# Agenda
## Advisory Committee on
## Model Civil Jury Instructions

February 11, 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

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|---|---|
| Approval of minutes | John Young |
| Product Liability | Peter Summerill |

**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.

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|---|---|
| March 10, 2008 | Medical Malpractice |
| April 14, 2008 | Commercial Contracts |
| May 12, 2008 | Motor Vehicles |
| June 9, 2008 | Premises Liability |
| August 11, 2008 | Employment |
| September 8, 2008 | Insurance Obligations |
| October 14, 2008 | Construction Contracts |
| November 10, 2008 | Intentional Torts / Fraud and Deceit |
| December 8, 2008 | Eminent Domain |
| January 12, 2008 | Probate |
| February 9, 2008 | Professional Liability |

# Tab 1

***MINUTES***
Advisory Committee on Model Civil Jury Instructions
January 14, 2008
4:10 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Tracy H. Fowler, L. Rich Humpherys, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, and Peter W. Summerill. Also present: Kamie F. Brown

Excused: Colin P. King

Mr. Young noted that the committee has been at work going on five years and has only completed three sections of instructions out of the proposed twenty-eight sections. It took only four years to produce MUJI 1st. Mr. Carney noted that there has been a growing sense of frustration among members of the bench and bar. Mr. Young presented a proposal for completing the committee's work more expeditiously. Each subcommittee would be given a deadline for completing its instructions. The subcommittee should see that the instructions accurately state the law and are stated in plain English. The draft instructions would then be reviewed by three members of the whole committee, none of whom is a member of the subcommittee. They would review the draft instructions to make sure they are understandable to lay jurors. Mr. Shea suggested that they also look at the organization of the instructions within a section. Mr. Summerill suggested that the group of three use Google Docs to review the instructions and coordinate their changes. If the three members have questions or changes, they would resolve them with the chairperson of the subcommittee. Then the instructions would be presented to the whole committee for review and approval in a single meeting. Mr. Carney suggested that the subcommittees need to be flexible and enlist the help of other attorneys if necessary to get their work done on time. Mr. Carney also noted that, for the committee to get through a complete set of instructions in one meeting, everyone will have to have read the instructions before the meeting and come to the meeting prepared to present any changes or suggestions. As groups of instructions are completed, they can be published. It was suggested that judges be given loose-leaf binders of the instructions, which can be updated yearly.

The committee adopted Mr. Young's proposal and adopted the following schedule:

**Products Liability:**

The draft instructions will be reviewed by Mr. Summerill (who will act as point person), Mr. Johnson, and Mr. Ferguson.

The subcommittee will have any changes to the group of three by **January 22, 2008.**

The group of three will have their changes to Mr. Shea by **February 4, 2008,** so that he can distribute them to the full committee for consideration at the **February 11, 2008,** meeting.

**Medical Malpractice:**

The draft instructions will be reviewed by Mr. Humpherys (who will act as point person), Mr. Simmons, and Mr. Shea.

The subcommittee will have any changes to the group of three by **February 11, 2008.**

The group of three will have their changes to Mr. Shea by **March 3, 2008,** so that he can distribute them to the full committee for consideration at the **March 10, 2008,** meeting.

**Commercial Contracts:**

The draft instructions will be reviewed by Mr. Johnson (who will act as point person), Dr. Di Paolo, and Mr. Ferguson.

The subcommittee will have any changes to the group of three by **March 10, 2008.**

The group of three will have their changes to Mr. Shea by **April 7, 2008,** so that he can distribute them to the full committee for consideration at the **April 14, 2008,** meeting.

**Motor Vehicle Accidents:**

The committee suggested the following attorneys to serve on the Motor Vehicle Accidents subcommittee: Lynn Davies, Warren Driggs, Victoria Kidman, William Stegall, someone from Petersen & Associates, Bryan Larson, Steve Sullivan, Ray Ivie, and Mark Flickinger.

The draft instructions will be reviewed by Mr. Humpherys (who will act as point person), Mr. King, and Mr. West.

