MINNESOTA'S NEW PRODUCTS LIABILITY JURY INSTRUCTIONS

I. Introduction

In 1999, the Minnesota District Judges Association Committee on jury instructions published the Fourth Edition of its Jury Instruction Guides - Civil. Continuing a tradition that started in 1962, this new two volume set of jury instructions, like its predecessors, provides the bench and bar of Minnesota with the framework for instructing all civil juries.[1]

As the Editors note, what is probably most important about this new Fourth Edition is, in their own words, "its break with tradition." For this edition, the committee, using a "plain language" consultant, essentially re-wrote all Minnesota civil jury instructions in plain language. The committee also substantially reorganized the jury instructions both in a new classification system and in a new numbering system.

As a consequence of this major revamping of the Civil JIGS, the practitioner looking to this Fourth Edition to formulate their jury instructions needs to focus on two sections of this Fourth Edition: (1) the product liability instructions themselves; and also (2) the preface to the jury instructions. In this preface, the Committee in its "Explanatory Note" and its "Use of Plain Language Civil Jury Instruction Guides," explains how the jury instructions are to be used, and additionally, how the parties, should they need or want to formulate their own instructions, must be guided by the principles established by the Committee in its Fourth Edition.

II. Major Principles Of The Fourth Edition

The "Explanatory Note" and "Use of Plain Language Civil Jury Instruction Guides" are indispensable reading in order to understand the problems the Committee found with the prior

jury instruction guides, and how the Committee went about trying to remedy these concerns. The Committee noted the problems inherent in attempting to provide meaningful instructions on substantive law to a lay audience. The Committee further discussed how finding and determining the substantive law can be very difficult for various reasons, including the fact that, by nature, the law is scattered and may be found in various sources, because appellate courts may never have addressed the issue, or because the law is in a state of flux.[2] The Committee found that the "process of bringing the two together," namely the substantive law and understandable instructions for the jury, "requires a juggling act worthy of an Olympic event."[3]

Th Committee also emphasizes that the Fourth Edition is geared almost exclusively for use with special verdicts, instead of general verdicts, and consequently, not only the instructions as drafted, but any additional instructions the parties may submit, need be focused exclusively on answering special verdict questions.

The new instructions also: (1) reclassify; and (2) renumber the major parts and categories of instructions. First the instructions have been totally reclassified into four separate "parts," each containing numerous "categories." The new guide contains the following general description of the new format:

> Trial Process. This part contains most of the "boilerplate" instructions that will be used, probably verbatim, in every kind of civil jury trial, including categories devoted to such repeatedly-used materials as "Preliminary Instructions" and "Closing Instructions."
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> General Areas of Law. This part covers, in its categories, instructions that tend to find their way into many other more specific areas of the law. Those frequently-used categories of instructions are placed into three divisions under this part: "Contract and Warranty," "Negligence," and "Vicarious Liability and Imputed Fault."
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> Topical Areas of Law. Many judges and lawyers will probably view this

part as the "heart" of the Fourth Edition. For, the categories here cover many of the specific causes of action tried in Minnesota courtrooms, including" "The Civil Damage Act" (dramshop), "Defamation," "Intentional Torts" (assault and battery, etc.), "Eminent Domain," "Motor Vehicles," "Products Liability," and "Professional Malpractice."

Damages. This final part is self-explanatory.[4]

Next, the Fourth Edition has completely renumbered the instructions, not only in the actual numbers given to the instructions themselves, but also in the system used. In contrast to the three prior editions, the new guide has eliminated the use of a one, two or three digit numbering system, and has replaced it with what it describes as a "xx.xx" system. The first two numbers before the decimal point indicate the particular category. For example, under "Part I. Trial Process," categories include "Category 10. Duties of the Jury," and "Category 12. Evidentiary Instructions." The distinction between categories found in "Part II. General Areas of Law" and "Part III. Topical Areas of Law" is demonstrated by finding such general topics as "Category 20. Contract," and "Category 57. Fraud and Misrepresentation" in the former, and more specific topics in the latter, including "Category 72. Privacy" and "Category 75. Products Liability." "Part IV. Damages" includes all types of damages, including the general, "Category 90. Damages," and the specific, "Category 94. Punitive Damages."

