Agenda
Advisory Committee on
Model Civil Jury Instructions

January 14, 2008
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.

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
December 10, 2007
4:00 p.m.

Present: Honorable William W. Barrett, Jr., Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Gary L. Johnson, Colin P. King, Stephen B. Nebeker, Timothy M. Shea, Paul M. Simmons, and Peter W. Summerill

Excused: John L. Young (chair), Francis J. Carney

Mr. Shea conducted the meeting in the absence of Mr. Young.

1. *New Committee Member.* Mr. Shea introduced Peter W. Summerill, the newest member of the committee.

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

a. *CV 1014. Negligence. "Negligence" defined.* Mr. Fowler noted that the subcommittee deleted "seller/distributer" from the bracketed language in paragraphs 2 through 4 because the liability of retail sellers is now covered in another instruction. The court and the parties will choose the words in the brackets that apply in the particular case.

b. *CV 1020. Negligence. Drug manufacturer's duty to warn.* Mr. Fowler noted that the instruction was revised in light of the committee's discussion at the last meeting to say that the "other available means of communication" referred to in *Barson v. E.R. Squibb & Sons,* 682 P.2d 832 (Utah 1984), must be reliable. A committee note was also added to highlight the issue of possible federal preemption. Mr. Ferguson asked whether "adverse reaction reports" had to be defined, but the committee thought it would be a matter of evidence, not instruction, in a given case. Dr. Di Paolo questioned whether "communications" should be "communication" and asked what a "continuous duty" meant. Mr. Ferguson suggested replacing the "continuous duty" phrase with "must always stay current." Dr. Di Paolo suggested "is required to" for "must." The committee revised the second sentence of the instruction to read: "[Name of defendant] has a duty to stay current on scientific developments about its product and to give timely and adequate warnings . . . ." Mr. Nebeker asked whether the jury needed to be instructed on how a defendant must give timely and adequate warning. The committee thought the instructions on warnings adequately covered that issue.

c. *CV 1021. Negligence. Retailer's duty.* Mr. Shea suggested saying "one who sells" instead of "one who is in the business of selling." Mr. Ferguson noted that products liability only applies to those in the business of distributing

the product, but Mr. Simmons pointed out that this is a negligence instruction, not a strict liability instruction, and those who are not in the business of selling the product can still be liable for negligence. At Mr. Shea's suggestion, the second sentence was revised to read, "One who . . . does not know and had no reason to know . . . ." Mr. Summerill asked why the product has to be "defective and unreasonably dangerous" in a negligence action. He suggested providing alternatives, as was done in CV 1014. Mr. Shea suggested two separate instructions.

Mr. Fowler will take CV 1021 back to the subcommittee to consider alternative instructions.

d. *CV 1023. Breach of express warranty. Creation of an express warranty.* Dr. Di Paolo noted that CV 1023, 1024, and 1025 all deal with what an express warranty is or is not and asked whether they should be combined into one instruction. Mr. Johnson and Mr. Fowler preferred separate instructions. All might not be needed in a given case, and it is easier to use instructions in closing argument if they are shorter. At Mr. Shea's suggestion, the committee reversed the order of CV 1024 and 1025. Dr. Di Paolo thought that "induces" was not easily understood and suggested replacing it with "convinces." Mr. Ferguson suggested "persuades." Mr. Ferguson wondered if jurors would understand the phrase "made part of the basis for the sale." Mr. Summerill suggested saying that an express warranty is created if the buyer relied on the promise, description, sample, or model. Subparagraph (1) was revised to read, "The seller of a product makes a promise or statement of fact about the product that reasonably persuades the other party to rely on the promise or statement."

e. *CV 1024 (formerly 1025). Breach of express warranty. What is not required to created an express warranty.* Dr. Di Paolo asked whether an express warranty is created by the buyer in his or her own mind. The committee explained that the buyer does not create the warranty; whether the seller's words or actions create an express warranty depends on an objective standard, that is, the buyer's belief that the seller's words or actions create an express warranty must be reasonable. The committee approved the instruction, but Mr. Johnson had a reservation. He thought that it did not adequately explain that "puffing" does not create a warranty and preferred MUJI 12.26.

f. *CV 1025 (formerly 1024). Breach of express warranty. Objective standard to create an express warranty.* At Mr. Ferguson's suggestion, "judge" in the first sentence was replaced by "consider." At Mr. Summerill's suggestion, "statement of fact, promise or description" was bracketed throughout, suggesting that the court use the term most appropriate for the particular case. Mr. Summerill also suggested adding "advertising materials" to the newly bracketed

language. The committee was not sure whether the law treats advertising materials differently from other statements. Mr. Johnson noted that it may make a difference for insurance purposes whether or not a statement is made in an advertisement, since some policies provide coverage for "advertising injury" but not for statements made in one-on-one sales. If there is no difference, then "advertising materials" could be added to the bracketed words, and the second paragraph could be eliminated.