The subcommittee will have any changes to the group of three by **April 14, 2008.**

The group of three will have their changes to Mr. Shea by **May 5, 2008,** so that he can distribute them to the full committee for consideration at the **May 12, 2008,** meeting.

**Premises Liability:**

The draft instructions will be reviewed by Mr. Simmons (who will act as point person), Mr. Ferguson, and Mr. Fowler.

The subcommittee will have any changes to the group of three by **May 12, 2008.**

The group of three will have their changes to Mr. Shea by **June 2, 2008,** so that he can distribute them to the full committee for consideration at the **June 9, 2008,** meeting.

**Employment:**

Mr. Young will speak to Erik Strindberg about chairing the Employment subcommittee. Other attorneys suggested as subcommittee members were Maralyn

Reger at Snow, Christensen & Martineau, Karra Porter at Christensen & Jensen, and David P. Williams at Snell & Wilmer.

The draft instructions will be reviewed by Ms. Blanch (who will act as point person), Dr. Di Paolo, and Mr. Ferguson.

The subcommittee will have any changes to the group of three by **June 9, 2008.**

The group of three will have their changes to Mr. Shea by **August 4, 2008,** so that he can distribute them to the full committee for consideration at the **August 11, 2008,** meeting. (There will be no committee meeting in July 2008.)

**Insurance Litigation:**

Mr. Humpherys chairs the Insurance Litigation subcommittee. The following attorneys were suggested as members of the subcommittee: Gary Johnson, Peter Summerill, Alan Bradshaw, Alma Nelson, and Stuart Schultz.

The draft instructions will be reviewed by Mr. Carney (who will act as point person), Mr. Simmons, and Mr. Fowler.

The subcommittee will have any changes to the group of three by **August 11, 2008.**

The group of three will have their changes to Mr. Shea by **September 2, 2008,** so that he can distribute them to the full committee for consideration at the **September 8, 2008,** meeting.

**Construction Contracts:**

The draft instructions will be reviewed by Mr. Young (who will act as point person), Mr. Carney, and Mr. Shea, with Dr. Di Paolo acting as a consultant.

The subcommittee will have any changes to the group of three by **September 8, 2008.**

The group of three will have their changes to Mr. Shea by **October 6, 2008,** so that he can distribute them to the full committee for consideration at the **October 14, 2008,** meeting.

**Fraud, Deceit, and Other Intentional Torts:**

The committee suggested George Haley and Bob Anderson to serve on the subcommittee.

The draft instructions will be reviewed by Mr. Johnson (who will act as point person), Dr. Di Paolo, and Mr. Humpherys.

The subcommittee will have any changes to the group of three by **October 14, 2008.**

The group of three will have their changes to Mr. Shea by **November 3, 2008,** so that he can distribute them to the full committee for consideration at the **November 10, 2008,** meeting.

**Eminent Domain:**

The draft instructions will be reviewed by Ms. Blanch (who will act as point person), Mr. Young, and Mr. Simmons.

The subcommittee will have any changes to the group of three by **November 10, 2008.**

The group of three will have their changes to Mr. Shea by **December 1, 2008,** so that he can distribute them to the full committee for consideration at the **December 8, 2008,** meeting.

**Probate:**

The draft instructions will be reviewed by Mr. Carney (who will act as point person), Mr. King, and Mr. West.

The subcommittee will have any changes to the group of three by **December 8, 2008.**

The group of three will have their changes to Mr. Shea by **January 5, 2009,** so that he can distribute them to the full committee for consideration at the **January 12, 2009,** meeting.

**Professional Liability of Attorneys, Accountants, and Design Professionals:**

The draft instructions will be reviewed by Mr. Johnson, Mr. Summerill, and Ms. Blanch.

The subcommittee will have any changes to the group of three by **January 12, 2009.**

The group of three will have their changes to Mr. Shea by **February 2, 2009,** so that he can distribute them to the full committee for consideration at the **February 9, 2009,** meeting.

