

# Agenda

## Advisory Committee on Model Civil Jury Instructions

October 15, 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.

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

September 10, 2007

4:00 p.m.

Present: Honorable William W. Barrett, Jr., Juli Blanch, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Jonathan G. Jemming, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and John L. Young (chair).  
Also present: Kamie F. Brown

Excused: Francis J. Carney, Colin P. King

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

a. *CV 1001. Strict liability. Introduction.* Mr. Simmons noted that he had proposed a revision to the second paragraph of the committee note, to reference the recent decision in *Egbert v. Nissan North America, Inc.*, 2007 UT 64, which clarified that the constitutionality of those portions of the Products Liability Act that were not reenacted after *Berry v. Beech Aircraft* is still an open question. The committee approved the proposed revision. Mr. Young asked whether the products liability instructions also reference the recent decision in *Tabor v. Metal Ware Corp.*, 2007 UT 71. Mr. Fowler noted that the decision was issued after the subcommittee last met, so it has not been accounted for.

b. *CV 1007. Strict liability. Elements of claim for failure to adequately warn.* Mr. Simmons noted that CV 1007 presupposes that the court also gives CV 1006 regarding the duty to warn. Where the duty to warn does not raise a jury issue but is decided by the court as a matter of law, CV 1006 will not be given. Mr. Simmons therefore proposed that the words "If you find that a warning was required" and "next" in the first line of CV 1007 be bracketed and the committee note be revised to say that the bracketed language should not be used if the court does not give CV 1006. The committee approved the change.

c. *CV 1008. Strict liability. Definition of "adequate warning."* Mr. Simmons noted that the first sentence of the instruction ("A [product] with an adequate warning is not defective or unreasonably dangerous.") was misleading, since a product with an adequate warning can still be defectively designed and manufactured. Dr. Di Paolo suggested dropping the first paragraph. The committee agreed with her suggestion and deleted the last paragraph as well, since it restated the misleading first paragraph. Dr. Di Paolo also noted that CV 1007 says that the court will define "adequate warning," but CV 1008 defines "inadequate warning." She asked whether the jury would be confused if the instruction were phrased in terms of an "adequate" warning if all the evidence and arguments are stated in terms of an "inadequate" warning. The committee did not think so. After some discussion, the committee revised the instruction to

say when a warning is “adequate,” rather than “inadequate.” The committee approved the instruction as revised.

d. *CV 1011. Strict liability. Component part manufacturer. Part defective only as incorporated into finished product.* The committee approved the instruction as drafted.

e. *CV 1012. Strict liability. Component part manufacturer. Defective part incorporated into finished product.* Mr. Fowler explained that the instruction offers alternatives because the members of the subcommittee could not agree whether a component part manufacturer and the manufacturer of the finished product should have their fault compared (alternative A) or whether they can be jointly liable (alternative B). There is no Utah appellate court decision on point. The committee discussed when alternative instructions should be used. Some thought that a disagreement among committee members alone was insufficient and that alternatives should be offered only when there is a conflict in the controlling case law. Others thought that alternatives are appropriate when there is no controlling law on point and the committee cannot agree that one position accurately states the law. Mr. Jemming suggested that the disagreement within the committee or subcommittee should be substantial, and that one member’s unsupported opinions should not be enough to warrant an alternative instruction. Mr. Simmons noted that the subcommittee was pretty evenly divided on this instruction, hence the alternatives. Mr. Ferguson noted that a trial court had denied his request for an instruction substantially in the form of alternative A. Mr. Fowler thought that alternative B should be relegated to the committee note. Mr. Simmons thought that, if the committee could not agree that alternative A accurately stated the law, the committee should offer courts and practitioners an alternative. He agreed, however, that there was no Utah law to support alternative B but noted that there was law from other jurisdictions with similar statutory schemes that would support alternative B. Mr. Young noted that the committee note can be as long as we would like. The committee agreed to move alternative B to the committee note, with an explanation.

**Mr. Simmons will revise the committee note to CV 1012 to include alternative B and explain the rationale for the alternative.**

f. *CV 1014. Negligence. “Negligence” defined.* Dr. Di Paolo noted that the instruction does not define “negligence,” as its title promises. Instead, it defines “reasonable care.” She thought that it needed a sentence saying that negligence is the failure to use reasonable care. Mr. Shea compared the instruction with the general negligence instruction (CV 202). Mr. Jemming asked whether CV 202 was meant to be given with CV 1014. Mr. Fowler said that

the intent was to have a stand-alone instruction for products liability cases. At the suggestions of Messrs. Young and Shea, the second paragraph of the instruction was deleted, and the third paragraph was revised to read:

Negligence means that a  
[manufacturer/designer/tester/inspector/seller/distributor] did  
not 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 what a reasonably careful  
[manufacturer/designer/tester/inspector] would do under similar  
circumstances. A person may be negligent in acting or failing to act.

