Agenda
Advisory Committee on Model Civil Jury Instructions

September 10, 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.

October 15, 2007 (3d Monday)
November 19, 2007 (3d Monday)
December 10, 2007
January 14, 2008
February 11, 2008
March 10, 2008
April 14, 2008
May 12, 2008
June 9, 2008
July 14, 2008
August 11, 2008
September 8, 2008
October 13, 2008
November 10, 2008
December 8, 2008

MINUTES

Advisory Committee on Model Civil Jury Instructions
June 11, 2007
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Francis J. Carney, Marianna Di Paolo, Tracy H. Fowler, Jonathan G. Jemming, Timothy M. Shea, Paul M. Simmons, David E. West, and John L. Young (chair). Also present: Kamie F. Brown

Excused: Paul M. Belnap, Ralph L. Dewsnup, and Colin P. King

1. *Committee Meetings*. Mr. Young referred to his e-mails to the committee of May 22 and 27, 2007, which reminded committee members to provide proposed instructions and related materials to Mr. Shea at least 10 days before committee meetings and established a format for the participation of subcommittee members in committee meetings. He emphasized that debates over the substantive law should be resolved in subcommittee meetings whenever possible so that the full committee can focus on the language of the instructions.

2. *Products Liability Instructions*. The committee continued its review of the products liability instructions.

a. *1005. Strict liability. Definition of "unreasonably dangerous."* Mr. West said that he was troubled by alternative B, which says that a product is not unreasonably dangerous if the user knew about the danger. He thought it conflicted with instruction 1054 on assumption of risk. He noted that an employee may be required to use what he knows is a dangerous product but have no choice in the matter. He did not think the product manufacturer should be relieved from liability in that situation. Mr. Carney did not think alternative B could be the law. Otherwise, a manufacturer that built a car with no seatbelts and no brakes could not be liable for putting a defective product on the market. Mr. Young noted that there was apparently no dispute over alternative A, which tracks the statute (Utah Code Ann. § 78-15-6(2)), and alternative B accurately restates the Tenth Circuit's interpretation of the statute in *Brown v. Sears, Roebuck & Co.,* 328 F.3d 1274 (2003). He suggested approving the instruction and letting the courts decide whether to use alternative A or alternative B. Ms. Blanch moved to approve instruction 1005; Judge Barrett seconded the motion. The motion passed, with Judge Barrett, Ms. Blanch, Mr. Jemming, Dr. Di Paolo, and Mr. Fowler voting in favor of it, and Messrs. Carney and West opposing the motion. Mr. Young suggested adding a committee note to the effect that the committee was not unanimous that alternative B should be given and that some members thought it was inconsistent with the assumption of risk instruction. Ms. Blanch thought that to do so would make a new precedent, that the mere fact of alternative instructions shows that the committee could not agree on a single instruction. Mr. Young thought it would still be helpful to note the disagreement over alternative B. Mr. Fowler noted that not all committee members agreed that

alternative A was a correct statement of the law. Mr. Shea recommended against including the committee vote in any note. Ms. Brown noted that no explanation was given for the alternatives in instruction 1003 other than to explain the difference between the alternatives. The committee ultimately concluded that the general explanation in the introduction to the instructions about why some instructions have alternatives was sufficient.

b. *1008. Strict liability. Definition of "adequate warning."* John Anderson of the products liability subcommittee was going to propose a comment for instruction 1008 stating his view that it may be appropriate to instruct on the user's subjective knowledge of the product's dangers in a particular case. The committee deferred further discussion of the instruction until Mr. Fowler can check with Mr. Anderson to see if he still intends to propose a committee note. The instruction was later approved, subject to the addition of any note. (*See* ¶ 2.d, *infra.)*

c. *1009. Strict liability. Failure to warn. Presumption that a warning would have been read and followed.* Mr. Carney thought the committee note (that says the instruction is appropriate only if it cannot be demonstrated whether the injured party would have read and followed a warning) was an incorrect statement of the law. He noted that the *House* opinion cited, as authority for the note, does not say that it only applies where the plaintiff is not available to testify. (The citation in the note to *House* was corrected to cite to the court of appeals' decision in that case, not the supreme court decision.) *House* cited a New Jersey case where the plaintiff was alive and well. Mr. Carney reviewed an A.L.R. annotation (38 A.L.R.5th 683) that cites cases in which the presumption applied even where the plaintiff had testified. Mr. Jemming suggested revising the note to read, "This instruction is appropriate when [rather than "only if"] it cannot be demonstrated . . ." Mr. Shea suggested changing "it cannot be demonstrated" to "it is not demonstrated." Mr. Fowler thought the note was vague. Mr. Simmons thought the second sentence of the note was misleading, since it suggests that the injured party only has the burden of proof when he can testify, and should be deleted. He further suggested deleting the whole first paragraph of the note. Dr. Di Paolo was not comfortable with the instruction itself. The first sentence says the jury can make the presumption, but the second sentence suggests there are circumstances when it cannot. At Mr. Simmons's suggestion, the instruction was revised to read:

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

Mr. Simmons expressed concerns about whether a heeding presumption should apply in the case of a learned intermediary, a situation addressed in the second paragraph of the committee note. At Mr. Young's suggestion, the last three sentences of the committee note were deleted.

d. *1010. Strict liability. Failure to warn. Presumption that a warning will be read and followed.* Dr. Di Paolo asked how instructions 1009 and 1010 were related. Mr. Fowler explained that 1009 is a presumption in favor of the plaintiff, whereas 1010 is a presumption in favor of the defendant. Dr. Di Paolo asked whether they could both be given in the same case. The committee thought not, since the heeding presumption (1009) arises where an adequate warning is *not* given, and the so-called reading presumption (1010) arises where an adequate warning *is* given. Mr. West and Mr. Simmons thought the last sentence of the instruction was misleading, since a product may still be defective in manufacture or design, even if it contains an adequate warning. Ms. Brown suggested adding "for failure to warn" to the end of the sentence. Ms. Blanch suggested revising it to say that a product "cannot be defective on the basis of a failure to warn; however, it can still be defective based on a manufacturing or design defect." Mr. Young asked whether the clarification would be better handled by a committee note. He also suggested revising the last sentence to read, "With respect only to plaintiff's claim of failure to warn, a [product] that contains an adequate warning is not defective or unreasonably dangerous." At Mr. Shea's suggestion, the sentence was deleted from instruction 1010 and moved to the beginning of instruction 1008 (defining "adequate warning"). Mr. West and Mr. Simmons thought that merely moving the sentence to 1008 did not satisfy their concerns. As modified, instruction 1008 was approved, subject to the subcommittee submitting a further comment.

