MINUTES
Advisory Committee on Model Civil Jury Instructions
February 12, 2008
4:00 p.m.

Present: John L. Young (chair), Juli Blanch, Francis J. Carney, Dr. Marianna Di Paolo, Phillip S. Ferguson, Tracy H. Fowler, Jonathan G. Jemming, Gary L. Johnson, Timothy M. Shea, Paul M. Simmons, Peter W. Summerill, and David E. West. Also present: Kamie F. Brown

1. *Products Liability Instructions*. Pursuant to the procedure adopted at the last meeting, the products liability instructions that had not yet been approved by the committee were reviewed before the meeting by a subcommittee of three (Messrs. Summerill, Ferguson, and Johnson). The draft of the instructions distributed to the committee before the meeting also contained suggested additions and deletions by Mr. Shea, shown in blueline. The committee considered the revised instructions.

a. *CV 1021A. Negligence. Retailer's duty*. Mr. Shea added "dangerous and" before "defective" in the last line of the first paragraph. At Mr. Simmons's suggestion, the phrase was amended to "unreasonably dangerous and defective condition." Mr. Young suggested deleting "merely" from the second sentence, but Dr. Di Paolo thought the word aided understanding, and it was left in. Mr. Young questioned the use of the phrase "then [name of defendant] can be liable" in the second paragraph. The committee revised it to read, "then [name of defendant] may be at fault." The instruction was approved as modified.

b. *CV 1021B. Negligence. Retailer's duty*. At Ms. Brown's suggestion, the committee note to 1021B was moved to 1021A. The phrase "then [name of defendant] can be liable" in the second paragraph was changed to, "then [name of defendant] may be at fault." At Dr. Di Paolo's suggestion, "its dangerous condition" in the third line of the second paragraph was changed to "the danger." The instruction was approved as modified.

c. *CV 1022. Breach of warranty. "Warranty" defined*. The instruction was approved as written.

d. *CV 1023. Breach of express warranty. Creation of an express warranty*. The instruction was approved (with Mr. Shea's edits).

e. *CV 1024. Breach of express warranty. What is not required to create an express warranty*. The instruction was approved (with Mr. Shea's edits).

f. *CV 1025. Breach of express warranty. Objective standard to create an express warranty*. The instruction was approved as written.

g. *CV 1026. Breach of express warranty. Essential elements of claim. (Contract.)* At Mr. West's suggestion, the word "essential" was deleted from the title of this instruction and CV 1027, 1028, 1029, 1031, and 1032. In the last paragraph, the phrase "may be liable" was changed to "may be at fault." Subparagraph (5) was returned to its original form. As modified, the instruction was approved.

h. *CV 1027. Breach of express warranty. Essential elements of claim. (Tort.)* The same changes that were made to CV 1026 were also made to CV 1027. As modified, the instruction was approved.

i. *CV 1028. Breach of implied warranty. Essential elements of implied warranty of merchantability claim. (Contract.)* Subparagraphs (2)(a) and (5) were returned to their original form. Mr. Young thought subparagraph (2)(b) was awkward, but the committee did not come up with better language. At Mr. West's suggestion, "or" was added after subparagraphs (2)(a) and (b). Dr. Di Paolo thought "merchantable" would not be understandable to an average juror. She suggested revising the second sentence to read, "To establish that the product was unmerchantable, [name of plaintiff] must prove all of the following." Mr. Shea and Mr. Simmons recommended leaving the sentence the way it was, and, after some discussion, the committee agreed. Mr. Carney thought there needed to be something in the instructions telling courts and attorneys that the instructions need to be tailored to the facts of the case. Mr. Shea noted that the introduction contained such a statement. The committee approved this instruction as modified, but Dr. Di Paolo still thought it was not understandable to a lay audience.

j. *CV 1029. Breach of implied warranty. Essential elements of implied warranty of merchantability claim. (Tort.)* The same changes that were made to CV 1028 were also made to CV 1029. As modified, the instruction was approved.