In another major change, and unlike the prior editions where there was no relationship between the various sections other than being numbered sequentially, the two digit number after the decimal point is used throughout to reference "category specific" special verdict forms. Every special verdict form is placed within the ".90" series. Thus, "Products Liability" instruction 75.95, by its ".95", is identified as a special verdict form, as is "Defamation" instruction 50.90.

The inclusion of special verdicts in the substantive categories themselves is yet another major change in these instructions. Rather than the parties and courts having to adapt the generic special verdict forms found in the prior editions to the particular substantive law at issue, the new guide includes category specific special verdict forms which will greatly ease the burden on the parties to draft such forms, and should result in much greater uniformity and predictability in how particular types of cases will be submitted to the jury.

When the parties wish to submit their own jury instruction (or when they need to because the type of claim is not included in the new guide, a "bad faith refusal to settle" claim being one such example), the Fourth Edition includes a number of mandates. First, "the requested instruction must be cast in the language of the special verdict instruction."[5] Additionally, as it must help the jury answer one of the special verdict form questions, the instruction cannot disclose the effect of the jury's answer to that question.[6] Thus, a submitted instruction that merely catalogs the necessary elements for recovery will not be acceptable in a special verdict case. The requirement that the instruction be in plain language also means that:

> it should no longer be acceptable for trial counsel to simply pluck some language from an appellate decision or other statement and request the judge to read that kind of language as an instruction to the jury. Appellate opinions and the Restatement tend to contain argumentative language and a discussion of policy considerations that are inappropriate for jury instructions. This procedure was discouraged in Minnesota long before the advent of plain language:. . .[7]

When parties are drafting their own jury instructions, they must also be aware of features of "plain language" specifically noted by the Committee and used in the Fourth Edition. This includes identifying the parties by name instead of using "Plaintiff / Defendant," using first person singular (such as replacing "the Court" with "I"), using an active voice, avoiding too many paragraphs and long and complex sentences, following certain grammatical rules, and in general, making sure to follow the specific "Plain English" guidelines that all lawyers would do well to follow even if they were not now mandated.[8]

On issues of substantive law, particularly some that involve products liability, the

Committee explained in detail the dilemma it faced on such matters as defining legal terms, quoting verbatim from statutory language, eliminating certain legal terms redundant, and other issues.

Dealing first with the definition of "difficult legal terms," the Committee stated that if it is "legally necessary to include a specific term, than that term has to be defined." However, it found that this requirement "has been a contentious issue," because where a term of art "in law may have a very specific meaning, the explanation may alter that meaning in ways that are not immediately apparent."[9] Ultimately, the Committee noted that it "tried to find accurate and unambiguous explanations, while keeping the term of art in place when necessary."[10]

The Committee also discussed "the difficult issue" of using statutory language or language taken verbatim from appellate decisions. Noting that "some judges and lawyers feel they must us the exact words and terms used in a law, because that is literally the law," and that while there is "safety in use of the exact words of a law or higher court opinion," the continuation of this practice has often resulted in language "incomprehensible to the general public, many lawyers and even some judges."[11] Using products liability as an example, the Committee explained:

> Take the area of products liability, where a jury is asked to decide if a manufacturer is responsible for selling a dangerous product. The established language reads "a product is in a defective condition unreasonably dangerous to the [user] if the [manufacturer] knew or reasonably could have discovered the danger involved in the use of the product." That sounds quite reasonable to the expert ear, but a layperson might ask, "Is the product dangerous because it is defective?" "Is it defective because it is dangerous?" "What is reasonably dangerous?" This was a problem that we did not solve, and the language remains intact.[12]

