3240 NEGLIGENCE: DUTY OF MANUFACTURER

It is the duty of a manufacturer to exercise ordinary care in the design, construction, and manufacture of its product so as to render the product safe for its intended use and also safe for unintended uses which are reasonably foreseeable.

It is the further duty of the manufacturer, in the exercise of ordinary care, to make all reasonable and adequate tests and inspections of its product so as to guard against any defective condition which would render such product unsafe when used as it is intended to be used. A manufacturer is charged with the knowledge of its own methods of manufacturing its product and the defects in such methods, if any.

Failure of the manufacturer to perform any such duty constitutes negligence.

COMMENT

This instruction and comment were originally published in 1971. The comment was updated in 1995, 1998, 1999, and 2006. The instruction was revised in 2006.

Ryan v. Zweck-Wollenberg Co., 266 Wis. 630, 64 N.W.2d 226 (1954); Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Flies v. Fox Bros. Buick Co., 196 Wis. 196, 218 N.W. 855 (1928); Restatement, Second, Torts § 395 (1965); 3 A.L.R. (3d) 1016, 1024-28 (1965) (testing, inspecting, and the failure of the manufacturer to do so in regard to defects).

Wisconsin has abolished privity as a test of liability in tort actions for negligence. The question of liability should be approached from the standpoint of the standard of care of the manufacturer or supplier and, thus, any necessity of determining whether a particular product is inherently dangerous is eliminated. Smith v. Atco Co., 6 Wis.2d 371, 94 N.W.2d 697 (1959).

The use of "unsafe" in the instruction is based on Smith v. Atco Co., supra.

As to the putting out of a product by a vendor, where it is made by another, and vendor's liability, see Wojciuk v. United States Rubber Co., 19 Wis.2d 224, 231, 120 N.W.2d 47 (1963); Restatement, supra § 400.

Product Use or Misuse. A manufacturer may be required to reasonably anticipate other uses than the one for which the chattel is primarily intended. Restatement, supra § 395, Comment m.

In Morden v. Continental AG, 2000 WI 51, 235 Wis.2d 325, 611 N.W.2d 659, the supreme court upheld a verdict which found Continental AG negligent in the design and manufacture of the tires on Plaintiff's VW van. Plaintiff's expert opined at trial that both rear tires blew out simultaneously after passing over a bump or dip on a highway overpass in Florida. After losing control of the van, it swerved, slid, bounced and rolled over into the grassy median area rendering Plaintiff a quadriplegic.

The first sentence of WCJI 3240 provides: "It is the duty of a manufacturer to exercise ordinary care in the design, construction, and manufacture of its product so as to render such product safe for its intended use."

In discussing the duty of care of a manufacturer, the Morden Court at ¶ 47, p. 356 states:

> ....Moreover, the test of foreseeability expects manufacturers to "anticipate the environment which is normal for the use of his product." Tanner, 228 Wis.2d at 367 (quoting Kozlowski v. John E. Smith's Sons Co., 87 Wis.2d 882, 896, 275 N.W.2d 915 (1979)). **Consequently, the duty of care requires manufacturers to foresee all reasonable uses and misuses and the consequent foreseeable dangers**, id. at 368 (citing Schuh, 63 Wis.2d at 742-43), **and to act accordingly.** (Emphasis supplied).

The supreme court in Schuh did not at pp. 742-43 make the statement attributed to it by the Morden Court. The Schuh Court stated at 742-43 as follows:

> Although the plaintiff testified he thought the machine was off, he still was "misusing" the machine by standing on the edge of the hopper and using it as a perch. Therefore, it becomes necessary for the jury to determine whether the defendant could reasonably foresee such misuse of its product. ". . . [T]he manufacturer is not liable for injuries resulting from abnormal or unintended use of his product, *if* such use was not reasonably foreseeable. The issue is one of foreseeability, and misuse may be foreseeable." (Emphasis in original.) Authorities cited.

The language attributed to the Schuh Court comes from Tanner v. Shoupe, 228 Wis.2d 357, 368 where the Court of Appeals stated as follows:

> . . . In other words, the manufacturer has the duty to foresee all reasonable uses and misuses and the resulting foreseeable dangers. Schuh, 63 Wis.2d at 742-43 . . . .

One who undertakes to rebuild or repair a chattel has the same duty as a manufacturer. 1 Frumer and Friedman, Products Liability § 5.03(3), (1966); Restatement, supra § 404.

The manufacturer of a final product has a duty to make all reasonable tests and inspections of the various component parts of the final product, even though some or all of the component parts are manufactured by another. Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Cedarburg Light & Water Comm'n v. Allis-Chalmers, 33 Wis.2d 560, 148 N.W.2d 13 (1967); 78 A.L.R.2d 481 (1961); 3 A.L.R.3d 1016 (1965).

Liability of a Machine Reconditioner. A reconditioner does not have a duty to bring the machines it reconditions into compliance with applicable safety standards in effect when it reconditions the machines so long as it does not hold itself as bringing machines into compliance with safety standards and is not requested to do so by the machines owner. Rolph v. EBI Cos., 159 Wis.2d 518, 464 N.W.2d 667 (1991).

Tailoring This Instruction to the Facts of the Case. In Anderson v. Alfa-Laval Agri, Inc., 209 Wis.2d 337, 564 N.W.2d 788 (Ct. App. 1997) the court of appeals encouraged trial courts to customize the patterned instructions based on the specific facts of the case to better assist the jury in understanding the nature of the law and how the law is to be applied to those specific facts.

In this case, a series of tailored jury instructions were requested involving the defendant's duty to incorporate foreseeable safety features into its product and the defendant's duty to all foreseeable persons who would have contact with the product, including bystanders and not just the purchaser or consumer of the product. Customized jury instructions were also sought in regard to the defendant's post-sales and nondelegable duties. The trial court, however, denied these requested instructions and gave patterned jury instructions. While recommending that specifically tailored jury instructions be used in the appropriate case, the court of appeals concluded that the trial court adequately instructed the jury even though it should have better assisted the jury with instructions specifically tailored to the factual issues raised in this case.

Negligent Design. In Sharp v. Case Corp., 227 Wis. 2d 1, 595 N.W.2d 380 (1999), the court was asked to overrule Greiten v. LaDow, 70 Wis.2d 589, 235 N.W.2d 677 (1975). The Greiten court held that a jury finding that a product is not unreasonably dangerous does not preclude a jury finding of negligent design. The court in Sharp declined to overrule Greiten. It further concluded that the jury finding that the product was not unreasonably dangerous was consistent with the jury finding that after manufacture and sale of the product, the manufacturer learned of a defect posing a serious hazard which originated and was unforeseeable at the time of manufacture, yet it failed to warn customers of the danger.

Effect of the Adoption of Restatement, Third, of Torts. In Sharp v. Case Corp., supra, the court acknowledged that Restatement, Third, of Torts was published in 1998 and may offer new insights into products liability law, but it declined "at this time" to overrule Greiten.