The committee discussed whether to include a section on civil rights instructions. Some committee members thought that such a section would not be necessary because civil rights claims are governed by federal law, and federal pattern instructions sufficiently cover them. Mr. Summerill thought it would be helpful to include a section of civil rights instructions because some civil rights claims may be based on state constitutional law.

Mr. Young will check with Judge Barrett and Mr. Nebeker to see if they would like to be on any of the reviewing committees of three committee members.

Mr. Young will also send an annual report to the Chief Justice with a spreadsheet showing the schedule the committee has adopted. Mr. Carney suggested that a copy of the report and spreadsheet also be sent to the presiding district court judges.

*Next Meeting*. The next meeting will be Monday, February 11, 2008, at 4:00 p.m.

The meeting concluded at 5:40 p.m.

# Tab 2

Model Utah Jury Instructions

Second Edition

Working Draft

February 4, 2008

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## CV 1001. Strict liability. Introduction.

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

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

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

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

**References**

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

**MUJI 1st References**

**Committee Notes**

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

Utah's Product Liability Act is codified at Utah Code Sections 78-15-1 to 78-15-7. Section 78-15-3 of the Utah Product Liability Act was declared unconstitutional in Berry ex rel. Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985). Following the Berry decision, the Utah legislature repealed former sections 78-15-2 (legislative findings) and 78-15-3 (the unconstitutional statute of repose), and enacted a new section 78-15-3 (statute of limitations). The legislature did not repeal, amend or otherwise change sections 78-15-1, 78-15-4, or 78-15-6, which were held to be not severable from the portions of the statute declared unconstitutional in Berry. Although Utah courts have consistently cited and relied upon the Product Liability Act as codified since the legislature's action, the Utah Supreme Court has never directly addressed since Berry the constitutionality of those sections declared unconstitutional in Berry. See Egbert v. Nissan N. Am., Inc., 2007 UT 64, ¶ 8, n.3. The United States District Court for the District of Utah, however, has rejected the argument that section 78-15-6 is unconstitutional. See Henrie v. Northrop Grumman Corp., 2006 U.S. LEXIS 23621 (D. Utah 2006).

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

**Staff Notes**

**Status**

Approved: 2/12/2007

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

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

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

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

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

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

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

**References**

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

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

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

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

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

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

**MUJI 1st References**

12.1.

**Committee Notes**

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

**Staff Notes**

**Status**

Approved: 2/12/2007

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

Alternative A.

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

Alternative B.

The [product] had a design defect if:

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

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

**References**

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

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

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

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

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

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

Restatement (Third) of Torts § 2, notes.

**MUJI 1st References**

12.3; 12.4; 12.5.

**Committee Notes**

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

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

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

**Staff Notes**

**Status**

Approved: 3/12/2007

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

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

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

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

**References**

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

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

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

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

**MUJI 1st References**

12.2.

**Committee Notes**

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

**Staff Notes**

**Status**

Approved: 3/12/2007

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

Alternative A.

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

Alternative B.

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

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

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

**References**

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

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

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

**MUJI 1st References**

12.1; 12.14.

**Committee Notes**

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

**Staff Notes**

**Status**

Approved: 6/4/2007

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

[Name of 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 1st 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 1007. Strict liability. Elements of claim for failure to adequately warn.

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

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

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

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

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

**References**

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

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

**MUJI 1st References**

12.6; 12.7.

**Committee Notes**

The bracketed language should be given only if the jury under Instruction 1006, 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: 3/12/2007

## 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 1st References**

**Committee Notes**

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

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

**Staff Notes**

**Status**

Approved: 9/10/2007

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

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

**References**

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

Rule 301. Utah Rules of Evidence.

**MUJI 1st References**

**Committee Notes**

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

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

**Staff Notes**

**Status**

Approved: 6/4/2007

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

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

**References**

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

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

**MUJI 1st References**

12.6; 12.7.

**Committee Notes**

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

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

**Staff Notes**

**Status**

Approved: 6/4/2007

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

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

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

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

**References**

**MUJI 1st References**

12.8.