With reference to sources of law such as government regulations that might be attempted

to be included in a jury instruction (for example, OSHA regulations), the Committee explained:

> One final example from government bolsters this point of view that statutory language does not need to be quoted verbatim. OSHA regulations are designed to convey information to workers about hazardous chemicals in the workplace. The OSHA regulations are a prime example of convoluted bureaucratic language. However, some lawyers insist that workers get these instructions in the original, rather than plain language versions, because OSHA's words are OSHA's words. This view is misguided, in that OSHA is telling us the categories of information that must be shared, but does not necessarily mandate any particular word usage. Is it more important that workers actually know about hazards, or that they have been "informed"? This interpretation on the actual wording has been confirmed by conversations with OSHA staff in Washington, D.C.[13]

III. Substantive Products Liability Instructions

A number of matters are important to note in general when reviewing the new Minnesota Jury Instruction Guide concerning products liability, now numbered as Category 75. One of the reporters for the Fourth Edition is Professor Michael K. Steenson,[14] along with Peter B. Knapp. Professor Steenson was also the reporter for the Third Edition, and has taught and written extensively on the substantive law of products liability. Hence, the courts will recognize the authoritative nature of both the instructions and the "Use Notes." In addition, the Third Edition that is being replaced here was published in 1986, just a few years after most of the landmark products liability cases in Minnesota, discussed infra, were decided.

The thirteen years between the Third and Fourth Editions witnessed the refinement of the basic guiding principles established in these cases, as well as the resolution of many of the specific issues that commonly occur in product liability cases. Consequently, most major products liability principles are not only now well established, but the district judges who make up the Committee have had thirteen years to witness the application of these major principles to the trial of products liability cases of all types.

Finally, it is important to note an important recent development potentially affecting Minnesota products liability law, namely the American Law Institute's recent adoption in 1997 of the Third Restatement of Torts. Unlike the near revolutionary Section 402A of The Restatement (Second) of Torts, adopted by the ALI in 1965 (Minnesota adopted Section 402A in McCormack v. Hankscraft Co.),[15] the Third Restatement instead reflects, for the most part, the results of the evolution of products liability law in various jurisdictions since the Second Restatement had been adopted over 30 years earlier.

While the Third Restatement is far more comprehensive than the Second Restatement (it includes 21 sections that discuss liability standards, post-sale obligations, loss allocation principles, and detailed guidance on the kinds of transactions and products to which products liability will apply), this new Restatement for the most part is generally more reflective of Minnesota products liability as it ultimately evolved, rather than a blueprint for changes in the law. While far beyond the scope of this article, comparison of Minnesota law with this Third Restatement can be useful in particular cases, and a detailed analysis is found in a recent Law Review article, Steenson, A Comparative Analysis of Minnesota Products Liability Law and the Restatement (Third of Torts): Products Liability.[16] (It is also worth noting that unlike the Second Restatement, this new Restatement was drafted and debated in a highly politically charged environment populated by interest groups with conflicting interests, and unlike most Restatements, various Restatement provisions on products liability have been highly controversial).[17]

The Minnesota District Judges Association Committee was well aware of the Third Restatement when drafting Minnesota's new products liability jury instructions, and thus, for the

most part, the practitioner in Minnesota can rely on the Fourth Edition without fear that the Third Restatement will dramatically alter the governing law or add further significant restrictions to a plaintiff's recovery.