Mr. Fowler and Mr. Simmons will review the law to determine whether it treats advertising warranties differently from other express warranties.

Mr. Shea suggested "relied on" for "bought the product based on" in the second sentence. Mr. Johnson thought that reliance was essential and that buying the product does not necessarily prove reliance on a warranty. Mr. Fowler suggested "bought the product in reliance on" the statement. Mr. Summerill suggested "would have relied on the statement in buying the product." Mr. Shea questioned whether "in substantial part" was necessary. Mr. Johnson asked where the phrase "at least in substantial part" came from.

Mr. Simmons will try to trace the derivation of the phrase "at least in substantial part."

Mr. King joined the meeting. Mr. Shea suggested deleting "to consumers" in the second paragraph. Mr. Fowler thought the phrase was meant to distinguish advertising directed to the public generally from other solicitations. Mr. King asked whether subparagraph (1) ("the ability of a reasonable buyer to see and understand for himself") referred to the buyer's subjective ability to understand or to such things as the font and size of an advertisement. Mr. Fowler thought it was meant to refer to the buyer's ability to test the statement, such as by kicking the tires of a car or seeing that the car was red and not green as the seller represented. Dr. Di Paolo thought it covered hyperbole. Mr. Shea suggested it referred to the buyer's ability to compare the product to the statement. Mr. Johnson suggested that "compare" implies something more than "see and understand" and did not know what a consumer is supposed to do to "compare" the product and the statement. Dr. Di Paolo thought "understand" was also problematic. She suggested saying, "the ability of a reasonable buyer to see and understand for himself the extent to which the product conforms to the statement." Mr. Fowler compared the instruction to MUJI 12.26 and 12.27. The committee agreed that the phrase "the matter to which the statement . . . related" was awkward. The committee deferred further discussion of the instruction pending further research on advertising and express warranty claims.

g. *CV 1026. Breach of express warranty. Essential elements of claim. (Contract.)* Mr. Fowler noted that there are contract and tort versions of several instructions. Mr. Simmons noted that the first MUJI did not distinguish between contract and tort warranty claims but distinguished between common-law and statutory warranty claims. Dr. Di Paolo asked whether the term "harm" included both bodily harm and economic harm. Mr. Ferguson thought it did. Dr. Di Paolo then asked where in the instructions it says so. Mr. Shea noted that the damage instructions only talk about tort damages. Mr. Johnson questioned the last sentence of the instruction and thought that comparative fault was a defense to warranty claims. Mr. Ferguson read section 78-27-37 of the Utah Code, which defines "fault" to include both "comparative negligence" and "breach of express or implied warranty of a product." Mr. Johnson thought that the case law, however, restricts the use of comparative fault as a defense in a breach of contract case in a strictly commercial setting. Mr. Johnson thought that, if the only authority for the last sentence was the cases cited, the sentence may not be good law; it may have been superseded by the Liability Reform Act (Utah Code Ann. § 78-27-37). He thought that, at a minimum, the sentence should be deleted from the end of CV 1027, dealing with tort claims for breach of express warranties. Mr. Fowler thought that the issue may need to be highlighted in a committee note. Mr. King asked whether subparagraph (5) was necessary. Mr. Johnson thought it was necessary to cover third-party beneficiaries.

3. *Next Meeting.* The next meeting will be Monday, January 14, 2008, at 4:00 p.m.

The meeting concluded at 5:55 p.m.

Model Utah Jury Instructions

Second Edition

Working Draft

January 8, 2008

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.

Negligence means that a [manufacturer/designer/tester/inspector] 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.

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 1st References

Committee Notes

The bracketed portions of the second paragraph represent two viewpoints regarding the elements required for negligence in a products liability claim.