**Committee Notes**

**Staff Notes**

**Status**

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 find both [name of defendant], the manufacturer of the component part, and [name of co-defendant or third party], the manufacturer of the finished product, liable to [name of plaintiff].

**References**

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

**MUJI 1st References**

**Committee Notes**

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 1st References**

12.13.

**Committee Notes**

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

**Staff Notes**

**Status**

Approved: 6/4/2007

## CV 1014. Negligence. "Negligence" defined.

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

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 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 1st References**

3.1; 3.2.

**Committee Notes**

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

Based upon their interpretation of Slisze v. Stanley-Bostitch, some 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 1st 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 1st 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 1st References**

**Committee Notes**

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

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

**Staff Notes**

**Status**

Approved: 9/10/2007

## CV 1019. Negligence. Duty of designer/manufacturer.

[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 1137 (Utah 1991).

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

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

**MUJI 1st References**

12.16.

**Committee Notes**

**Staff Notes**

**Status**

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/distributing] 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 dangerous and 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. Negligence Retailer's ~~liability~~ duty.

Ordinarily, one who [sells/distributes] 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] 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 1021A 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. One judge in the U.S. District Court for the District of Utah held that the Liability Reform Act did not do away with strict products liability for passive distributors in Kahler v. American Honda Motor Co., No. 2:00-CV-00294PGC, but the Utah Court of Appeals essentially rejected this position in Sanns v. Butterfield Ford, 2004 UT App. 203, 94 P.3d 301. 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 promise 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~~ gave [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**

**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] reasonably 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. See, e.g., Boud v. SDNCO, Inc. 2002 UT 83 (discussing whether Plaintiff relied on the express warranty under the UCC). Others believe the issue was resolved by dictum in GAF stating, "actual reliance need not be shown." 760 P.2d at 315.

**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 [name of plaintiff] was harmed;

~~(3)~~ (4) that the defective condition and failure of the [product] to conform to the warranty ~~caused~~ was a cause of [name of plaintiff]'s harm; and

~~(4)~~ (5) that [name of plaintiff] reasonably 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**

Some members of the committee believe 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 Hahn and its progeny, 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 committee note that the court in Hahn refered 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. See Committee Note to Instruction 1026

**Staff Notes**

**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]:

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

(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] reasonably 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) that [name of defendant] sold the [product;]

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

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

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

(4) that [name of plaintiff] was harmed;

~~(4)~~ (5) that the defective condition of the [product] was ~~the~~ a cause of [name of plaintiff]'s ~~injuries~~ harm.

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

(2) [name of buyer] was relying on [name of ~~defendant~~ seller]'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~~ was a cause of [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~~ was a cause of [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**

See Committee Note to Instruction 1027.

**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 shows their understanding or provides a basis for interpreting their statements or 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~~ this 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-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. 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 normal 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 and about which [name of defendant] did not know, then [name of plaintiff] cannot recover for breach of warranty.

**References**

**MUJI 1st References**

12.33.

**Committee Notes**

**Staff Notes**

**Status**

## CV 1035. 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] was a cause of [his] harm, 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 1036. 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 was concealed.

**References**

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

**MUJI 1st References**

12.35.

**Committee Notes**

This instruction has three concepts. In the first paragraph, there are the concepts of the existence of a warranty and responsibility. In the second paragraph there is the concept of reliance. In addition, the first paragraph speaks in terms of “should” and “could” have been discovered. The second paragraph uses “was not obvious or was concealed.” These shifts may confuse the jury. Consider instead:

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, then there is no [express waranty] or [implied warranty] as to defects that a reasonable examination would have discovered. However, there remains an [express waranty] and [implied warranty] against defects that a reasonable examination would not have discovered.

**Staff Notes**

**Status**

## CV 1037. Breach of Warranty. Exclusion or modification of express warranties by agreement.

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

**References**

Utah Code Section 70A-2-316.

**MUJI 1st References**

12.36.