Based on a staff note, Mr. Simmons thought that instruction 1010 was unnecessary. The instruction says that a seller who gives a warning may presume that it will be read and followed. The presumption goes to the issue of causation (whether the plaintiff should have read and followed a warning that was given). A product that contains an adequate warning is not defective, so the jury does not have to reach the question of causation (i.e., it does not have to decide whether the plaintiff should have read and followed the warning) if it finds that an adequate warning was given. Mr. Fowler thought the instruction was necessary because a form of it was included in MUJI 1st, and it is taken from comment *j* to Restatement (Second) of Torts § 402A. In addition, Mr. Simmons's argument only applies if the warning must be adequate for the presumption to apply, and Mr. Fowler did not think that the adequacy of the warning is a prerequisite for the presumption to apply. Mr. Simmons disagreed that a so-called reading presumption arises where the warning is inadequate, that is, where it is not

reasonably calculated to catch the user's attention. Mr. Young suggested that the subcommittee review the issue further.

e. *1013. Strict liability. Defective condition of FDA approved drugs.* The first sentence was revised to read, "If a drug product conformed with the United States Food and Drug Administration (FDA) standards . . . ." Mr. Simmons noted that the presumption only applies to design claims and suggested revising the last part of the sentence to read, "the product is presumed to be free of any design defect." Ms. Brown suggested, "the product is not defectively designed." Dr. Di Paolo suggested, "the product is free of any design defect." Mr. Simmons asked what the effect of the presumption was. If it is a rebuttable presumption, then the instruction should not say that the product is free from any design defect because the plaintiff may be able to rebut the presumption. Mr. Young suggested revising the next sentence to read, "However, [name of plaintiff] may still prove that the product was defective and unreasonably dangerous due to a manufacturing defect or an inadequate warning." Dr. Di Paolo questioned whether the second sentence was necessary. Mr. Carney asked what the source of the instruction was--a statute or case law. The committee agreed that the instruction was based on *Grundberg v. Upjohn Co.,* 813 P.2d 89 (Utah 1991), and not on any statute. Mr. Carney did not think that the FDA approval process was adequate to warrant the presumption.

f. *1014. Strict liability. Defect not implied from injury alone.* Mr. Young asked if anyone was in favor of keeping instruction 1014. Ms. Blanch and Mr. Fowler were. They thought that there was a significant difference between a strict products liability claim and a negligence claim such as the claims involved in *Green v. Louder,* 2001 UT 62, 29 P.3d 638, and *Randle v. Allen,* 862 P.2d 1329 (Utah 1993), in which the Utah Supreme Court disapproved of nearly identical instructions. They thought that lay people are more likely to infer a product defect from the mere happening of an accident than they are to infer negligence. Mr. Simmons noted that the Liability Reform Act treats both negligence and strict products liability as "fault." He read from *Green,* in which the supreme court said, "we explicitly direct trial courts to abandon the use of this instruction ['The mere fact that an accident or injury occurred does not support a conclusion that the defendant or any other party was at fault or was negligent.'] hereafter." Mr. Young thought that the court's reasoning in *Green* applied equally to negligence and products liability claims. (Mr. Jemming was excused.) Mr. West moved to delete instruction 1014. Mr. Simmons seconded the motion. The motion carried, with Messrs. Carney, Simmons, and West voting to delete the instruction, and Mr. Fowler voting to keep it.

g. *1046. Prefactory comment.* This instruction was deleted. It is now covered by the comment to instruction 1001.

h. *1049. Sophisticated user.* Mr. Simmons thought the instruction was inconsistent with the Tenth Circuit opinion in *Brown v. Sears, Roebuck.* Mr. Young questioned whether the instruction would be given if the court gave alternative B of instruction 1005. Messrs. Simmons and West thought that the knowledge or sophistication of the user should be part of the comparative fault equation and not a complete defense. But Mr. Simmons conceded that the *House* opinion said that there was no duty to warn a sophisticated user. At the suggestion of Dr. Di Paolo and Mr. Shea, the instruction was revised to read:

> In this case, [name of defendant] claims that [name of plaintiff] was a sophisticated user of the product.
>
> To prove this defense, [name of defendant] must prove that [name of plaintiff] either:
>
> (1) had special knowledge, sophistication or expertise about the dangerous or unsafe character of the product; or
>
> (2) belonged to a group or profession that reasonably should have had general knowledge, sophistication or expertise about the dangerous or unsafe character of the product. . . .

3. *New Committee Members.* Mr. Young noted that he had received the following suggestions to replace Mr. Belnap: Gary Johnson or Joe Minnock. Mr. Johnson has expressed interest in serving but will not be available until October 2007. Mr. Young asked for suggestions to replace Mr. Dewsnup. Mr. Carney suggested Pete Summerill, and Mr. West suggested Roger Hoole. Mr. Young asked that, if committee members have any other suggestions, to e-mail them to him.

4. *Summer Schedule.* The committee agreed to cancel the meetings scheduled for July 9 and August 13, 2007.

5. *Next Meeting.* The next meeting will be Monday, September 10, 2007, at 4:00 p.m.

The meeting concluded at 5:55 p.m.

Model Utah Jury Instructions

Second Edition

Working Draft

September 4, 2007

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

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

Staff Notes

Status

Approved: 2/12/2007

CV 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

Approved: 2/12/2007

CV 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

Approved: 3/12/2007

CV 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

Approved: 3/12/2007

CV 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

Approved: 6/4/2007

CV 1006. Strict liability. Duty to warn.

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

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

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

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

References

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

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

MUJI 1st References

12.6; 12.7.

Committee Notes

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

Staff Notes

Status

Approved: 5/21/2007

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

If you find that a warning was required, you must next decide whether:

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

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

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

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

References

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

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

MUJI 1st References

12.6; 12.7.