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, some members of the committee believe that 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 recognized that Utah's Product Liability Act "does not preclude a party from jointly bringing common law negligence claims and that it is, therefore, possible to simultaneously bring a negligence and strict liability claim." The Utah Supreme also recognized in that case 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 common law 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 common law negligence claim. Tallman v. City of Hurricane, 985 P.2d, 896 (Utah 1999). Section 395 does not require proof of a "defective and unreasonably dangerous condition."

Staff Notes

Status

Approved: 9/10/2007

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

[Name of defendant] is a drug manufacturer and, as such, is considered to be an expert in its field. [Name of defendant] has a duty to stay current on scientific developments about its product, and 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. [Name of defendant] 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 reliable communications.

References

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

MUJI 1st References

Committee Notes

Some members of the committee believe that this instruction conflicts with federal regulations governing the labeling of prescription drugs, see 21 C.F.R. § 201.57, and, therefore, it is inappropriate. The FDA's position at the time of the drafting of this instruction was that its approval of labeling for prescription drugs preempts state law failure to warn claims. See 71 Fed. Reg. 15, 3922, 3967-69 (Jan. 24, 2006)(amending 21 C.F.R. part 201). 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. This instruction may, therefore, be inapplicable or its language may require amendment depending upon the resolution of that conflict.

Regarding the issue of a post-sale duty to warn, the members of the committee believe that the manufacturer should not be deemed to have constructive knowledge of possible risks associated with the use of a drug that are reported from unreliable sources. "If pharmaceutical companies were required to warn of every suspected risk that could possibly attend the use of a drug, the consuming public would be so barraged with warnings that it would undermine the effectiveness of these warnings." Doe v. Miles Laboratories, Inc., Cutter Laboratories Div., 927 F.2d 187 (4th Cir. 1990). Therefore, the committee has included in the instruction that constructive knowledge of any dangerous side effects associated with the use of a particular drug imputed to a manufacturer must be based on sources that are trustworthy and reliable.

Staff Notes

Status

Approved: 12/10/2007

CV 1021A. 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. One who merely [sells/distributes] the [product] and does not know and had no reason to know of its defective condition is not responsible for any harm caused by the defective condition of the [product].

If, however, [name of defendant] knew or had reason to know that the [product] was defective and unreasonably dangerous, then [name of defendant] can be liable to [name of plaintiff] if [name of defendant] did not exercise reasonable care to inform [name of plaintiff] or otherwise protect [him] from the dangerous and defective condition of the [product].

References

Sanns v. Butterfield, 2004 UT App 203, 94 P.3d 301 (Utah Ct. App. 2004).

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

MUJI 1st References

12.17.

Committee Notes

This instruction may not be appropriate if the defendant distributes the product as his own, Restatement (Second) of Torts § 400, or if the manufacturer of the product is not a party to the action or is insolvent, see Sanns, 2004 UT App 203, ¶¶ 21 & 22.

Staff Notes

Status

Changes from: 12/10/2007

CV 1021B. Retailer's liability.

Ordinarily, one who sells a product that was made by another does not have a duty to inspect or test the product. One who merely [sells/distributes] the product and does not know and had no reason to know of a problem with the product is not responsible for any harm caused by the product.

If, however, [name of defendant] knew or had reason to know that the product was or was likely to be dangerous for its intended use and has no reason to believe that the user will realize its dangerous condition, then [name of defendant] can be liable to [name of plaintiff] if [name of defendant] did not exercise reasonable care to inform [name of plaintiff] or otherwise protect [him/her] from the risk and [name of defendant]'s failure to exercise reasonable care was a cause of [name of plaintiff]'s injury.

References

Sanns v. Butterfield Ford, 2004 UT App 203, 94 P.3d 301.

Restatement (Second) of Torts §§ 388-90, 399, 401, 402.

MUJI 1st References

12.17

Committee Notes

This instruction is meant to state a retailer's liability for negligence. Members of the committee disagreed over whether a plaintiff must prove that the product was defective and unreasonably dangerous in a negligence action. Instruction 1021 reflects the views of those members who think that a plaintiff must prove that the product was defective and unreasonably dangerous even where the plaintiff's claim sounds in negligence and not strict products liability. This instruction reflects the views of those members of the committee who think that the elements of a negligence claim are different from those for strict products liability and do not require a showing that the product was "defective and unreasonably dangerous."