k. *CV 1030. Breach of implied warranty. Creation of an implied warranty of fitness for a particular purpose.* Mr. Shea questioned whether the terms "buyer" and "seller" should be changed to "plaintiff" and "defendant" throughout. The committee thought "buyer" and "seller" were more appropriate for this instruction. Mr. West asked whether "if" should be moved to the end of the second line, but the committee thought it would change the meaning to do so. Mr. Young questioned the use of the word "contracting" at the end of the first paragraph and suggested replacing it with "sale." Mr. Johnson thought there was a distinction between a contract and a sale and thought that "contracting" (the statutory language) was more accurate. Dr. Di Paolo suggested that the

distinction could be covered in a committee note, which could say that the statute says "at the time of contracting," that in most cases this will also be the time of sale, but in cases where the distinction is important, "contracting" can be substituted for "sale." Over Mr. Johnson's objection, the committee voted to change "contracting" to "sale," a term the committee thought would be more easily understood. As modified, the instruction was approved.

l. *CV 1031. Breach of implied warranty. Essential elements of claim for breach of an implied warranty of fitness for a particular purpose. (Contract.)* Mr. Young thought the phrase "bought it for" in subparagraph (3) was awkward, but Dr. Di Paolo and other committee members thought it was clear. Mr. Shea struck "suitable or" in the second line and changed "caused" to "was a cause of" in subparagraph (5). Dr. Di Paolo thought "suitable or fit" was okay, but did not feel strongly about deleting "suitable or." The instruction was approved with Mr. Shea's edits.

m. *CV 1032. Breach of implied warranty. Essential elements of claim for breach of an implied warranty of fitness for a particular purpose. (Tort.)* Mr. Shea made the same changes to this instruction as he made to CV 1031. The instruction was approved with Mr. Shea's edits.

n. *CV 1033. Breach of implied warranty. Warranty implied by course of dealing or usage of trade. (Contract.)* The committee changed the phrase "between the parties" in the third paragraph to read "between the plaintiff and defendant." As modified, the instruction was approved.

o. *CV 1034. Breach of warranty. Allergic reaction or hypersensitivity.* Mr. Simmons suggested striking the second sentence ("There is no breach of warranty when a [product] is harmless to a normal person"), because, standing alone, it was not an accurate statement of the law and the law was adequately stated in the rest of the instruction. Dr. Di Paolo suggested moving the sentence to the end of the instruction and inserting "Otherwise," at the beginning of the sentence. The committee deleted the sentence. Mr. Simmons also thought that the instruction should say that a defendant can be liable if he knows of the plaintiff's hypersensitivity or allergy and knows that his product is dangerous to someone with such a hypersensitivity or allergy. The other committee members thought that that conclusion followed from the second paragraph and went without saying. The second paragraph was revised to read: "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 that [name of defendant] did not know about, then there is no breach of warranty." The instruction was approved as modified.

p. *CV 1035. Breach of warranty. Improper use.* Mr. Young suggested starting the second sentence with, "If you find that [name of plaintiff] improperly used the product, which was a cause of his harm, . . ." The committee decided to leave the instruction as it was and approved the instruction with Mr. Shea's suggested changes.

q. *CV 1036. Breach of warranty. Effect of buyer's examination.* Mr. Shea noted that the committee note should have been a staff note and reflected his confusion with the instruction as written. Other committee members thought that the instruction as written more accurately stated the law than Mr. Shea's proposed alternative instruction and thought it would be understandable to a lay juror. At Mr. Simmons's suggestion, "[he]" in the third line was replaced with "[name of plaintiff]." Messrs. Shea and Jemming suggested deleting the first sentence of the second paragraph, but Messrs. Fowler and Simmons thought it was important to keep it in. The instruction was approved as modified.

r. *CV 1037. Breach of warranty. Exclusion or modification of express warranties by agreement.* Mr. Shea suggested changing "buyer" and "seller" to "plaintiff" and "defendant," but the committee thought that the instruction was accurate and understandable as written. At Mr. Shea's suggestion, "shall" or "can be" was replaced with "are" or "is," and "has been made" was changed to "can be made." As modified, the instruction was approved.

s. *CV 1038. Breach of warranty. Validity of disclaimer.* The instruction was approved as written, with Mr. Shea's edits.

t. *CV 1039. Breach of warranty. Notice of breach.* Mr. Simmons questioned whether the word "(Contract)" should be added at the end of the title, as with other instructions, such as 1031, 1033, 1041, and 1042. He said he knew of no requirement for notice of breach in an action not governed by the UCC. Mr. Fowler and Ms. Brown noted that the UCC can apply to tort actions as well as contract actions. The committee thought that, if there is a breach of warranty claim that is not governed by the UCC, the instruction would not apply and would not be given. The committee approved the instruction as edited by Mr. Shea.