Committee Notes

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

Staff Notes

Status

Approved: 3/12/2007

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

A [product] with an adequate warning is not defective or unreasonably dangerous. A [product] with an inadequate warning is defective.

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

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

(2) was not understandable to foreseeable users;

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

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

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

References

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

MUJI 1st References

Committee Notes

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

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

Staff Notes

Status

Approved: 6/4/2007

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

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

References

House v. Armour of America, Inc., 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340, 347 (Utah 1996).

Rule 301. Utah Rules of Evidence.

MUJI 1st References

Committee Notes

This instruction is appropriate when it cannot be demonstrated whether the injured party would have read and followed an adequate warning. See House v. Armour of America, 886 P.2d 542 (Utah Ct App 1994), affd 929 P.2d 340, 347 (Utah 1996).

Some members of the committee do not believe this instruction is appropriate in cases in which the "learned intermediary doctrine" applies. See Schaerrer v. Stewart's Plaza Pharmacy, Inc., 2000 Utah 43, 16, 79 P.3d 922 (citation omitted). While the FDA regulates the labeling of prescription pharmaceuticals and medical devices, it does not regulate the practice of medicine, including the prescribing practices of physicians. See 59 FR 59820-04, 1994 WL 645925 (1994).

Staff Notes

Status

Approved: 6/4/2007

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

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

References

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

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

MUJI 1st References

12.6; 12.7.

Committee Notes

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

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

Staff Notes

Status

Approved: 6/4/2007

CV 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

CV 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

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

If a drug product conformed with the United States Food and Drug Administration (FDA) standards in existence at the time the product was sold, the product is free of any design defect. However, [name of plaintiff] may still prove that the product was defective and unreasonably dangerous due to a manufacturing defect or an inadequate warning.

References

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

MUJI 1st 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

Approved: 6/4/2007

CV 1014. Negligence. "Negligence" defined.

[Name of plaintiff] seeks to recover damages based upon a claim that [he] was injured due to [name of defendant]'s negligence. You must decide whether [name of defendant] was negligent.

I will now define what negligence means.

A [manufacturer/designer/tester/inspector] of a product has a duty to use reasonable care in [designing/manufacturing/testing/inspecting] the product [to avoid causing a defective and unreasonably dangerous condition] [to eliminate any unreasonable risk of foreseeable injury]. Reasonable care means the degree of care that a reasonably prudent [manufacturer/designer/tester/inspector] would use under similar circumstances.

For example, a [designer/manufacturer/tester/inspector] of a product might be required to use more care if a prudent [designer/manufacturer/tester/inspector] would understand that more danger is involved in the use of the product. In contrast, a [designer/manufacturer/tester/inspector] of a product may be able to use less care because a prudent [designer/manufacturer/tester/inspector] would understand that less danger is involved in the use of the product.

The [designer/manufacturer/tester/inspector] of the product owes a duty of reasonable care to any persons who the [designer/manufacturer/tester/inspector] expects would use the product.

References

W. R. H., Inc. v. Economy Builders Supply, 633 P.2d 42 (Utah 1981).

Hunt v. ESI Engineering, Inc., 808 P.2d 1137 (Utah 1991).

Bishop v. GenTec, Inc., 48 P.3d 218 (Utah 2002).

Utah Code Section 78-15-6 (2006).

MUJI 1st References

Committee Notes

Under Utah's Product Liability Act, "In any action for damages for personal injury, death, or property damage allegedly caused by a defect in a product" a plaintiff must prove, among other things, that "a defect or defective condition in the product" rendered the product "unreasonably dangerous to the user or consumer." Utah Code Ann. § 78-15-6 (2006). In Bishop v. GenTec, the Utah Supreme Court confirmed that a claim sounding in "[p]roducts liability always requires proof of a defective product . . ." 48 P.3d 218 (Utah 2002) (citing Grundberg v. Upjohn Co., 813 P.2d 89, 92 (Utah 1991)) and "allegations of negligence contained in a claim for products liability do not transform the claim into one for ordinary negligence." Thus, pursuant to the Product Liability Act and this authority from the Utah Supreme Court, no matter the theory, plaintiff must prove that a defect or defective condition rendered the product unreasonably dangerous.

However, the Utah Supreme Court in Slisze v. Stanley-Bostitch also recognized that "a manufacturer may act negligently without its product being unreasonably dangerous .

. . .” Slisze, 979 P.2d at 317. Thus, some members of the committee believe that in pursuing a negligence claim involving a product under Utah law plaintiff must prove that a manufacturer has a “duty to use reasonable care in manufacturing the product to eliminate any unreasonable risk to those who the manufacturer knows or should expect would be endangered by the product.” These committee members believe that a negligence claim does not require proof that the product is defective and in an unreasonably dangerous condition. In addition to Slisze, these members believe Section 395 of the Restatement (Second) or Torts properly described the requirements for a negligence claim. Section 395 does not require proof of a “defective and unreasonably dangerous condition.”

Staff Notes

Status

CV 1015. Negligence. Elements of claim for [design] [manufacturing] defect.

[Name of plaintiff] claims that [he] was injured by [name of defendant]'s negligence. 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 [product]'s defect was the result of [name of defendant]'s failure to use reasonable care; and

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

References

Utah Code Section 78-15-6 (2006).

Bishop v. GenTec, Inc., 48 P.3d 218 (Utah 2002).

MUJI 1st References

3.1; 3.2.

Committee Notes

This instruction should be followed by Instruction 1003 (Definition of Design Defect) or Instruction 1004 (Definition of Manufacturing Defect) and Instruction 1005 (Definition of Unreasonably Dangerous.

Based upon their interpretation of Slisze v. Stanley-Bostitch, some subcommittee members do not believe that the jury should be instructed that elements 1 and 2 are required for a negligence claim involving a product. See Committee Note to Instruction 1014.

Staff Notes

Status

CV 1016. Negligence. Duty to warn.

[Name of plaintiff] claims that [he] was injured because [name of defendant] failed to exercise reasonable care in providing an adequate warning.

You must first decide if the defendant was required to provide a warning.

[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]'s foreseeable use that is generally known and recognized.

References

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

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

MUJI 1st References

12.6; 12.7.

Committee Notes

Staff Notes

Status

CV 1017. Negligence. Elements of claim for failure to adequately warn.