Some committee members think that a retailer can still be liable under a theory of strict products liability under the Liability Reform Act. The Utah Supreme Court has not yet decided this issue, but the Utah Court of Appeals essentially rejected this argument in Sanns. The court, however, did recognize possible exceptions. The first paragraph of this instruction may therefore not be appropriate if the defendant distributes the product as his own, Restatement (Second) of Torts § 400, or if the manufacturer of the product is not a party to the action or is insolvent. See Sanns, 2004 UT App 203, ¶¶ 21 & 22.

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 about the condition or performance of a product.

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).

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 implied warranty of merchantability"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 preceded enactment 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 defect, regardless of the legal theory asserted. Courts interpreting Utah law 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.

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 principal 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. 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

Approved: 10/15/2007

CV 1023. Breach of Express Warranty. Creation of an express warranty.

An express warranty is created if:

(1) The seller of a product makes a promise or statement of fact about the product that reasonably persuades the other party to rely on the pronis or statement. In that case, the seller has made an express warranty that the product will conform to the promise or statement.

(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

Approved: 12/10/2007

CV 1024. 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

Approved: 12/10/2007

CV 1025. Breach of Express Warranty. Objective standard to create an express warranty.

You must consider any [statement of fact/promise/description of the product] as a reasonable person would have understood it. If a reasonable person would have relied on the [statement/promise/description] in buying the product, then you may find that the [statement/promise/description] created an express warranty.

In deciding whether a reasonable person would have relied on the [statement/promise/description], you should consider such facts as:

(1) the ability of a reasonable buyer to see and understand whether the [product] conformed to the [statement/promise/description];

(2) how specific or vague the [statement/promise/description] was; and

(3) how believable the [statement/promise/description] 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

Deleted by the subcommittee: "Advertising material 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 would have relied on the advertising material in buying the [product]."

Status

Changes from: 12/10/2007

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, [name of 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

Reviewed: 12/10/2007

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, [name of 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.

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

Add comparative negligence instruction.

Status

Changes from: 12/10/2007

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 [name of plaintiff]'s improper use of the [product], then you must find that [name of plaintiff] was at fault, and [name of plaintiff]'s fault must be compared with any fault on the part of [name of defendant] or others, according to the other instructions I will give [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] [sample/model of the product] 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. Breach of Warranty. Definition of “sale.” (Contract)

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. Breach of Warranty. Definition of "sample" or "model." (Contract)

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.

[Name of defendant] claims that [name of plaintiff] was a sophisticated user of the [product]. A "sophisticated user" is a user who either (l) has special knowledge, sophistication or expertise about the dangerous or unsafe character of the [product]; or (2) belongs to a group or profession that reasonably should have general knowledge, sophistication or expertise about the dangerous or unsafe character of the [product].

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

References

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

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

MUJI 1st References

Committee Notes

Staff Notes

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 demonstrated by a preponderance of evidence that the [product] is 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).

Egbert v. Nissan, 2007 UT 64, ¶14.

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 was the cause of [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 was the cause of the injury, you may consider that misuse in apportioning fault 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 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 1049A. Comparative fault.

[Name of defendant] contends that [name of plaintiff] was at fault and that [name of plaintiff]'s fault caused or contributed to [his] injuries. This is called comparative fault.

Comparative fault is [negligence] [misuse] [assumption of risk] [or other misconduct] by [name of plaintiff] that causes or contributes to the [his] injuries.

[Name of defendant] has the burden of proving [name of plaintiff]'s comparative fault by a preponderance of the evidence.

Any comparative fault of [name of plaintiff] does not bar [his] recovery unless you apportion 50% or more of the total fault to [name of plaintiff]. In other words, [name of plaintiff] may recover from [name of defendant] if [name of defendant]'s fault is greater than [name of plaintiff]'s.

If you allocate 50% or more of the total fault of all parties listed on the verdict form to [name of plaintiff], then [name of plaintiff] will recover nothing. If you allocate less than 50% of the total fault to [name of plaintiff], then the court will reduce [name of plaintiff]'s total damages you have determined by the percentage of fault you attribute to [name of plaintiff].

References

MUJI 1st References

12.9; 12.10.

Committee Notes

"Fault" is defined in instruction 201.