u. *CV 1040. Breach of warranty. Definition of "goods."* Mr. West questioned whether this was a proper subject for a jury instruction, since whether or not a particular product is considered a "good" within the meaning of the UCC will generally be a question of law, for the court to decide. Ms. Brown noted that MUJI 1st contained a similar instruction. The committee note says that this instruction and the following instructions (1041-43) should only be used when

there is a disputed issue of fact as to whether the statutory requirement has been met. The committee approved the instruction as written.

v. *CV 1041. Breach of warranty. Definition of "sale." (Contract.)* The committee approved the instruction as written.

w. *CV 1042. Breach of warranty. Definition of "sample" or "model." (Contract.)* The committee approved the instruction as edited by Mr. Shea.

x. *CV 1043. Breach of warranty. Description of goods.* At Mr. Simmons's suggestion, the instruction was moved to follow instruction 1023 (breach of express warranty: creation of express warranty). The committee approved the language of the instruction as written.

y. *CV 1044. Sophisticated user.* The committee approved the instruction as edited by Mr. Shea.

z. *CV 1045. Conformity with government standards.* Mr. Simmons thought that the second sentence was an inaccurate statement of the law. In effect it said that if the plaintiff proved that the product was defective, the jury could still find that the product was not defective, based on the presumption of nondefectiveness. If the plaintiff proves that the product was defective, then the jury must find it is defective. Mr. Simmons and Mr. Summerill thought that the rebuttable presumption created by the statute meant that if the plaintiff came forward with evidence that the product was defective, the presumption disappeared, and the jury had to weigh the evidence on each side of the issue, unaided by the presumption. Mr. Fowler and Ms. Brown thought that the instruction was mandated by *Egbert v. Nissan,* 2007 UT 64, but Mr. Simmons noted that *Egbert* only held that the jury should be instructed on the presumption and that the presumption could be overcome by a preponderance of the evidence, not clear and convincing evidence. *Egbert* did not sanction any particular form of instruction. Mr. Ferguson asked whether the instructions should say "a preponderance of the evidence" or "the greater weight of the evidence." The committee noted that "preponderance of the evidence" has been used in other instructions and is defined in the general instructions. After further discussion, the instruction was revised to read:

> If the manufacturer of a [product] complies with federal or state laws, standards, or regulations for the industry regarding proper design, inspection, testing, manufacture, or warnings, it is presumed that the [product] is not defective. However, if you find that [name of plaintiff] has established by a preponderance of

> evidence that the [product] was defective even though the manufacturer followed government laws, standards, or regulations, then a presumption that the product is not defective no longer applies.

The committee approved the instruction as revised.

aa. *CV 1046. Product misuse.* The committee approved the instruction as edited by Mr. Shea.

bb. *CV 1047. Product alteration.* The committee approved the instruction as edited by Mr. Shea.

cc. *CV 1048A. Comparative fault.* The committee approved the instruction as edited by Mr. Shea. At Ms. Brown's suggestion, a reference to Utah Code Ann. §§ 78-27-37 through -41 was added under "References."

dd. *CV 1048B. Comparative fault.* The committee approved the instruction as edited by Mr. Shea. At Mr. Simmons's suggestion, *Mulherin v. Ingersoll-Rand Co.,* 628 P.2d 1301 (Utah 1981), was added to the references.

ee. *CV 1049. Unreasonable use. (Assumption of risk.)* Mr. Summerill suggested deleting "Assumption of risk" from the title. Other committee members thought that "assumption of risk" was still a viable defense; it is just not a complete defense but is to be considered as a form of comparative fault. CV 1048B refers to "assumption of risk" as a defense. Mr. Young suggested that CV 1049 be moved to precede the comparative fault instructions (CV 1048A & B). The committee approved the instruction as edited by Mr. Shea.

ff. *CV 1050. Industry standard.* Mr. Simmons noted that the instruction does not state a defense but only tells the jury what evidence it may consider in determining whether a product is defective. At Mr. Simmons's suggestion, it was moved to follow CV 1004. Dr. Di Paolo asked whether it meant that the jury could consider industry standards in the absence of evidence of such standards. To eliminate this ambiguity, the instruction was revised to read:

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

The committee approved the instruction as revised.

gg. *CV 1051. Product unavoidably unsafe.* The committee substituted "at fault" for "liable for any injuries the product caused" at the end of the first sentence and lowercased "rabies" in the last sentence. The committee approved the instruction as modified.

