Notes

Staff Notes

The essence of the difference between A and B is whether the warning has to be adequate in order to invoke the conclusion. We should develop a committee note explaining the authority for why there is this difference of opinion.

It seems as though the second paragraph is the corolary to the first paragraph of 1007. Should it be integrated there instead of here?

Status

Reviewed: 12/11/2006

1011. Strict liability. Component part manufacturer. Part defective only as incorporated into finished product.

[Name of defendant] [designed/manufactured/distributed/sold] a component part of the [product]. If you find that the component part was not defective as [designed/manufactured/distributed/sold] but only became defective as a result of the way it was [installed/incorporated/used] in the finished [product], then [name of defendant] can only be liable to [name of plaintiff] if:

(1) [Name of defendant] knew enough about the design or operation of the finished [product] that [he] could have reasonably foreseen that an injury could occur because of the way the component part would be used in the [product], and

(2) [Name of defendant] did not warn the [final assembler of the product] of that danger.

References

MUJI 1st References

12.8.

Committee Notes

Staff Notes

Status

1012. Strict liability. Component part manufacturer. Defective part incorporated into finished product.

[Name of defendant] [designed/manufactured/distributed/sold] a component part of the [product].

Alternative A.

If you find that the component part was defective as [designed/manufactured/distributed/sold] and that the defective part made the finished product unreasonably dangerous, then you may apportion fault to [name of defendant], the manufacturer of the component part, and [name of co-defendant or third party], the manufacturer of the finished product.

Alternative B.

If you find that the component part was defective as [designed/manufactured/distributed/sold] and that the defective part made the finished product unreasonably dangerous, then you may find both [name of defendant], the manufacturer of the component part, and [name of co-defendant or third party], the manufacturer of the finished product, liable to [name of plaintiff].

References

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

MUJI 1st References

Committee Notes

Some subcommittee members believe that whether the liability of the component part manufacturer and the manufacturer of the finished product is joint and several, or apportioned under the Liability Reform Act, is an open issue under Utah law.

Staff Notes

Status

Changes from: 12/11/2006

1013. Strict liability. Defective condition of FDA approved drugs.

If a drug product was (designed?) in conformity with United States Food and Drug Administration (FDA) standards in existence at the time the product was sold (designed?), the product is presumed to be free of any defect. [Name of plaintiff] may still recover by proving that the product was defective and unreasonably dangerous due to a manufacturing defect or an inadequate warning.

References

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

MUJI 1st References

12.13.

Committee Notes

In Grundberg v. Upjohn Co., 813 P.2d 89 (Utah 1991), the Utah Supreme Court exempted claims for misrepresentation on the FDA from the operation of this rule. However, in the subsequent decision of Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341, 121 S.Ct. 1012, 69 USLW 4101, the United States Supreme Court held that state law fraud on the FDA claims conflict with and are preempted by federal law. 531 U.S. at 348, 121 S.Ct. at 1017. Accordingly, the committee has not included claims of misrepresentation on the FDA in this instruction. At the time of the drafting of this instruction, there was an unresolved split among federal district courts regarding preemption of warnings claims for FDA approved pharmaceuticals. The language of this instruction may, therefore, require amendment depending upon the resolution of that conflict.

Staff Notes

Status

Reviewed: 12/11/2006

1014. Strict liability. Defect not implied from injury alone.

The fact that an accident or injury occurred does not support a conclusion that the [product] was defective.

References

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

MUJI 1st References

Committee Notes

Some subcommittee members thought the instruction was substantially similar to the "unavoidable accident" and "mere fact of an accident" instructions that the Utah Supreme Court has held should not be given. See Green v. Louder, 2001 UT 62, 18, 29 P.3d 638; Randle v. Allen, 862 P.2d 1329, 1334-36 (Utah 1993). Some subcommittee members thought that such instructions are not necessary and create a potential for confusing and misleading the jury by suggesting to the jury that the plaintiff has an additional hurdle to get over. These members believe such instructions circumvent proper application of instructions on the elements of a claim and burden of proof and allow the jury to reach a result without following the principles set out in those instructions. These members also believe that such instructions tend to reemphasize the defendant's theory of the case and, to that extent, constitute an inappropriate judicial comment on the evidence. See Randle, 862 P.2d at 1335-36.

Staff Notes

There was no motion and vote, but, from the minutes, it appears that most committee members favored deleting this instruction.

Status

Reviewed: 12/11/2006

1046. Prefactory comment.

When in these instructions, the term "manufacturer" is used, the terms "retailer," "designer," "distributor," etc. may be substituted as the circumstances of the case warrant.

References

MUJI 1st References

Committee Notes

Staff Notes

This seems more like a direction on how to draft the instruction than an instruction to the jury.