If nonparties are alleged to be at fault and will be listed on the verdict form, the instruction may have to be broadened to include nonparties as well as the plaintiff and defendants.

The definition of "comparative fault" in the second paragraph should include only those forms of comparative fault that are at issue in the case. The court should give separate instructions defining the particular type of misconduct involved (e.g., misuse or unreasonable use).

The committee has developed two comparative fault instructions for use in products liability cases. The committee is divided over whether the "pure comparative fault" rule established in Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981) survived the Liability Reform Act of 1986.

At the time Utah adopted strict products liability in 1979, the Utah comparative negligence statute applied the so-called 50/50 rule, under which a plaintiff could not recover if his or her negligence was greater than or equal to that of the defendants. In Mulherin v. Ingersoll Rand Co., 628 P.2d 1301 (Utah 1981), the Utah Supreme Court adopted a pure form of comparative fault in strict products liability cases. In 1986 the Utah Legislature enacted the Utah Liability Reform Act, which kept the 50/50 rule of the prior comparative negligence. MUJI contained two similar alternative instructions in light of the uncertainty at the time as to whether the Utah Liability Reform Act applied to strict

liability claims involving comparative fault. Some committee members believe this uncertainty still exists. Thus, the two alternative positions are set forth in Instructions 1049A and 1049B.

However, the Utah Supreme Court has decided a case involving strict liability and other claims apparently based on the 50/50 rule of comparative fault. In Interwest Construction v. Palmer, 923 P.2d. 1350 (Utah 1996), the Utah Supreme Court, in an opinion affirming a bench trial found that the trial court had erred in not considering the appellant's strict liability and negligence claims but found the error harmless because the trial court had correctly ruled against the appellant on its breach of contract and warranty claims because the appellant had caused its own damage. The Supreme Court read this as a factual determination that [the appellant's] misuse of [the product] exceeded the fault, if any, of its suppliers [the appellees]. Otherwise, the trial court would have apportioned damages on [the appellant's] breach of warranty claim." 923 P.2d at 1357. This language suggests that the court thought the Liability Reform Act applied. Nonetheless, some members of the committee believe the trial court's ruling can also be read as meaning that the appellant was the sole proximate cause of damages, in which case an apportionment of fault would be neither necessary nor proper. Notably, in Red Flame, Inc. v. Martinez, 2000 UT 22 , the Utah Supreme Court held that the mere fact that the Dramshop Liability Act prescribes a form of strict liability rather than traditional negligence does not exclude it from application of the comparative fault statute. See also S.H. v. Bistryski, 923 P.2d 1376 (Utah 1996) (holding comparative fault provisions of sections 78-27-37 and -38 applied to Utah's strict liability dog bite statute).

Staff Notes

Status

CV 1049B. Comparative fault.

[Name of defendant] contends that [name of plaintiff] was at fault and that [name of plaintiff]'s fault caused or contributed to [his] injuries. This is called comparative fault.

Comparative fault is [negligence] [misuse] [assumption of risk] [or other misconduct] by [name of plaintiff] that causes or contributes to [his] injuries.

[Name of defendant] has the burden of proving [name of plaintiff]'s comparative fault by a preponderance of the evidence.

If you determine that both [name of plaintiff] and [name of defendant] were at fault in causing [name of plaintiff]'s injuries, then you must determine the percentages of fault attributable to [name of plaintiff] and [name of defendant]. You must also determine the total damages [name of plaintiff] has sustained as a result of [his] injuries. The court will then reduce the total amount of damages by the percentage of [name of plaintiff]'s fault.

References

MUJI 1st References

Committee Notes

Staff Notes

Status

CV 1050. Unreasonable use. (Assumption of risk.)

[Name of defendant] claims that, if the [product] was defective, [name of plaintiff] knew about the defect and voluntarily proceeded to use the [product]. To establish this defense, [name of defendant] must show that [name of plaintiff] (1) knew about the defect in the [product], (2) knew the defect could cause injury, (3) proceeded to use the product despite this knowledge, and (4) a reasonably prudent person would not have used the [product] under the circumstances. If you find that [name of plaintiff] unreasonably used the [product] knowing of the defect and the danger it posed, you may consider that in apportioning fault on the special verdict form.

References

Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981).