If you find that a warning is required, you must next determine whether:

(1) [name of defendant] failed to exercise reasonable care because the [product] lacked an adequate warning;

(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, Inc., 929 P.2d 340, 344 (Utah 1996).

Restatement (Second) of Torts § 402A cmt. j (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

CV 1018. Negligence. Definition of "adequate warning."

A [manufacturer/seller] fails to exercise reasonable care if it does not provide a warning or provides an inadequate warning where a warning is required.

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

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

(2) was not understandable to foreseeable users;

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

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

References

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

MUJI 1st References

Committee Notes

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

To the extent regulatory bodies, such as the Food and Drug Administration, dictate what specific warning must be given for a particular product, this instruction may not be appropriate. See, e.g., 21 CFR 201.57 (detailing format, headings and order of warnings for particular prescription drugs and medical devices.)

Staff Notes

Status

CV 1019. Negligence. Duty of designer/manufacturer.

The [designer/manufacturer] has a duty to [design/manufacture] a product to eliminate any unreasonable risk of foreseeable injury.

However, there is no duty to make a safe product safer. A [designer/manufacturer] has no duty to refrain from marketing a non-defective product when a safer model is available, or to inform the consumer of the availability of the safer model.

References

Hunt v. ESI Engineering, Inc., 808 P.2d 1127 (Utah 1991).

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

Slisze v. Stanley-Bostitch, 1999 UT 20 (1999).

MUJI 1st References

12.16.

Committee Notes

Staff Notes

Status

CV 1020. Negligence. Drug manufacturer's duty to warn.

The manufacturer of a drug has a duty to give timely and adequate warnings to the medical profession of any dangerous side effects produced by its drugs of which it knows or has reason to know.

A drug manufacturer is considered to be an expert in its particular field and is under a continuous duty to keep abreast of scientific developments pertaining to its product and to notify the medical profession of any additional side effects of which it learns. The drug manufacturer is responsible not only for actual knowledge gained from its research and adverse reaction reports, but also for what it could have learned from trustworthy scientific literature and other available means of communication.

References

Barson v. E. R.. Squibb & Sons, Inc., 682 P.2d 832, 835-36 (Utah 1984).

MUJI 1st References

Committee Notes

Staff Notes

Status

CV 1021. Negligence. Retailer's duty.

Ordinarily, one who is in the business of selling a product that was made by another does not have a duty to inspect or test the product for possible defects. If, however, a seller knows or has reason to know that the product is defective and unreasonably dangerous, then the seller has a duty to exercise reasonable care to inform the buyer or otherwise protect the buyer from the defective and unreasonably dangerous condition.

References

Sanns v. Butterfield, 2004 UT App 203.

Restatement (Second) of Torts §§ 401, 402.

MUJI 1st References

12.17.

Committee Notes

Staff Notes

Status

CV 1022. Breach of Warranty. “Warranty” defined.

[Name of plaintiff] claims that [name of defendant] breached a warranty. A warranty is a promise or guarantee made by one party to a contract to the other party to the contract that something is so. If the thing turns out not to be as promised, the person making the warranty may have to pay damages to the other person if the other person is injured as a result.

For example, the seller of a product may warrant that the product is safe for its intended use. If the product turns out not to be safe for its intended use and the buyer of the product is injured as a result, the seller can be liable to the buyer for breach of warranty.

References

Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983).

Black's Law Dictionary 1618 (8th ed. 2004).

MUJI 1st References

12.18.

Committee Notes

A breach of warranty claim may sound in contract or tort. Notably, under Utah law, the analysis applied to a warranty claim is determined by "the nature of the action and not the pleading labels chosen." Davidson Lumber v. Bonneville Inv., 794 P.2d 11, 14 (Utah 1990) (finding a clear distinction between implied warranties for contract purposes and implied warranties in tort).

The breach of warranty model instructions cover both a warranty claim under the Uniform Commercial Code (UCC) and a warranty claim under a tort theory. Certain instructions may pertain exclusively to contract or tort actions. These instructions are appropriately labeled. Where the committee members could not agree on an instruction, their positions are set forth in the committee notes.

A plaintiff whose product has been damaged or destroyed, or who alleges lost profits because of the inability to use his or her product, may only seek recovery from the seller or manufacturer in contract, pursuant to the Uniform Commercial Code. American Towers Owners Association, Inc. v. CCI Mechanical, Inc., 930 P.2d 1182 (Utah 1996), quoting Maack v. Resource Design & Construction, Inc., 875 P.2d 570, 579-80 (Utah Ct. App. 1994) (holding under Utah law, economic damages are not recoverable in negligence or strict liability absent damage to property other than the subject product or bodily injury); Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 217-18 n.3 (Utah 1984) (stating the court has never blended tort and contract concepts to allow products liability for purely economic injuries). Under the economic loss rule, a plaintiff seeking this type of economic damages has no recourse in tort law.

However, plaintiffs who have suffered personal injuries and damage to property other than the product itself can recover under a tort theory, including the pursuit of a claim for breach of warranty. Utah courts have stated that when brought under a tort theory, the elements of strict liability and breach of warranty "are essentially the same." Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 159 (Utah 1979) (citing William L. Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960); David G. Epstein, Products Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267); Grundberg v. Upjohn Co., 813 P.2d 89, 91-92 (Utah 1991) (strict liability claim analyzed under Section 402A of the Restatement (Second) of Torts (1965) which was the predecessor of Utah's Product's Liability Act); Berry By and Through Berry v. Beech Aircraft, 717 P.2d 670, 672 (Utah 1985) (plaintiff's claims of strict liability and breach of warranty were analyzed under Utah's Product Liability law). See also Salt Lake City Corp. v. Kasler Corp., 855 F. Supp. 1560, 1572 (D. Utah 1994); Straub v. Fisher & Paykel Health Car, 1999 UT 102, ¶ 16 n.1, 990 P.2d 384; Burns v. Cannondale Bicycle Co., 876 P.2d 415, 418 n.2 (Utah Ct. App. 1994). Moreover, pursuant to the language of Utah's Product Liability Act, Utah Code Ann. § 78-15-6 (stating "[I]n any action for damages for personal injury, death, or property damage allegedly caused by a defect in a product . . ."), applies to all claims for injuries caused by a product, regardless of the legal theory asserted. Utah courts have concluded that the Products Liability Act applies to all claims against a manufacturer based on a defective product, regardless of the legal theory. See McCollin v. Synthes, Inc., 50 F. Supp. 2d 1119, 1122 (D. Utah 1999); Strickland v. General Motors Corp., 852 F. Supp. 956, 958-59 (D. Utah 1994); McKinnon v. Tambrands, Inc., 815 F. Supp. 415, 418 (D. Utah 1993). See also Local Gov't Trust v. Wheeler Mach., 2006 UT App 513, ¶ 11, 154 P.3d 175 (the parties agreed, based on Strickland, that the Product Liability Act's statute of limitations would apply to all claims arising out of a product defect). Accordingly, some members of the committee believe that in a tort action for breach of warranty, plaintiff must prove, among other elements, that a specific defect rendered the product unreasonably dangerous. See Utah Code Ann (2006).