Status

1049. Sophisticated user.

In this case, [name of defendant] claims that [name of plaintiff] was a sophisticated user of the product.

A "sophisticated user" is a user who either:

(1) has special knowledge, sophistication or expertise about the dangerous or unsafe character of the product; or

(2) belongs to a group or profession that reasonably should have general knowledge, sophistication or expertise about the dangerous or unsafe character of the product.

If you find that [name of plaintiff] was a sophisticated user, then [name of defendant] cannot be liable for failure to give an adequate warning

References

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

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

MUJI 1st References

Committee Notes

Staff Notes

Paragraph 2 should be worded more like Paragraph 2 in 1052: What the defendant has to prove.

Status

1050. Conformity with government standard.

If the manufacturer of a product complies with federal or state laws, standards or regulations for the industry that are in effect when it makes the product, regarding proper design, inspection, testing, manufacture, or warnings, you shall presume that the product is not detective. However, if [name of plaintiff] has shown you evidence that causes you to believe that the [product] is still defective even though the manufacturer followed government laws, standards or regulations, you are free to abandon that presumption if you so choose.

References

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

MUJI 1st References

12.1.

Committee Notes

Some members question whether the instruction should be used at all because the "rebuttable presumption" may render it meaningless. Some committee members feel that the Plaintiff must produce clear and convincing evidence, and that that is 'what is needed to overcome the presumption. Others believe that the Plaintiff must show only a preponderance of evidence. If the latter is the case, then the instruction is little different than a restatement of the burden of proof.

Staff Notes

Plain language favors "must" over "shall."

Should resolve the Preponderance/C&C dispute. As written, any evidence at all is sufficient.

Status

1051. Product misuse.

[Name of defendant] claims that [name of plaintiff] misused the [product] and that the misuse caused [name of plaintiff]'s claimed injury.

A person misuses a [product] if [he] uses it or handles it in a way that the manufacturer did not intend and could not reasonably anticipate.

If you find that [name of plaintiff] misused the [product] in the way claimed by [name of defendant] and that the misuse caused the injury, you may consider that misuse in apportioning fault to [name of plaintiff] on the Special Verdict form.

References

MUJI 1st References

12.39.

Committee Notes

Staff Notes

Paragraph 2 should be worded more like Paragraph 2 in 1052: What the defendant has to prove.

Status

1052. Product alteration.

[Name of defendant] claims as a defense that the [product] was modified or altered by someone.

To prove this defense, [name of defendant] must show:

(1) that the [product] was altered or modified after it sold the [product];

(2) that the alteration or modification changed the manufacturer's intended purpose, use, construction, function, design, or manner of use of the product; and

(3) that the modification or alteration either caused or substantially contributed to [name of plaintiff]'s injury.

If [name of defendant] proves these things, you may consider this defense when apportioning fault on the Special Verdict form.

References

Utah Code Section 78-15-5.

MUJI 1st References

12.11.

Committee Notes

Staff Notes

Status

1053. Retailer liability.

A person or company that does not make a product that is alleged to be defective, but merely sells [or distributes] the product, is not necessarily liable for the defect. To make a retailer [or distributor] liable for a defect, [name of plaintiff] must prove that the retailer was at fault in a manner that was a contributing cause of the injury.

References

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

MUJI 1st References

Committee Notes

This instruction may not be applicable in a case in which the manufacturer is insolvent or not subject to the court's jurisdiction.

Some members think this instruction is altogether inappropriate because the Utah Supreme Court has not set forth the law on this subject.

Staff Notes

Consider: [Name of defendant] retails/distributes] the [product]. To make a [retailer/distributor] liable for a defect, [name of plaintiff] must prove that the [retailer/distributor] was at fault in a manner that contributed to the injury.

Status

1054. Assumption of risk.

[Name of defendant] claims that if the [product] was defective, [name of plaintiff] knew about the defect and voluntarily assumed the risk that [he] could be injured by the [product].

To establish that [name of plaintiff] assumed the risk, [name of defendant] must show that [name of plaintiff]:

(1) knew about the defect;

(2) knew the defect could cause injury; and

(3) despite this, unreasonably exposed [himself] to the risk of injury.

If you find that [name of plaintiff] assumed the risk, you may consider that in apportioning fault to [name of plaintiff] on the Special Verdict form.

References

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

MUJI 1st References

Committee Notes

Staff Notes

Status

1055. Industry standard.

When determining if the [product] is defective, you may consider other similar products in the applicable industry with respect to design, testing, manufacture or the type of warning given.

References

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

MUJI 1st References

Committee Notes

Staff Notes

Consider: In deciding whether the [product] is defective, you may consider the design, testing, manufacture and type of warning for similar products.

Status