3260.1 PRODUCT LIABILITY: WIS. STAT. § 895.047 (FOR ACTIONS COMMENCED AFTER JANUARY 31, 2011)

To prove liability of (defendant manufacturer) in this case, (plaintiff) must establish all of the following five elements:

1. The product is defective because

   [SELECT ONE OR MORE OF THE FOLLOWING THREE BRACKETED ITEMS]

   [it contains a manufacturing defect which departs from its intended design even though all possible care was exercised in the manufacture of the product.]

   [the foreseeable risks of harm posed by the product's design could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe.]

   [of inadequate instructions or warnings only if the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the manufacturer and the omission of the instructions or warnings renders the product not reasonably safe.]
2. The defective condition rendered the product unreasonably dangerous to persons or property.
3. The defective condition existed at the time the product left the control of the manufacturer.
4. The product reached the user or consumer without substantial change in the condition in which it was sold.
5. The defective condition was a cause of (plaintiff)'s damages.

Question No. 1 on the verdict form asks:

When the product left the control of (manufacturer) and has reached the user or consumer without substantial change in the condition it was sold, was it in such a defective condition as to be unreasonably dangerous to a (user) (person) (property)?

[NOTE: USE THE FOLLOWING PARAGRAPH IF EVIDENCE HAS BEEN RECEIVED ON THE PRODUCT'S COMPLIANCE WITH STANDARDS, CONDITIONS, OR SPECIFICATION ADOPTED OR APPROVED BY A FEDERAL OR STATE LAW OR AGENCY. SEE WIS. STAT. § 895.047(3)(b).]

[There was evidence received that at the time of sale, the product complied in material respects with relevant standards, conditions, or specifications adopted or approved by a federal or state law or agency. From this evidence, a rebuttable presumption arises that the product was not defective. However, there is also evidence which may be believed by you that the product is defective. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable than not that the product was defective, then in answering Question No. 1, you should find that the product was not defective.]

Question No. 2 on the verdict form asks:

Was the defective condition of the product a cause of injury to (plaintiff)?

(Read Wis JI-Civil 1500)

[NOTE: USE THE FOLLOWING PARAGRAPHS IF EVIDENCE HAS BEEN RECEIVED ON DRUG USE OR ALCOHOL CONSUMPTION BY PLAINTIFF. SEE WIS. STAT. § 895.047(3)(a).]

[There was evidence received regarding the consumption of (drugs) (alcohol) by (plaintiff). If you are satisfied by clear, satisfactory, and convincing evidence to a reasonable certainty, that at the time of the injury, (plaintiff) was under the influence of any controlled substance [or controlled substance analog] [or had a concentration of .08 or more of alcohol in (100) (210) milliliters in (his) (her) (blood) (breath), then a rebuttable presumption arises that [being under the influence of a controlled substance (controlled substance analog)] [having an alcohol concentration of .08 or more at the time of the injury] was the cause of (plaintiff)'s injury.]

[The term "under the influence" means that at the time of injury, (plaintiff)'s ability to operate (use) the manufacturer's product, was impaired because of consumption of a controlled substance (controlled substance analog) which renders (him) (her) incapable of safely operating (using) the product.]

(Read Wis JI-Civil 205 Burden of Proof: Middle)

[The words "the cause" mean that neither the product nor the conduct of any other party was a substantial factor in producing (plaintiff)'s injury and that (plaintiff)'s [alcohol concentration of .08 or more] [being under the influence of a controlled substance (controlled substance analog)] was the single, exclusive cause of (his) (her) injury. However, there is evidence which may be believed by you that (plaintiff)'s injury had more than one cause. You must resolve this conflict. Unless you are satisfied by the greater weight of the credible evidence, to a reasonable certainty, that it is more probable than not that there was an additional cause which produced (plaintiff)'s injury, you must find that [being under the influence of a controlled substance (controlled substance analog)] [having an alcohol

concentration of .08 or more] was the cause of (plaintiff)'s injury and you must answer Question No. 2, relating to a cause "no."]

[Question No. _____ on the verdict form asks:

Was (plaintiff) negligent with respect to (his) (her) safety?