Turning to some key aspects of this substantive law, it is important at the outset to remember that the term "products liability" does not denote a "cause of action" under Minnesota law, but is instead essentially a description of a type of claim that includes various causes of action. These causes of action traditionally have included negligence, strict liability and warranty. However, as discussed more fully below, in a series of cases in the early 1980's, the Minnesota Supreme Court essentially concluded that negligence and strict liability design defect and failure to warn cases, despite their different origins, were both based on negligence principles.[18] An implied warranty of merchantability theory is also considered merged, along with strict liability and negligence, into a single theory of recovery.[19] Consequently, the only cases would be appropriate to submit both strict liability and negligent claims would be those involving manufacturing flaws.[20]

With this basic framework in mind, The Fourth Edition divides the substantive issues in Minnesota products liability cases into 12 categories and then provides six special verdict forms. However, on certain issues, the Committee recommended that no instruction be given, unless certain additional questions existed. These categories and verdict forms are as follows:

CIVJIG

75.10 Defendant in Business of Selling or Leasing. (no instruction recommended)
75.15 Defect Must have Existed When it Left Seller. (no instruction recommended)
75.20 Design Defect.
75.25 The Duty to Warn (Strict Liability and Negligence).
75.30 Manufacturing Defects.
75.35 Liability of Manufacturer or Seller of Goods –Negligence.

75.40 Manufacturer's Duty to Provide Post-Sale Warnings.
75.45 Bailments.
75.50 Causation.
75.55 Useful Life.
75.60 Food. (no instruction recommended)
75.65 Strict Liability–Avoidance. (no instruction recommended)

SPECIAL VERDICT FORM

CIVSVF

75.90 Design Defect and Inadequate Warning Theories (Single Plaintiff And Single Defendant).
75.92 Manufacturing Defect Theory (Single Plaintiff and Single Defendant).
75.94 Liability Asserted Against Manufacturer and Other Seller Based on Design Defect (Single Plaintiff, Manufacturer, and Other Seller).
75.95 Liability Asserted Only Against Another Product Seller–Manufacturer Not in Suit (Single Plaintiff and Single Product Seller Other Than Manufacturer).
75.96 Design Defect Asserted Against Manufacturer and Component Parts Manufacturer (Single Plaintiff, Product Manufacturer, and Component Parts Manufacturer).
75.98 Liability of Product Manufacturer Based on Design Defect and Inadequate Warnings and Plaintiff's Employer (Single Plaintiff, Single Manufacturer, and Plaintiff's Employer).

On the issues listed above where the Committee recommended generally that no instructions be given, it recommends the submission of special verdict questions if there are fact issues that arise under 75.10 and 75.15. Concerning 75.60, the Committee notes that the Minnesota appellate courts have not taken a clear position yet on the standard to be applied in determining whether food is defective. Finally, it recommends no instruction on avoidance, but instead advises that if an issue arises under Minn. Stat. § 544.41 (allowing all the other parties in the chain of distribution to be dismissed if the manufacturer is solvent and subject to personal jurisdiction) special verdict questions could be tailored to the issues that have to be resolved, such as the defendant's control over the design or manufacture of the product, the particular

defendant's instructions or warnings to the manufacturer about the product, whether that defendant knew about that defect, and whether they created the defect that caused harm.

Jury instructions, of course, must reflect the substantiative law. While the substantiative law of products liability in Minnesota is far beyond the scope of this article (for an in-depth analysis, see Steenson & Weiner, "Products Liability," MTLA Cause of Action Manual 3d Ed.), it is important to highlight here a few of the key aspects of the substantiative law and how it is reflected in these instructions.

Like most states, Minnesota products liability law has undergone a tremendous evolution since Section 402A of The Restatement (Second) of Torts was first adopted in 1965. Through a line of cases in the late 1970's and early 1980's where plaintiffs were submitting their claims to the jury on all available products liability theories and getting inconsistent verdicts (for example, in Halvorson v. American Hoist & Derrick Co.,[21] a crane manufacturer was found negligent but not strictly liable and the same lack of safety devices were at issue under both theories), the Minnesota Supreme Court concluded that design defect theories and warning theories were essentially based on negligence principles, and that plaintiffs would be required to elect between theories when submitting their case to the jury. In Bilotta v. Kelly Co.,[22] the jury in a design defect case had been instructed pursuant to then existing JIG II 118, which was commonly called the "consumer expectation" standard, and which provided that:

> A condition is unreasonably dangerous if it is dangerous when used by an ordinary consumer who uses it with knowledge common to the community as to the product's characteristics and common usage.