Mr. Shea asked whether the alternative “to” phrases were necessary. Mr. Fowler thought they were, based on alternative views of the statute and case law. Mr. Shea suggested changing the word “causing,” since causation as used in the instructions has a specific legal meaning. Mr. Fowler suggested “creating” for “causing.” Mr. Shea also asked whether “prudent” should be replaced by “careful,” since “prudent” is a less common word. Dr. Di Paolo thought that “prudent” implied more expertise and wisdom than “careful.” Mr. Shea noted that the first synonym for “prudent” in the on-line thesaurus was “careful,” but “prudent” was not listed as a synonym for “careful.” (The first synonym for “careful” is “cautious.”) The committee changed “prudent” in the third paragraph to “careful” but left “prudent” in the following paragraph, to suggest that the words were meant to be synonymous. Mr. Simmons suggested adding “seller/distributor” to the bracketed language beginning “manufacturer.” Mr. Fowler and Ms. Brown thought that distributors were adequately covered in other instructions, but Mr. Simmons pointed out that those instructions do not purport to define “negligence.” Mr. Young suggested that the subcommittee decide whether to include sellers and distributors in CV 1014 or in a separate instruction. The instruction as modified was approved, subject to further action by the subcommittee.

g. *CV 1015 through CV 1021. Negligence instructions.* Mr. Simmons thought that the instructions were based on a misunderstanding of the relationship between strict liability and negligence and that CV 1014 and the general negligence instructions would suffice. Instructions CV 1015 through 1021 add the elements of a claim for strict products liability to those for a negligence claim. Mr. Fowler thought that the critical element in any products liability claim, whether it sounds in strict liability or negligence, is a defect that makes the product unreasonably dangerous. Ms. Brown thought that this result was required by *Bishop v. GenTec, Inc.*, 2002 UT 36, 48 P.3d 218, but Mr. Simmons

thought it was based on a misreading of *Bishop* and was inconsistent with *Slisze v. Stanley-Bostitch*, 1999 UT 20, 979 P.2d 317. At Mr. Young's suggestion, the committee decided to leave the instructions as they are and let the judge decide the issue in each case. The committee thought the dispute was adequately identified in the committee notes to CV 1014 and 1015.

h. *CV 1016. Negligence. Duty to warn.* Mr. Simmons noted that this instruction was essentially the same as CV 1006. Mr. Ferguson noted that the instructions are different. Under CV 1006, the issue is whether the product was defective because there was no adequate warning; under CV 1016, the issue is whether the defendant was negligent because there was no adequate warning. But product defect is also an element of a negligence claim as stated in the first alternative in CV 1014. Dr. Di Paolo suggested adding a committee note to the effect that the court would probably only give CV 1006 or CV 1016, not both. Subject to that addition, the instruction was approved.

i. *CV 1017. Negligence. Elements of claim for failure to adequately warn.* At Mr. Simmons's suggestion, the instruction was revised in accordance with the changes to CV 1007. Mr. Simmons also questioned whether the first element accurately stated the law. It implies that the lack of an adequate warning is prima facie evidence of negligence. At Dr. Di Paolo's suggestion, the first subparagraph was revised to read, "(1) [name of defendant] failed to exercise reasonable care because [he/she/it] did not provide an adequate warning."

j. *CV 1018. Negligence. Definition of "adequate warning."* At the suggestion of Messrs. Young and Ferguson, CV 1018 was revised in accordance with the changes to CV 1008.

k. *CV 1019. Negligence. Duty of designer/manufacturer.* Mr. Young asked whether the subcommittee should reconsider this instruction in light of the Utah Supreme Court's adoption of part of the Restatement (Third) of Torts: Products Liability in *Tabor v. Metal Ware Corp.*, 2007 UT 71. Dr. Di Paolo noted that the instruction was hard to process because it contained so many negatives. The committee revised the second paragraph of the instruction to read:

However, a manufacturer may market a nondefective product even if a safer model is available. There is no duty to make a safe product safer. A [designer/manufacturer] has no duty to inform the consumer of the availability of the safer model.