hh. *CV 1052. Learned intermediary.* Mr. Simmons thought that, because the instruction says that manufacturers of prescription drugs have a duty to warn only the prescribing physician, the instruction should also explain that, if the manufacturer fails to provide the physician with an adequate warning, the manufacturer can be liable to the plaintiff. The rest of the committee thought that conclusion would be self-evident when the instruction was read in context and did not have to be stated. The committee approved the instruction as edited by Mr. Shea.

ii. *CV 1053. Spoliation.* Mr. Young questioned whether spoliation should be the subject of a jury instruction. Mr. Carney noted that Utah Rule of Civil Procedure 37 has been amended to allow the jury to draw an adverse inference from spoliation. The committee agreed that there should be an instruction on spoliation but also agreed that it belongs in the general instructions and is not unique to products liability actions.

jj. *CV 1054. Definition of "state of the art."* Mr. Simmons thought that the instruction was unnecessary because it was adequately covered in other instructions, including 1050 and 1051. He thought that "state of the art" is not a defense, that a product can comply with the state of the art and industry standards and still be defective. He circulated a proposed alternative instruction, based on the treatise *Jury Instructions on Products Liability*. Mr. Fowler, Mr. Johnson, and Ms. Brown disagreed. They thought that "state of the art" was a defense to a products liability action. The products liability subcommittee had disagreed on this point. Dr. Di Paolo thought the last sentence was hard to understand and suggested changing it to say that a manufacturer does not have a duty to incorporate into its products "all of the [instead of "only those"] features representing the ultimate in safety." The committee deleted the words "only those" from that sentence. Ms. Blanch thought that the sentence was better covered in CV 1056, but some committee members thought that CV 1056 should not be used. The committee concluded that CV 1054 was an accurate statement of the law and approved the instruction as modified.

kk. *CV 1055. Subsequent remedial measures. Standards and purchases.* Mr. Simmons thought that Utah Rule of Evidence 407 made it clear that a "subsequent" remedial measure was a measure taken after the incident and not after the product was designed or manufactured. Mr. Fowler and Ms. Brown,

however, thought that the question was unresolved under Utah law and that alternatives were therefore necessary. Mr. Summerill thought that the term "accident" should be replaced with "incident." The committee approved the instruction as written.

ll. *CV 1056. The manufacturer is not an insurer.* Messrs. Carney and West thought the instruction was the type of instruction the Utah Supreme Court has held should not be given, akin to an "unavoidable accident" instruction (*Randle v. Allen,* 862 P.2d 1329 (Utah 1993)) and a "mere fact of an accident" instruction (*Green v. Louder,* 2001 UT 62). Other committee members thought it was distinguishable from the instructions in *Randle* and *Green*. Mr. Simmons noted that the committee had voted in June 2007 to delete the instruction. The committee voted again to delete the instruction, with Messrs. Young, Carney, Simmons, Summerill, and West voting to delete it, and Ms. Blanch and Messrs. Fowler, Ferguson, and Johnson voting to keep it.

Mr. Fowler was excused.

mm. *CV 1057. Safety risks.* Mr. Simmons thought that the instruction was unnecessary, since it merely stated the converse of what a plaintiff must prove in a strict products liability action. In that respect, it was similar to the language he had proposed adding to the learned intermediary instruction and which the committee thought was unnecessary. Mr. Carney agreed and thought the instruction was argumentative and should not be used. Ms. Brown thought the instruction was supported by *Slisze v. Stanley-Bostitch,* 1999 UT 20, but Mr. Carney noted that just because an instruction may find support in the language of a case does not mean that it should be given. Mr. Johnson noted that he would still request such an instruction, even if it were not included in MUJI. Dr. Di Paolo asked if it should come earlier in the instructions. Mr. Young thought the instruction was in conflict with CV 1005. Ms. Blanch suggested adding language to CV 1005 saying that a product is not defective or unreasonably dangerous merely because it could have been made safer or because a safer model is available and deleting the rest of CV 1057. The committee deferred further discussion of the instruction until the next meeting.

2. *Next Meeting*. The next meeting will be Monday, March 10, 2008, at 4:00 p.m., at which time the committee will consider CV 1057 and the medical malpractice instructions. Mr. Young asked whether the committee meetings should start at 3:30 p.m. instead of 4:00 p.m. A majority of the committee preferred starting at 4:00 p.m. and going later if necessary rather than starting earlier.

The meeting concluded at 6:25 p.m.