The Supreme Court ruled that since a manufacturer designing a product had to balance various circumstances, this jury instruction was inappropriate except in a manufacturing defect

case.

> [The manufacturer] contends that an instruction based on the consumer expectations standard does not adequately reflect the manufacturer's duty of care that we adopted in Holm. We agree. JIG II 118 was formulated for the qualitatively different product defect of inadvertent manufacturing flaws. In such a case an objective standard exists – the flawless product – by which a jury can measure the alleged defect. Thus, in manufacturing-flaw cases the defect is proved by focusing on the condition of the product. The JIG II 118 consumer expectation instructions, which focus only on the condition of the product, are appropriate for this type of case, since the manufacturer's conduct is irrelevant.
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> In a design-defect case, however, there is no doubt that the product is in the condition intended by the manufacturer. In such a case, the "defect" lies in a consciously chosen design. The manufacturer has deliberately added or omitted the challenged component and has presumably made that decision after balancing a variety of factors. A jury must, [the manufacturer] contends, be told to weigh these same factors and decide whether the risk-utility balance struck by the manufacturer was or was not reasonable.[23]

In Hauenstein v. Loctite Corp.[24] the jury reached an inconsistent verdict in a failure to warn case, and the Supreme Court found that "[u]nder both theories, Loctite's duty to warn was defined in terms of reasonableness." Recognizing "the problem of mixing ordinary negligence and strict liability where the only basis for liability is failure to warn," the Court ruled:

> [W]here a plaintiff seeks damages for both negligence and strict liability based solely upon failure to warn, the plaintiff may submit the case to the jury on only one theory.[25]

With these fundamental principles in mind, the new Fourth Edition of Minnesota JIGS (as did the Third Edition to a significant extent) is designed to submit a design defect claim (CIVJIG 75.20) and a failure to warn claim (CIVJIG 75.25) on a single theory. Manufacturing defects, on the other hand, can be submitted to the jury on both a strict liability claim (CIVJIG

75.30) and a negligence claim (CIVJIG 73.35).

As to warranty causes of action in injury or death cases (and this article is not intended to address the important substantive issue of right to tort causes of action in a property damage case)[26] a plaintiff may not submit an implied warranty of merchantability claim in addition to their strict liability or negligence theories, but may, if supported factually, submit an express warranty claim (CIVJIG 22.10 - 22.20) or implied warranty of fitness for a particular purpose claim (CIVJIG 22.35). Similarly, a claim based on fraud or misrepresentation (CIVJIG 57.10) may be submitted in addition to those in category 75.

The Use Notes also explain that when manufacturing defects are submitted on both strict liability and negligence, the special verdict form (CIVSVF 75.92) requires the jury to first consider the strict liability issue, and negligence is to be considered only after the jury has first found that the product is defective. This structuring is intended to "eliminate any possibility of an inconsistent jury verdict based on the finding of negligence but no product defect."[27]

Finally, the Use Notes to these instructions provide extensive guidance to the practitioner on the Committee's view or resolution of various uncertainties or controversies in products liability law. For example, an oft debated issue is whether a manufacturer can be responsible for failing to warn of a defect that could not have been discovered. The Use Notes take a position that the imputed knowledge standard that has been adopted in other jurisdictions, see Beshada v. Johns-Manville Products Corp.[28] (which has also been criticized by other Courts), has not been adopted by the Minnesota Supreme Court, and that the jury instructions "therefore, contain limiting language that would require proof that a manufacturer or seller knew or could reasonably have discovered the product danger before liability can be imposed for inadequate

warnings or instructions."[29]