Mr. Jemming questioned whether a "nondefective" product is necessarily a "safe" product. At Mr. Shea's suggestion, "[name of defendant]" was substituted for "[designer/manufacturer]."

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2. *Next Meeting.* The next meeting will be Monday, October 15, 2007, at 4:00 p.m. (This is the third Monday in October, since the second Monday is Columbus Day.)

The meeting concluded at 6:05 p.m.

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Second Edition  
Working Draft  
October 9, 2007

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**CV 1006. Strict liability. Duty to warn.**

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

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

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

[Name of defendant] was not required to warn about a danger from the [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 1<sup>st</sup> References**

12.6; 12.7.

**Committee Notes**

This instruction may not be appropriate if the manufacturer provided a warning, or if the manufacturer does not dispute that it had a duty to warn the plaintiff of a particular danger.

**Staff Notes**

**Status**

Approved: 5/21/2007

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

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

- (1) was designed to reasonably catch the user's attention;
- (2) was understandable to foreseeable users;
- (3) fairly indicated the danger from the [product]'s foreseeable use; and
- (4) was sufficiently conspicuous to match the magnitude of the danger.

**References**

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

**MUJI 1<sup>st</sup> 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: 9/10/2007

**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 1<sup>st</sup> References**

12.8.

**Committee Notes**

**Staff Notes**

**Status**

Approved: 9/10/2007

**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].

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.

**References**

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

**MUJI 1<sup>st</sup> References**

**Committee Notes**

The Utah Supreme Court has not yet determined if or how fault should be apportioned between the manufacturer of a defective part and the manufacturer of the finished product. Some courts applying a comparative fault system similar to Utah's have concluded that, in some situations, such as in cases of vicarious liability or strict products liability, multiple defendants should be treated as a single unit, on the theory that they are "joint tortfeasors" in the original sense, that is, persons responsible for carrying out a tort by concerted action. See, e.g., *In re Rapco Foam, Inc.*, 23 B.R. 692 (W.D. Wis. 1982); *Arena v. Owens-Corning Fiberglas Corp.*, 74 Cal. Rptr. 2d 580, 593 (Ct. App.), review denied (Cal. 1998); *Wimberly v. Derby Cycle Corp.*, 65 Cal. Rptr. 2d 532, 535-41 (Ct. App. 1997), and cases cited therein; *Steenrod v. Doubrava*, 498 N.Y.S.2d 225 (App. Div. 1986); Restatement (Third) of Torts: Apportionment of Liability §§ 7 cmt. j; 13 & cmts. a, c, d, and e. Therefore, some subcommittee members favored the following instruction:

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].

**Staff Notes**

**Status**

Approved: 9/10/2007

**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 1<sup>st</sup> 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.

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].

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).

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

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

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

### **MUJI 1<sup>st</sup> 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) of 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**

Approved: 9/10/2007

**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).

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

**MUJI 1<sup>st</sup> 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 committee 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**

Approved 9/10/2007

## **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] was 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] 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 cmt. j (1963 & 1964).

### **MUJI 1<sup>st</sup> References**

12.6; 12.7.

### **Committee Notes**

### **Staff Notes**

### **Status**

Approved: 9/10/2007

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

[If you find that a warning was required,] you must [next] determine whether:

(1) [name of defendant] failed to exercise reasonable care because [he] did not provide 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 1<sup>st</sup> References**

12.6; 12.7.

**Committee Notes**

The bracketed language should be given only if the jury under Instruction 1016, not the judge, decides whether there was a duty to warn.

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

**Staff Notes**

**Status**

Approved: 9/10/2007

**CV 1018. Negligence. Definition of “adequate warning.”**

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

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

- (1) was designed to reasonably catch the user’s attention;
- (2) was understandable to foreseeable users;
- (3) fairly indicated the danger from the [product]’s foreseeable use; and
- (4) was sufficiently conspicuous to match the magnitude of the danger.

**References**

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

**MUJI 1<sup>st</sup> 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**

Approved: 9/10/2007

**CV 1019. Negligence. Duty of designer/manufactur.**

[Name of defendant] has a duty to [design/manufacture] a product to eliminate any unreasonable risk of foreseeable injury.

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

**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 1<sup>st</sup> References**

12.16.

**Committee Notes**

**Staff Notes**

**Status**

Approved: 9/10/2007

## **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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 *McCullin 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 defective. 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> 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**