Other committee members believe that the elements of a breach of warranty claim are essentially the same whether the claim sounds in contract or tort and that the principle differences between a breach of warranty claim sounding in contract and one sounding in tort are in the applicable statutes of limitations, privity requirements, defenses, and remedies. These committee members do not think that the plaintiff in a breach of warranty action must prove "a specific defect" other than the breach of warranty itself. These committee members believe the Utah Supreme Court has stated that the Products Liability Act does not subsume all claims involving products. Slisze v. Stanley-Bostitch, 979 P.2d 317, 319, ¶¶ 7 & 8 (Utah 1999) (holding that it is possible to bring a common-law negligence claim and a strict liability claim simultaneously). Cf. Alder v. Bayer Corp., 2002 UT 115, ¶¶ 21-23, 61 P.3d 1068 (the products liability statute of limitations did not apply to a claim based on the negligent installation and maintenance of a product); Misener v. General Motors, 924 F. Supp. 130, 132 & n.1 (D. Utah 1996) (per Magistrate Judge Boyce) (claims for negligence and breach of implied warranty are not governed by the Products Liability Act; to the extent Strickland implied

otherwise, it has been undermined by Dansie v. Anderson Lumber Co., 878 P.2d 1155, 1159 (Utah Ct. App. 1994)).

Notably, the Utah Supreme Court has not explained how implied warranty claims and strict liability claims may differ.

Staff Notes

Status

CV 1023. Breach of Express Warranty. How an express warranty is created.

An express warranty is created if:

(1) The seller of a product makes a promise or represents a fact relating to the product that reasonably induces the other party to rely on it. In that case, the seller has made an express warranty that the product will conform to the promise or representation.

(2) A description of the product is made part of the basis for the sale. In that case there is an express warranty that the goods will conform to the description.

(3) A sample or model is made part of the basis for the sale. In that case, there is an express warranty that the product will conform to the sample or model.

References

Utah Code Section 70A-2-313.

Division of Consumer Protection v. GAF Corp. 760 P.2d 310 (Utah 1988).

Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983).

CACI 1230.

Ronald W. Eades. Jury Instructions On Products Liability § 4-1 (3d ed. 1999).

MUJI 1st References

12.20.

Committee Notes

The court should include in the instruction only the numbered paragraph or paragraphs that describe the plaintiffs' claim and that are supported by the evidence. For example, if the case does not involve a sample or model, the court should not include paragraph (3).

Staff Notes

Status

CV 1024. Breach of Express Warranty. Objective standard to create an express warranty.

You must judge any statement of fact, promise or description of the product as a reasonable person would have understood it. If a reasonable person would have bought the product based on the statement, promise or description, then you may find that the statement promise or description created an express warranty.

Advertising materials provided by the seller to consumers can create an express warranty if a reasonable person would have understood that the seller was making a warranty and bought the product based at least in substantial part on the warranty.

In deciding whether a reasonable person would have bought the product based on a statement, promise or description, you should consider such facts as:

(1) the ability of a reasonable buyer to see and understand for himself the matter to which the statement or promise related;

(2) how specific or vague the statement was; and

(3) how believable the statement was.

References

Division of Consumer Protection v. GAF Corp., 760 P.2d 310 (Utah 1988).

MUJI 1st References

12.26; 12.27.

Committee Notes

Staff Notes

Status

CV 1025. Breach of Express Warranty. What is not required to create an express warranty.

A warranty does not require any particular words. Formal words such as "warrant" or "warranty" or "guarantee" are not necessary to create a warranty.

Also, [name of defendant] does not have to specifically intend to create a warranty for a warranty to exist.

But a warranty is not created simply because [name of defendant] may have stated the value of the product, given [his] opinion about the product or recommended the product.

References

Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983).

CACI 1230.

MUJI 1st References

12.20.

Committee Notes

Staff Notes

Status

CV 1026. Breach of Express Warranty. Essential elements of claim. (Contract).

In this case, [name of plaintiff] claims that [name of defendant] made an express warranty that [describe the alleged warranty]. To establish this claim, the plaintiff must prove all of the following:

(1) That [name of defendant] made an express warranty [that became part of the basis of the parties' bargain] [upon which [name of plaintiff] relied];

(2) That the product did not conform to this warranty;

(3) That [name of plaintiff] was harmed;

(4) That the failure of the product to conform to the warranty was a cause of [name of plaintiff's harm; and

(5) That [name of plaintiff] could have reasonably been expected to use or be affected by the product.

[Name of plaintiff] does not have to prove that [name of defendant] knew or should have known that the representation or promise [he] was making was false. [Name of defendant] may be liable for breach of warranty even if [he] exercised reasonable care in making the statement. Similarly, [name of plaintiff] can recover even though [he] did nothing to determine whether or not the statement was true.

References

Utah Code Section 70A-2-318.

Boud v. SDNCO, Inc. 2002 UT 83.

Division of Consumer Protection v. GAF Corp., 760 P.2d 310 (Utah 1988).

Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983).

Management Committee of Graystone Pines HOA v. Graystone Pines, Inc., 652 P.2d 896, 900 (Utah 1982).

Erickson v. Poulsen, 15 Utah 2d 190,389 P.2d 739 (1964).

Ronald W. Eades, Jury Instructions On Products Liability § 4-1 (3d ed. 1999).

MUJI 1st References

12.18; 12.19; 12.26.