Jacobsen Constr. Co. v. Structo-Lite Eng'g Inc., 619 P.2d 306 (Utah 1980).

Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 158 (Utah 1979).

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

MUJI 1st References

12.40

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

Tafoya v. Sears Roebuck & Co., 884 F.2d 1330, 1332 (10th Cir. 1989).

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

CV 1052. Product unavoidably unsafe.

In response to [name of plaintiff]'s claim that the [product] was defective in design, [name of defendant] claims that the [product] was unavoidably unsafe and that it is therefore not liable for any injuries the product caused. Some products cannot be made safe for their intended use, but their benefits are great enough to justify their risks of harm. The Rabies vaccination is an example, since a few recipients will suffer serious side effects, but the result of not receiving the vaccination is death. To establish the defense that the [product] was unavoidably unsafe, [name of defendant] must prove that (1) when the [product] was made, it could not be made safe for its intended use even applying the best available testing and research; and (2) the benefits of the [product] justified its risk. If [name of defendant] proves both by a preponderance of the evidence, the [product] is not defective.

This defense does not apply to [name of plaintiff]’s claims that the [product] was improperly manufactured or had inadequate warnings.

References

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

Restatement (Second) of Torts §402A, cmt. k.

MUJI 1st References

Committee Notes

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

Staff Notes

Status

CV 1053. Learned intermediary.

Manufacturers of prescription drugs have a duty to warn only the physician prescribing the drug, not the end user or the patient, of the risks associated with the drug and the procedures for its use. If you find that the manufacturer gave appropriate warnings to the physician, you must find that the manufacturer fulfilled its duty to warn.

References

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

MUJI 1st References

Committee Notes

Staff Notes

Status

CV 1054. Spoliation.

You may consider whether one party intentionally concealed, destroyed, altered, or failed to preserve evidence when under a duty to do so. If so, you may assume that the evidence would have been unfavorable to that party

References

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

URCP 37(g).

MUJI 1st References

Committee Notes

Staff Notes

Should this instruction be included instead in the general instructions (100 series)?

Status

CV 1055. Definition of "state of the art."

“State of the art” means the best technical, mechanical, and scientific knowledge and methods which are practical and available for use at the time of the design and testing of products in the same or similar industry for the same or similar products, for the purposes of providing for the quality and safety of such products.

In this case, if you find that the [product] as designed and manufactured conformed to the state of the art in the industry at the time of sale, then you may consider this as evidence that the product was not defective or unreasonably dangerous. A manufacturer’s duties to safely design a product do not include a duty to incorporate into its products only those features representing the ultimate in safety.

References

Utah Code Section 78-15-6(3) (2007).

Slisze v. Stanley-Bostitch, 1999 UT 20.

MUJI 1st References

Committee Notes

Staff Notes

Status

CV 1056. Subsequent remedial measures. Standards and purchases.

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

References

Utah R. Evid. 407.

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

Utah Code Section 78-15-6.

MUJI 1st References

Committee Notes

Some committee members believe that the relevant timeframe for consideration of subsequent remedial measures is based on the date the accident occurred. See Misener v. General Motors, 924 F. Supp. 130, 132-33 (D. Utah 1996). Other committee members believe that the relevant timeframe for consideration of product defect according to Utah's Product Liability Act is when the product was designed or manufactured; therefore, subsequent remedial measures that occurred after the design or manufacture are irrelevant. See Utah Code Ann. 78-15-6. Two alternatives are presented to reflect these viewpoints.

Staff Notes

Status

CV 1057. The manufacturer is not an insurer.

A manufacturer is not an insurer of the products it sells. The law recognizes that no product is or can be made absolutely safe or "accident proof."

References

Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301, 1302 (Utah 1981).

Raymond v. Union Pac. R. Co., 191 P.2d 137, 140 (Utah 1948).

MUJI 1st References

Committee Notes

Staff Notes

Status

CV 1058. Safety risks.

A product is not defective or unreasonably dangerous merely because it presents some safety risks that cause it to be dangerous for its intended use, nor is it defective or unreasonably dangerous merely because it could have been made safer or because a safer model of the product is available.

References

Slisze v. Stanley-Bostitch, 1999 UT 20, ¶ 10.

Fed. Jury Prac. and Instr., § 122.10 (5th Ed. 2000) (modified).

MUJI 1st References

Committee Notes

Staff Notes

Status