As to one of the issues in the Third Restatement that has been subject to criticism, namely the extent of the burden on the plaintiff to prove a "feasible alternative design," the Committee's Use Notes review the Third Restatement in light of Minnesota law as established in Kallio v. Ford Motor Co.,[30] In Kallio, the Minnesota Supreme Court concluded that while evidence of a "safer alternative design" is normally presented by the plaintiff, the "existence of a safer, practical alternative design is not an element of an alleged defective product design prima facie case."[31]

Nevertheless, while not an element of the cause of action, the Court in Kallio also found that as a "practical matter," proof of a feasible alternative may be critical in determining whether a product is defective.[32] The new JIGS provide a specific feasible alternative design jury instruction if the jury is to be instructed on this issue.[33]

The new instructions also provide a "post-sale warnings" instruction, essentially taken from the leading Minnesota Supreme Court decision on this issue, Hodder v. Goodyear Tire & Rubber Co.[34] Dealing with the threshold question of when such a duty exists, the Committee notes that the Court's decision in Hodder was "limited to serious risk of personal injury or death."[35] While the decision points out certain factors specific to the case itself, it also states that "special circumstances" will justify a post-sale failure to warn instruction, and examples are found in the authorities listed under this instruction.[36]

Finally, the instructions include a "Useful Life" instruction, based on Minn. Stat. §604.03, which was limited to being a factor considered by the jury in determining its answers to special verdict questions on fault.[37]

IV. CONCLUSION

The new jury instructions should be of tremendous assistance to the bench and bar in providing uniformity in the submission of products liability cases, eliminating inconsistent verdicts, and easing the burden on the parties and the Courts who will not have to "reinvent the wheel" when instructing the juries in products liability cases. Nevertheless, sufficient issues will likely remain in many cases so that the drafting of additional product liability instructions will not become a "lost art."

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1. The first edition was published in 1962, the second in 1974 and the third in 1986.

2. Jury Instruction Guides - Civil (4th Ed. 1999), "Explanatory Note" at XXVI.

3. Id.

4. Id. at XXXI.

5. Id at XXXVI.

6. Id.

7. Id.

8. Jury Instruction Guides - Civil (4th Ed. 1999), "Use of Plain Language Civil Jury Instruction Guides" at XXIX-XLIII.

9. Id. at XL.

10. Id.

11. Id.

12. Id.

13. Id. at XLI.

14. Michael K. Steenson is a Margaret H. and James E. Kelley Professor of Tort Law, William Mitchell College of Law.

15. 278 Minn 322, 154 N.W.2d 488 (1967).

16. 24 Wm.Mitchell L.Rev. 1 (1998).

17. See "A New Frontier, Design Defect Cases and the New Restatement," Trial Magazine, November 1998.

18. See Holm v. Sponco Mfg., Inc., 324 N.W.2d 207 (Minn. 1982); Bilotta v. Kelley Co., 346 N.W.2d 616 (Minn. 1984); Hauenstein v. Loctite Corp., 347 N.W.2d 272 (Minn. 1984).

19. Bilotta, supra, note 18.

20. Id.

21. 307 Minn. 48, 240 N.W.2d 303 (1976).

22. 346 N.W.2d 616 (Minn. 1984).

23. Id. at 621-22.

24. 347 N.W.2d 272 (Minn. 1984).

25. Id. at 275.

26. See Smith v. Den-Tal-Ez, Inc., 491 N.W.2d 11 (Minn. 1992).

27. Jury Instruction Guides - Civil, Vol 4A (4th Ed. 1999) at 108.

28. 90 N.J. 191, 447 A.2d 539 (1982).

29. Jury Instruction Guides - Civil, supra, note 27, at 130.

30. 407 N.W.2d 92 (Minn. 1987).

31. Id. at 96-97.

32. Id. at 96, n.6.

33. Jury Instruction Guides - Civil, supra, note 27, at 120-21.

34. 426 N.W.2d 826 (Minn. 1988) cert denied, 492 U.S. 926 (1989).

35. Jury Instruction Guides - Civil, supra, note 27, at 141.

36. Id. at 142-45.

37. See Hodder, supra, note 30.