Committee Notes

The bracketed language at the end of paragraph (1) represents two alternatives, depending on whether the case is governed by the UCC or not. The first alternative is for cases governed by the UCC; the second is for cases not governed by the UCC. In cases not arising under the UCC, the Utah Supreme Court has said that reliance is generally necessary for a claim for breach of express warranty. See Groen v. Tri-O-Inc., 667 P.2d 598, 606 (Utah 1983); Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 900 (Utah 1982). The UCC, however, treats reliance under the "basis of the bargain" requirement. Some members of the

committee believe that whether further reliance is required under the UCC is an open question under Utah law.

Staff Notes

Status

CV 1027. Breach of Express Warranty. Essential elements of claim. (Tort)

In this case, [name of plaintiff] claims that [name of defendant] made an express warranty that [describe the alleged warranty]. To establish this claim, the plaintiff must prove all of the following:

(1) That [name of defendant] made an express warranty about the product [that became part of the basis of the parties' bargain] [upon which [name of plaintiff] relied];

(2) That the product did not conform to this warranty, resulting in a defective and unreasonably dangerous condition;

(3) That the defective condition and failure of the product to conform to the warranty caused [name of plaintiff] harm; and

(4) That [name of plaintiff] could have reasonably been expected to use or be affected by the product.

[Name of plaintiff] does not have to prove that [name of defendant] knew or should have known that the representation or promise [he] was making was false. [Name of defendant] may be liable for breach of warranty even if [he] exercised reasonable care in making the statement. Similarly, [name of plaintiff] can recover even though [he] did nothing to determine whether or not the statement was true.

References

Utah Code Section 78-15-6.

Division of Consumer Protection v. GAF Corp., 760 P.2d 310 (Utah 1988).

Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983).

Erickson v. Poulsen, 15 Utah 2d 190,389 P.2d 739 (1964).

MUJI 1st References

12.18; 12.19; 12.26.

Committee Notes

In a tort action, the elements of strict liability and breach of warranty "are essentially the same." Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 159 (Utah 1979) (citing William L. Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960); David G. Epstein, Products Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267); see also Salt Lake City Corp. v. Kasler Corp., 855 F. Supp. 1560, 1572 (D. Utah 1994) (citing Utah cases). Based upon this holding, some members of the committee believe that the elements for a claim of breach of express warranty are different if the claim sounds in tort than if it sounds in contract. This instruction is meant to state the elements of a tort claim for breach of express warranty.

However, other members of the subcommittee believe that the court in Hahn and subsequent authorities refer only to a claim for breach of implied warranty of merchantability, not for breach of an express warranty. Thus, these committee members

believe that the elements of a claim for breach of express warranty are the same, whether the claim sounds in contract or tort. They believe that this instruction adds the elements of a strict liability claim to those of a claim for breach of express warranty, making a claim for breach of express warranty more onerous than a claim for strict liability and hence not “essentially the same.”

The bracketed language at the end of paragraph 1 represents two alternatives, depending on whether the case is governed by the UCC or not. The first alternative is for cases governed by the UCC; the second is for cases not governed by the UCC. In cases not arising under the UCC, the Utah Supreme Court has said that reliance is generally necessary for a claim for breach of express warranty. See Groen v. Tri-O-Inc., 667 P.2d 598, 606 (Utah 1983); Management Comm. of Graystone Pines Homeowners Ass'n v. Graystone Pines, Inc., 652 P.2d 896, 900 (Utah 1982). The UCC, however, treats reliance under the "basis of the bargain" requirement. Some members of the committee believe whether further reliance is required under the UCC is an open question under Utah law.

Staff Notes

Status

CV 1028. Breach of Implied Warranty. Essential elements of implied warranty of merchantability claim. (Contract).

In this case, [name of plaintiff] claims that [name of defendant] breached an implied warranty that the [product] was merchantable. To establish this claim, [name of plaintiff] must prove all of the following:

(1) That at the time of the purchase, [name of defendant] was in the business of selling these products or by [his] occupation held [himself] out as having special knowledge or skill regarding these [products];

(2) That the [product]:

<blockquote>

[(a) was not reasonably fit for the ordinary purposes for which such products are used;]

[(b) was not of the same kind and quality as other products with which it was sold;]

[(c) would not pass without objection in the industry;] </blockquote>

(3) That [name of plaintiff] was harmed;

(4) That the failure of the [product] to have the expected quality was a cause of [name of plaintiff]'s harm; and

(5) That [name of plaintiff] could have reasonably been expected to use or be affected by the product.

References

Utah Code Section 70A-2-314(1) to (2).

Utah Code Section 70A-2-318.

Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983).

CACI 1231

MUJI 1st References

12.29; 12.30.

Committee Notes

Section 70A-2-314(2) lists six ways in which a product may be unmerchantable. Paragraph (2) of this instruction incorporates the most common ways in which a product is alleged to have been unmerchantable in a products liability case. The court should tailor the instruction to the party's claims and the particular facts of the case.

Staff Notes

Status

CV 1029. Breach of Implied Warranty. Essential elements of implied warranty of merchantability claim. (Tort).

In this case, [name of plaintiff] claims that [name of defendant] breached an implied warranty that the [product] was merchantable. To establish this claim, [name of plaintiff] must prove all of the following:

(1) [Name of defendant] sold the [product;]

(2) At the time of sale, the [product]:

<blockquote>

[(a) was not reasonably fit for the ordinary purposes for which such products are used;]

[(b) was not of the same kind and quality as other products with which it was sold;]

[(c) would not pass without objection in the industry;] </blockquote>

(3) That this condition rendered the [product] defective and unreasonably dangerous;

(4) That the defective condition of the [product] was the cause of [name of plaintiff]'s injuries.

References

Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 159 (Utah 1979).

63 Am Jur 2d Products Liability § 707.

MUJI 1st References

Committee Notes

In a tort action, the elements of strict liability and breach of warranty "are essentially the same." Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 159 (Utah 1979) (citing William L. Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960); David G. Epstein, Products Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267); see also Salt Lake City Corp. v. Kasler Corp., 855 F. Supp. 1560, 1572 (D. Utah 1994) (citing Utah cases). Thus, some members of the committee believe that the elements for a claim of breach of implied warranty of merchantability are different if the claim sounds in tort than if it sounds in contract. This instruction is meant to state the elements of a tort claim for breach of implied warranty of merchantability.

