3200 PRODUCTS LIABILITY: LAW NOTE

Products liability falls into three categories: (1) breach of warranty (expressed or implied); (2) common law negligence; and (3) strict liability in tort.

In each of the above theories, it is necessary to establish that: (a) the product was defective; (b) the defect existed at the time the manufacturer or seller relinquished control; (c) the injury resulted from the use of the product.

1. **Breach of Warranty**

A claim for breach of warranty ordinarily depends upon a contractual relationship between the parties. The doctrine of privity of contract is essential to a breach of warranty claim.[1]

The requirement as to privity of contract does not apply to members of the buyer's family or guests in the buyer's home, both of whom may take advantage of any warranty existing between the buyer and the seller if it is reasonable to expect that the person may use, consume, or be affected by the goods, and that person is injured by the breach of the warranty, expressed or implied.[2]

There may exist both an express warranty and implied warranty in the same sale.[3]

The most significant implied warranties relate to merchantability and fitness for intended purpose.[4]

Two provisions of the Uniform Commercial Code under Ch. 402 of the Wisconsin Statutes present difficulty for the consumer or user who is injured by the defective product, namely: (1) the requirement that the defendant be given notice of the breach of warranty

within a reasonable period of time, and (2) disclaimer which allows the seller to disclaim all warranties, including warranty of merchantability, by giving an appropriate notice.[5]

Notice of breach of warranty within a reasonable time is a condition precedent to liability.[6] The notice need not be in any particular form (written or oral), but it must fairly inform the seller of the breach of warranty and that the buyer will look to the seller for damages.[7] The notice requirement applies to both expressed and implied warranties.[8]

Although the question of timeliness of notice is usually one of fact for the jury, an unreasonable delay may be determined as a matter of law.[9] Knowledge by the seller of the facts which give rise to breach of warranty does not relieve the buyer of the requirement to give notice.[10]

Under proper circumstances, a seller may be held to have waived the statutory requirement of notice of breach of warranty and may also be held to be estopped from asserting want of notice by the buyer, but waiver and estoppel must be pleaded by the buyer.[11]

The seller may disclaim a warranty either orally or in writing.[12] A written disclaimer must be sufficiently conspicuous so as to charge the buyer with knowledge of it, and this question is for the court.[13]

Disclaimers which are contrary to public policy or contrary to statute are void.[14] An "as is" disclaimer negates any implied warranty of fitness for a particular purpose.[15]

The product, as warranted, must be used for its intended purpose. When the buyer misuses, alters the product, or uses it for a purpose other than its intended use, warranty does not apply.[16]

2. **Negligence**

Privity. The privity of contract rule is inapplicable to actions predicated upon common law negligence.[17]

Duty. The duty of a manufacturer or supplier of a product is to exercise ordinary care to insure that the product will not create an unreasonable risk of injury or damage to the user or owner when used in its intended or foreseeable manner.[18] This duty must be "approached from the standpoint of the standard of care to be exercised by the reasonably prudent person in the shoes of the defendant manufacturer or supplier."[19] A manufacturer, among other requirements, is required to exercise ordinary care in the manufacture of its product in the following respects: (1) safe design of the product so that it will be fit for its intended or foreseeable purpose; (2) construction of the product so that the materials and workmanship furnished will render the product safe for its intended or foreseeable use; (3) adequate inspections and tests to determine the extent of defects both as to materials and workmanship; (4) adequate warnings of danger in the use of the product and adequate instructions as to the proper use of the product which is dangerous when used as intended.[20]

Warnings and Instructions. A warning or instruction, when required, must be reasonably calculated to reach and be understood by those likely to use the product. The warning must be sufficient to inform the average user of the nature and extent of the danger which he or she may encounter in the use of the product.[21]

Before a seller can be held responsible for failure to warn, the seller must have actual or constructive notice of the dangers of the product.[22] Where a seller undertakes to give instructions as to the proper use of a product, the seller assumes the duty of adequate instructions and to calling attention to dangers to be avoided.[23]

Res Ipsa Loquitur. The plaintiff may invoke the doctrine of res ipsa loquitur. The following elements must concur before res ipsa loquitur will be invoked: (1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by the agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to the contributory negligence of the plaintiff.[24] The contributory negligence referred to in element (3), as to res ipsa loquitur, does not bar recovery since Wisconsin adheres to the comparative negligence rule.[25] In applying the res ipsa loquitur doctrine, the right to control is the important factor and actual control is not necessary.[26] Where the product has been subject to misuse and abuse by the user, the doctrine of res ipsa loquitur may not apply.[27] This doctrine has been applied in two exploding bottle cases.[28]

Contributory Negligence. Contributory negligence is a defense in products liability actions predicated upon common law negligence. The buyer has a duty to use ordinary care for his own safety and protection.