**Committee Notes**

**Staff Notes**

**Status**

## CV 1038. 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 the word “merchantability,” and ~~in the case of the writing~~ if written, the writing must be conspicuous. To exclude or modify any implied warranty of fitness, the exclusion or modification must be in writing and be 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~~ are no implied warrant~~y~~ies.

**References**

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

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 1039. 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~~ the 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 is required. The notice 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~~ are for you to determine.

**References**

Utah Code Section 70A-2-607.

**MUJI 1st References**

12.38.

**Committee Notes**

**Staff Notes**

**Status**

## CV 1040. 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 1041-1043 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 1041. 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 1042. 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~~ 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 1043. 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 specifications or blueprints, which may be more exact than language. As long as the description is made part of the basis for entering into the transaction, the goods must conform to that description.

**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 1044. 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:

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

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

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

**References**

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

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

**MUJI 1st References**

**Committee Notes**

**Staff Notes**

**Status**

Approved: 6/4/2007

## CV 1045. 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 ~~demonstrated~~ proved by a preponderance of evidence that the [product] is defective even though the manufacturer followed government laws, standards or regulations, you are free to ignore 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**

**Staff Notes**

**Status**

## CV 1046. Product misuse.

[Name of defendant] claims that [name of plaintiff] misused the [product] and that the misuse was ~~the~~ a cause of [name of plaintiff]'s ~~claimed injury~~ harm. To establish this defense, [name of defendant] must prove that:

(1) [name of plaintiff] used [the product] in a way that the manufacturer did not intend and could not have reasonably anticipated; and

(2) the misuse was ~~the~~ a cause of [name of plaintiff]'s ~~injury~~ harm.

If you find that [name of defendant] has proved these points, you may consider [name of plaintiff]'s misuse of the [product] in apportioning fault on the Special Verdict form.

**References**

**MUJI 1st References**

12.39.

**Committee Notes**

**Staff Notes**

**Status**

## CV 1047. Product alteration.

[Name of defendant] claims that the [product] was modified or altered by someone. To prove this defense, [name of defendant] must prove that:

(1) the [product] was altered or modified after [name of defendant] sold the [product];

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

(3) the modification or alteration was a cause of [name of plaintiff]'s ~~injury~~harm.

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 1048A. Comparative fault.

[Name of defendant] ~~contends~~ claims that [name of plaintiff] was at fault and that [name of plaintiff]'s fault caused or contributed to the ~~injuries~~ harm. 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 ~~injuries~~ harm.

[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(s)] if [name of defendant(s)]'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~~ I 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 1048A and 1048B.

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**

Recommend that we stay with the singular.

**Status**

## CV 1048B. Comparative fault.

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

Comparative fault is [misuse] or [assumption of risk] by [name of plaintiff] that causes or contributes to the ~~injuries~~ harm.

[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~~ harm, 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 the ~~injuries~~ harm. ~~The court~~Then I 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 1049. 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]~~ it. 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 that

(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.~~ If [name of defendant] proves these things, you may consider this defense when 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 1050. Industry standard.

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

**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**

**Status**

## CV 1051. 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 1052. 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 1053. Spoliation.

You may consider whether [name of plaintiff] [name of defendant] intentionally concealed, destroyed, altered, or failed to preserve evidence. 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)? G3 says "yes."

**Status**

## CV 1054. Definition of "state of the art."

"State of the art" means the best technical, mechanical, and scientific knowledge and methods ~~which~~ that 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~~ when the [product] was designed and tested.

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~~ duty to safely design a product ~~do~~ does 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**

The last sentence seems a restatement of 1056 and 1057. Should it be incorporated into 1019, Duty of designer/manufacturer?

**Status**

## CV 1055. Subsequent remedial measures. Standards and purchases.

Any evidence you have heard about design changes with respect to the [product] made after the [accident] [injury] [product was designed/manufactured] cannot be considered to prove negligence, culpable conduct, a defect in the product, a defect in the [product]'s design, or a need for a warning or instruction. However, you may consider such evidence 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 1056. 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 1057. 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**

This seems very similar to 1056.

**Status**