Other members of the committee believe that the elements of a claim for breach of implied warranty of merchantability are the same whether the claim sounds in contract or tort. These committee members believe that, when the court in Hahn said that the elements of strict liability and breach of implied warranty “are essentially the same,” it merely meant that a product that breached the implied warranty of merchantability was, by definition, defective, at least under a consumer expectations test such as that set out in Utah Code Ann. § 78-15-6(2). These committee members do not believe that a plaintiff in a tort case must prove a product defect separate and apart from the breach of

implied warranty of merchantability but only has to show that a breach of the implied warranty and that the breach caused his harm.

Staff Notes

Status

CV 1030. Breach of Implied Warranty. Creation of an implied warranty of fitness for a particular purpose.

Unless excluded or modified, an implied warranty of fitness for a particular purpose exists if at the time of contracting:

(1) the seller has reason to know that [name of plaintiff] was buying the [product] for a particular purpose, and

(2) [name of plaintiff] was relying on [name of defendant]'s skill or judgment to select or furnish a suitable [product].

References

Utah Code Section 70A-2-315.

Weir v. Federal Ins. Co., 811 F.2d 1387 (10th Cir. 1987).

MUJI 1st References

12.28.

Committee Notes

Staff Notes

Status

CV 1031. Breach of Implied Warranty. Essential elements of claim for breach of an implied warranty of fitness for a particular purpose. (Contract).

In this case, [name of plaintiff] claims that [name of defendant] made an implied warranty that the [product] was suitable or fit for [describe the particular purpose]. To establish this claim, [name of plaintiff] must prove all of the following:

(1) That [name of defendant] knew or had reason to know that [name of plaintiff] was buying the [product] for a particular purpose;

(2) That [name of defendant] knew or had reason to know that [name of plaintiff] was relying on [name of defendant]'s skill or judgment to select or furnish a suitable [product];

(3) That the [product] was unfit for the particular purpose [name of plaintiff] bought it for;

(4) That [name of plaintiff] was harmed, and

(5) That the failure of the product to conform to the warranty caused [name of plaintiff]'s harm.

References

Utah Code Section 70A-2-315.

Weir v. Federal Ins. Co., 811 F.2d 1387 (10th Cir. 1987).

MUJI 1st References

12.28.

Committee Notes

Staff Notes

Status

CV 1032. Breach of Implied Warranty. Essential elements of claim for breach of an implied warranty of fitness for a particular purpose. (Tort).

In this case, [name of plaintiff] claims that [name of defendant] made an implied warranty that the [product] was suitable or fit for [describe the particular purpose]. To establish this claim, [name of plaintiff] must prove all of the following:

(1) That [name of defendant] knew or had reason to know that [name of plaintiff] was buying the [product] for a particular purpose;

(2) That [name of defendant] knew or had reason to know that [name of plaintiff] was relying on [name of defendant]'s skill or judgment to select or furnish a suitable [product];

(3) That the [product] was defective, unreasonably dangerous, and unfit for the particular purpose [name of plaintiff] bought it for;

(4) That [name of plaintiff] was harmed, and

(5) That the defective condition caused [name of plaintiff]'s harm.

References

Fitz v. Synthes (USA), 1999 UT 103, ¶9, 990 P.2d 391.

63 Am. Jur. 2d 586 Products Liability § 724 (1996).

MUJI 1st References

Committee Notes

In a tort action, the elements of strict liability and breach of warranty "are essentially the same." Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 159 (Utah 1979) (citing William L. Prosser, The Assault Upon the Citadel, 69 Yale L.J. 1099 (1960); David G. Epstein, Products Liability: Defenses Based on Plaintiff's Conduct, 1968 Utah L. Rev. 267); see also Salt Lake City Corp. v. Kasler Corp., 855 F. Supp. 1560, 1572 (D. Utah 1994) (citing Utah cases). Thus, some members of the committee believe that the elements for a claim of breach of express warranty are different if the claim sounds in tort than if it sounds in contract. This instruction is meant to state the elements of a tort claim for breach of express warranty.

However, other committee members believe the court in Hahn was referring to a claim for breach of implied warranty of merchantability, not for breach of an implied warranty of fitness for a particular purpose. These committee members believe that the elements of a claim for breach of implied warranty of fitness for a particular purpose are the same, whether the claim sounds in contract or tort. They believe that this instruction adds the elements of a strict liability claim to those of a claim for breach of implied warranty of fitness for a particular purpose, making a claim for breach of implied warranty of fitness more onerous than a claim for strict liability and hence not “essentially the same.”

Staff Notes

Status

CV 1033. Breach of Implied Warranty. Warranty implied by course of dealing or usage of trade. (Contract).

[Name of plaintiff] claims that [name of defendant] breached a warranty implied from a course of dealing or a usage of trade.

Unless excluded or modified, an implied warranty may arise from a course of dealing or usage of trade.

A "course of dealing" is prior conduct between the parties that one can fairly regard as establishing a common basis for understanding or interpreting their statements and conduct.

A "usage of trade" is any practice or method of dealing that is so regularly followed in a particular trade, vocation or place that one would expect it to be observed in a particular case.

To establish a claim for breach of a warranty implied by course of dealing or usage of trade, [name of plaintiff] must prove all of the following:

(1) That the prior conduct between the parties or the practices regularly followed in the trade or place gave rise to an implied warranty that [describe the alleged warranty];

(2) That the product did not conform to this warranty;

(3) That [name of plaintiff] was harmed, and

(4) That the failure of the product to conform to the implied warranty was a cause of [name of plaintiff]'s harm.

A warranty will not be implied contrary to a course of dealing between [name of plaintiff] and [name of defendant] [or] [a usage of trade].

References

Utah Code Sections 70A-1-205; 70A-2-314(3); 70A-2-316(3)(c) .

MUJI 1st References

12.31; 12.32.

Committee Notes

Staff Notes

Status

CV 1034. Breach of Warranty. Effect of custom. (Contract).

A warranty will not be implied contrary to [a course of dealing or course of performance between the seller and the buyer] [or] [a usage of trade]. [A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question]. [A course of dealing is a sequence of previous conduct between the parties to a particular transaction is fairly to be required as establishing a common basis of understanding for interpreting their expressions and other conduct.]