Defenses. The following conduct on the part of the plaintiff may constitute defenses to an action based on a defective product: (1) negligent failure to discover the defective condition; (2) use of the product after discovery of the defect; and (3) use of the product in a manner that could not have been reasonably foreseen by the manufacturer.[29]

Statutory Violations. Generally, when a statute is designated to protect a certain class of persons from a particular hazard, and the statute sets up a standard of conduct, the violation of such statute constitutes negligence as a matter of law or at least is evidence of negligence.[30]

Generally, a violation of a criminal statute constitutes negligence per se.[31]

3. **Strict Product Liability** (Common Law; Before 2011 Wisconsin Act 2, effective for actions that are commenced on or after February 1, 2011)

The law of strict product liability was substantially altered in 2011 with the enactment of 2011 Wisconsin Act 2. This section covers the common law of strict liability that existed prior to the enactment of 2011 Wisconsin Act 2. For a summary of the changes to strict products liability law in Wisconsin made by the new legislation, see the comment to Wis JI-Civil 3260.1.

Strict liability applies not only to the manufacturer but also to the distributor, wholesaler, and retailer.[32] The concept of strict tort liability may be misleading. Strict tort liability does not make the manufacturer or seller an insurer, nor does it impose absolute liability. Rather, it relieves the injured "user" from proving specific acts of negligence and protects him or her from the contractual defenses of notice of breach, disclaimer, and lack of privity.[33]

Elements. The following elements must be proved to warrant recovery under the doctrine of strict liability in tort: (1) that the product was in a defective condition unreasonably dangerous; (2) that the product was defective when it left the possession or control of the seller; (3) that the defect was a cause (substantial factor) of the plaintiff's injury; (4) that the seller was engaged in the business of selling such products (it does not apply to an isolated or infrequent sale); and (5) that the product was one which the seller expected to and did reach the consumer without substantial change.

The term "seller" includes restauranteur, manufacturer, distributor, wholesaler, and retailer.[34] One who represents a product to be his or her own is subject to the same liability as if he or she was the manufacturer.[35] A product is unreasonably dangerous when it is

dangerous beyond that contemplated by the ordinary user who purchases it with the ordinary knowledge common to the community as to its characteristics.[36]

A defective product is one which, when sold by a seller, is in a condition not contemplated by the ordinary consumer which is unreasonably dangerous.[37] A product may be defective by reason of manufacturer or design. A failure to give adequate directions or warnings may likewise constitute a "defective" condition.[38]

Where an adequate warning is given, the seller may reasonably assume that it would be read and heeded; a product bearing such warning, which would be safe for use if followed, is not in a defective condition nor is it unreasonably dangerous.[39]

The mere showing of product malfunction evidences a defective condition.[40]

A seller cannot immunize himself against liability under strict tort liability theory by inserting an exculpatory clause in the sales contract as he or she may do with respect to negligence and warranty.[41]

Defenses. The liability under the strict tort liability theory is subject to the defense of contributory negligence. Some of the defenses of contributory negligence: (1) failure to use the product for the intended purpose; (2) abuse or alteration of the product; and (3) use of the product where its intended use is coupled with inherent danger. The mere failure of the user of the product to discover a defect or guard against the possibility of a defect does not render the user of the product contributorily negligent.[42] A user may be contributorily negligent if he or she voluntarily exposes himself or herself to a known danger.[43]

4. **Strict Product Liability** (Wis. Stat. § 895.045(3), 895.046, and 895.047, (Effective for Actions Commenced On or After February 1, 2011)

The law controlling product claims based on strict liability was substantially altered by the legislature in 2011 with the enactment of 2011 Wisconsin Act 2. The act's provisions are effective for actions commenced after January 31, 2011.