References

Utah Code Sections 70A-1-205 and 70A-2-316(3)(c).

MUJI 1st References

12.31.

Committee Notes

Staff Notes

Status

CV 1035. Breach of Warranty. Allergic reaction or hypersensitivity.

Any warranty that the product involved in this case had certain characteristics or was suitable for a certain purpose was based on the assumption that the product would be used by a typical person. There is no breach of warranty when a product is harmless to 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, then [name of plaintiff] cannot recover for breach of warranty.

References

MUJI 1st References

12.33.

Committee Notes

Staff Notes

Status

CV 1036. Breach of Warranty. Improper use.

Any warranty involved in this case was based on the assumption that the product would be used in a reasonable manner, appropriate for the purpose for which it was intended. If you find that [name of plaintiff]'s injuries resulted in whole or in part from the plaintiff's improper use of the product, then you must find that the plaintiff was at fault, and the plaintiff's fault must be compared with any fault on the part of the defendant or others, according to the other instructions I will give [or have given] you.

References

Utah Code Sections 78-27-37 and 78-27-38.

Dixon v. Stewart, 658 P.2d 591 (Utah 1982).

MUJI 1st References

12.34.

Committee Notes

Staff Notes

Status

CV 1037. Breach of Warranty. Effect of buyer's examination.

If [name of plaintiff] examined the product [or sample or model] as much as he wanted before buying it, or if [name of defendant] demanded that [name of plaintiff] examine the product and he refused to examine it, then there is no implied warranty as to defects that a reasonable examination under the circumstances should have discovered. However, [name of defendant] is still responsible for defects that could not have been discovered by a reasonable examination.

[Name of plaintiff] may rely on an express warranty even though he may have had an opportunity to examine the product before he bought it. If [name of plaintiff] actually examined the product, he may still rely on [name of defendant]'s express warranty rather than on his own examination as to any defect in the product that was not obvious or apparent or was concealed.

References

Utah Code Section 70A-2-316(3)(b).

MUJI 1st References

12.35.

Committee Notes

Staff Notes

Status

CV 1038. Breach of Warranty. Exclusion or modification of express warranties by agreement.

The buyer and seller may agree that there shall be no express warranties relating to the goods [or they may agree that only certain warranties shall apply and all others be excluded]. If such an agreement has been made, there can be no express warranty contrary to its terms.

References

Utah Code Section 70A-2-316.

MUJI 1st References

12.36.

Committee Notes

Staff Notes

Status

CV 1039. Breach of Warranty. Validity of disclaimer.

To exclude or modify an implied warranty of merchantability, or any part of it, the language of the exclusion or modification must mention merchantability, and in the case of the writing, must be conspicuous. To exclude or modify any implied warranty of fitness, the exclusion must be in writing and conspicuous.

Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults," or other language which, in common understanding, calls that buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

References

Utah Code Section 70A-2-607.

Billings Yamaha v. Rick Warner Ford, Inc., 681 P.2d 1276 (Utah 1984).

Christopher v. Larsen Ford Sales, Inc., 557 P.2d 1009 (Utah 1976).

Chrysler Credit Corp. v. Burns, 527 P.2d 655 (Utah 1974).

MUJI 1st References

12.37.

Committee Notes

Staff Notes

Status

CV 1040. Breach of Warranty. Notice of breach.

A seller is not liable for a breach of warranty unless the buyer gave the seller notice of such breach within a reasonable time after the buyer knew, or in the exercise of reasonable care should have known, of the alleged [defect in goods] [breach of warranty]. What amounts to a reasonable time depends on the circumstances and the kind of product involved.

Notice may be oral or in writing; no particular form of notice if required. It merely must inform the seller of the alleged breach of warranty and buyer's intention to look to the seller for damages. Whether the buyer gave this information to the seller and, if so, whether the buyer acted within a reasonable time is for you to determine.

References

Utah Code Section 70A-2-607.

MUJI 1st References

12.38.

Committee Notes

Staff Notes

Status

CV 1041. Breach of Warranty. Definition of “goods.”

"Goods" means all tangible things, including specially manufactured products or articles, which are moveable and are the subject of the contract for sale.

References

Utah Code Section 70A-2-105.

MUJI 1st References

12.21.

Committee Notes

This instruction and instructions 1042-1044 are based on statutory definitions in the Uniform Commercial Code (UCC). They should only be used where there is a disputed issue of fact as to whether the statutory requirement has been met (that is, whether the product involved was a “good” under the UCC, whether there was a “sale” of the product, whether a “sample” or “model” gave rise to a warranty, or whether there was a sufficient “description” of the product to give rise to a warranty).

Staff Notes

Status

CV 1042. Contractual Breach of Warranty. Definition of “sale.”

A "sale" consists in the passing of ownership in goods from the seller to the buyer for a price.

References

Utah Code Section 70A-2-106(1).

MUJI 1st References

12.22.

Committee Notes

Staff Notes

Status

CV 1043. Contractual Breach of Warranty. Definition of "sample" or "model."

A "sample" is drawn from the bulk of the goods which is the subject matter of the sale; a "model" is a specially created item offered for inspection and has not been drawn from the bulk of the goods.

References

Pacific Marine Schwabacher, Inc. v. Hydroswift Corp., 525 P.2d 615 (Utah 1974).

MUJI 1st References

12.24.

Committee Notes

Staff Notes

Status

CV 1044. Breach of Warranty. Description of goods.

A description of goods may be by words or may be expressed in any other manner, such as use of technical specification or blueprints, which may be more exact than language. As long as they are made part of the basis for entering into the transaction, the goods must conform.

References

Pacific Marine Schwabacher, Inc. v. Hydroswift Corp., 525 P.2d 615 (Utah 1974).

MUJI 1st References

12.25.

Committee Notes

Staff Notes

Status

CV 1045. Sophisticated user.

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

To prove that [name of plaintiff] was a sophisticated user, [name of defendant] must show that [name of plaintiff]:

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

(2) belonged to a group or profession that had 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

Status

Approved: 6/4/2007

CV 1046. 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

CV 1047. 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

CV 1048. 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

CV 1049. 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

CV 1050. 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

CV 1051. 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