Section 895.047(1)(a) specifies three ways in which a product may be defective: a manufacturing defect, design defect or an inadequate instructions/warnings defect. Each of these are defined in the Act. The definitions are taken from the Restatement (Third) of Torts: Products Liability, sec. 2. Strict liability is retained for manufacturing defects, while design and inadequate instructions/warnings defects use the negligence concept of "foreseeable risks of harm." For a summary of the changes to products liability contained in this Act, see the comment to Wis JI-Civil 3260.1.

Section 985.047(2) codifies the common law principle that a "seller or distributor," i.e., an entity other than the manufacturer—can be strictly liable under limited circumstances.[44] A federal district court, interpreting Section 985.047(2), concluded that if an entity served "the traditional functions of both retail seller and wholesale distributor," it was a "seller or distributor" regardless of whether it ever owned the product.[45] A seller or distributor is not strictly liable "unless the manufacturer would be liable under sub. (1)," and the seller or distributor undertook the manufacturer's duties, the manufacturer is unavailable for service of process within Wisconsin, or the manufacturer is judgment proof.[46]

COMMENT

This law note was approved by the Committee in 1971. It was updated in 2001, 2011, and 2021.

FOOTNOTES

1. Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967); Strahlendorf v. Walgreen Co., 16 Wis.2d 421, 114 N.W.2d 326 (1962); Smith v. Atco Co., 6 Wis.2d 371, 94 N.W.2d 697 (1959); Kennedy-Ingalls Corp. v. Meissner, 11 Wis.2d 371, 105 N.W.2d 696 (1960); Cohan v. Associated Fur Farms, Inc., 261 Wis. 584, 53 N.W.2d 788 (1952); Prinsen v. Russos, 194 Wis. 142, 215 N.W. 905 (1927); Barlow v. DeVilbiss Co., 214 F. Supp. 540 (E.D. Wis. 1963).

2. Wis. Stat. § 402.318. Express warranty is defined in Wis. Stat. § 402.313. Implied warranty is defined in Wis.2d 402.314.

3. Hellenbrand v. Bowar, 16 Wis.2d 264, 114 N.W.2d 418 (1962).

4. Wis. Stat. §§ 402.314 and 402.315; Calumet Cheese Co. v. Chas. Pfizer & Co., 25 Wis.2d 55, 130 N.W.2d 290 (1964); Hellenbrand v. Bowar, supra note 3; Kennedy-Ingalls Corp. v. Meissner, supra note 1; Betehia v. Cape Cod Corp., 10 Wis.2d 232, 103 N.W.2d 64 (1960).

5. Wis. Stat. § 402.316.

6. Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932).

7. Wis. Stat. § 402.607; Wojciuk v. United States Rubber Co., 13 Wis.2d 173, 108 N.W.2d 1949 (1961); Mack Trucks, Inc. v. Sunde, 19 Wis.2d 129, 119 N.W.2d 321 (1963); Hellenbrand v. Bowar, supra note 3; Kennedy-Ingalls Corp. v. Meissner, supra note 1.

8. Tews v. Marg, 246 Wis. 245, 16 N.W.2d 795 (1944).

9. Schaefer v. Weber, 265 Wis. 160, 60 N.W.2d 696 (1953) (delay of 5 months); Lumbermen's Mut. Cas. Co. v. S. Morgan Smith Co., 251 Wis. 218, 28 N.W.2d 343 (1947) (delay of 10 months); Wood v. Heyer, 179 Wis. 628, 192 N.W. 689 (1923) (delay of 8 months); Tegen v. Chapin, 176 Wis. 410, 187 N.W. 185 (1922) (delay of 57 days).

10. Hellenbrand v. Bowar, supra note 3.

11. Mack Trucks, Inc. v. Sunde, supra note 7.

12. Wis. Stat. § 402.316.

13. Wis. Stat. § 401.201(10); Calumet Cheese Co. v. Chas. Pfizer & Co., supra note 4.

14. Metz v. Medford Fur Foods, 4 Wis.2d 96, 90 N.W.2d 106 (1958).

15. Hyland v. G.C.A. Tractor & Equip. Co., 274 Wis. 586, 80 N.W.2d 771 (1957); Wis. Stat. § 402.316(3)(a).

16. 1 Hursh, American Law of Products Liability § 3:10 (1961); Crown v. General Motors Corp., 355 F.2d 814 (4th Cir. 1966); Strahlendorf v. Walgreen Co., supra note 1; Prosser, Law of Torts (3d) 656 (1964).

17. Smith v. Atco Co., supra note 1.

18. Smith v. Atco Co., supra note 1; Restatement, Second, Torts § 395 (1965); Prosser, supra note 16, at 648-650.

19. Smith v. Atco Co., supra note 1.

20. Schwalbach v. Antigo Elec. & Gas Co., 27 Wis.2d 651, 135 N.W.2d 263 (1965); Smith v. Atco Co., 266 Wis. 630, 64 N.W.2d 226 (1954); Marsh Wood Products Co. v. Babcock & Wilcox Co., supra note 6; Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); 1 Frumer and Friedman, Products Liability § 6.8 (1966); Restatement, Second, Torts § 395 (1965); 6 A.L.R.3d 91 (1966).

21. Harper and James, 2 Law of Torts § 28.7 at 1548-1549 (1956).

22. Strahlendorf v. Walgreen Co., supra note 1; Restatement, supra note 20, § 401 at 339 (1965).

23. Karsteadt v. Phillip Gross H. & S. Co., 179 Wis. 110, 190 N.W. 844 (1922).

24. Turk v. H. C. Prange Co., 18 Wis.2d 547, 119 N.W.2d 365 (1963); Ryan v. Zweck-Wollenberg Co., supra note 20.

25. Turk v. H. C. Prange Co., supra note 24.

26. Id.

27. Wojciuk v. United States Rubber Co., supra note 7.

28. Weggeman v. Seven-Up Bottling Co., 5 Wis.2d 503, 93 N.W.2d 467 (1958); Zarling v. LaSalle Coca-Cola Bottling Co., 2 Wis.2d 596, 87 N.W.2d 263 (1958).

29. Yaun v. Allis-Chalmers Mfg. Co., 253 Wis. 558, 34 N.W.2d 853 (1948); 38 Am. Jur. Negligence §§ 181, 182, 184, 188, 190, 191 (1941 and pocket part).

30. Note, Products Liability Based on Violation of Statutory Standards, 64 Mich. L. Rev. 1388 (1966); Prosser, supra note 16, § 35 at 202.

31. Perry Creek C. Corp. v. Hopkins Ag. Chem. Co., 29 Wis.2d 429, 139 N.W.2d 96 (1966); Arndt Brothers Minkery v. Medford Fur Foods, 274 Wis. 627, 80 N.W.2d 776 (1957); McAleavy v. Lowe, 259 Wis. 463, 49 N.W.2d 487 (1951); Pizzo v. Wiemann, 149 Wis. 235, 134 N.W. 899 (1912).

32. 13 A.L.R.3d 1057, 1096-1100 (1967).

33. Dippel v. Sciano, supra note 1.

34. Restatement, Second, Torts § 402A, Comment f at 350 (1965).

35. Wojciuk v. United States Rubber Co., supra note 7.

36. Restatement, supra note 34, Comment i at 352.

37. Green v. Smith & Nephew AHP, Inc., 2001 WI 109, 245 Wis.2d 772, 629 N.W.2d 727.

38. Id., Canifax v. Hercules Powder Co., 237 Cal. App.2d 44, 46 Cal. Rptr. 552 (1965); Crane v. Sears Roebuck & Co., 218 Cal. App.2d 855, 32 Cal. Rptr. 754 (1963).

39. Restatement, supra note 34, Comment j at 353; Yaun v. Allis-Chalmers Mfg. Co., supra note 29.

40. Greco v. Bueciconi Eng'r Co., 283 F. Supp. 978 (W. D. Pa. 1967), aff'd, 407 F.2d 87 (3d Cir. 1969).

41. Restatement, supra note 34, Comment m at 356; Vandermark v. Ford Motor Co., 37 Cal. Rptr. 896, 391 P.2d 256, 403 P.2d 145 (1965).

42. Restatement, supra note 34, Comment n at 356.

43. Id.; Prosser, Law of Torts (3d) 538, 540 (1964); Sweeney v. Matthews, 94 Ill. App. 6, 236 N.E.2d 439 (1968); Williams v. Brown Mfg. Co., 93 Ill. App. 334, 236 N.E.2d 125 (1968).

44. State Farm Fire & Casualty Co. v. Amazon, 390 F. Supp. 3d 964, 968 (W.D. Wis. 2019).

45. Id. at 973.

46. Id. at 968–69.