(Read WIS JI-CIVIL 3268 CONTRIBUTORY NEGLIGENCE modified as necessary to address the defenses of contributory negligence or misuse, alteration, or modification of the product by plaintiff. See Wis. Stat. § 895.047(3)(c).)

Question No. _____ on the verdict form asks:

Was (plaintiff)'s negligence a cause of the injury?

(Read Wis JI-Civil 200 Burden of Proof: Ordinary)]

COMMENT

This instruction and comment were approved in 2012. A reporter's note was deleted in 2014.

2011 Wisconsin Act 2, on which this instruction is based, became effective February 1, 2011. For a comparison of how this act changed common law products liability, see the discussion that follows.

Former Products Liability Law. Before the enactment of 2011 Wisconsin Act 2, products liability was based on common law. See Wis JI-Civil 3260, which is based upon Restatement (Second) of Torts, sec. 402A which was adopted in Dippel v. Sciano, 37 Wis.2d 443 (1967). Dippel elements for a product liability claim include the following:

1. That the product was in defective condition when it left the possession or control of the seller

2. That it was unreasonably dangerous to the user or consumer

3. That the defect was a cause (a substantial factor) of the plaintiff's injuries or damages

4. That the seller engaged in the business of selling such product or, put negatively, that this is not an isolated or infrequent transaction not related to the principal business of the seller, and

5. That the product was one which the seller expected to and did reach the user or consumer without substantial change in the condition it was when he sold it.

Liability is imposed under Restatement (Second) of Torts although a person "has exercised all possible care in the preparation and sale of the product, provided the product was being used for the purpose for which it was designed and intended to be used." Sec. 402A(2)(a), Wis JI-Civil 3260.

The "consumer contemplation" test is used to determine elements #1 & #2, above. A product is said to be "defective" when it is in a condition not contemplated by the ordinary user or consumer which is unreasonably dangerous to the ordinary user or consumer. Green v. Smith & Nephew AHP, Inc., 2001 WI 109, 245 Wis.2d 772 Par. 77. A "defect" is not subject to any general definition and must be determined on a case-by-case relying on expectations of the ultimate consumer. Sumnicht v. Toyota, 121 Wis.2d 338, 368 (1984).

Sec. 402A(2)(b) abolished the privity defense, imposing liability "although the user or consumer has not bought the product from or entered into any contractual relation with the seller."

New Products Liability Law Created by 2011 Wisconsin Act 2. New products liability in Wisconsin is based on Wis. Stat. § 895.047(1) created by 2011 Wisconsin Act 2. The new law applies to any claim filed after January 31, 2011. The statutory elements are as follows:

1. That the product is defective because it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product contains a manufacturing defect if the product departs from its intended design even though all possible care was exercised in the manufacture of the product. A product is defective in design if the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the manufacturer and the omission of the alternative design renders the product not reasonably safe. A product is defective because of inadequate instructions or warnings only if the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the manufacturer and the omission of the instructions or warnings renders the product not reasonably safe. This statutory language is taken from Restatement (Third) of Torts, sec. 2.

2. That the defective condition rendered the product unreasonably dangerous to persons or property.

3. That the defective condition existed at the time the product left the control of the manufacturer.

4. That the product reached the user or consumer without substantial change in the condition in which it was sold.

5. That the defective condition was a cause of the claimant's damages.

This new law makes the following changes to the common law:

1. Categorizes types of defect [manufacture, design and failure to instruct/warn] under two different liability standards: (1) manufacturing defects: strict liability; and (2) design and failure to instruct/warn defects: failure to reduce foreseeable risks of harm (which is an element of negligence) See Green, supra, Par. 54-56.

2. Introduces the "reasonable alternative design" test in cases where the design defect is at issue (apparently discarding the consumer contemplation test).

3. In design defect cases, the Restatement Third approach adopted by the statute increases plaintiff's burden by requiring proof of the manufacturer's negligence, and also adding an additional element of proof (i.e. reasonable alternative design) to the negligence standard. This approach was rejected in Green, which predated enactment of Act 2.

Problem Areas. Act 2 leaves several important questions unanswered. First, is there any difference between "not reasonably safe" and "unreasonably dangerous"?, i.e. Can proof of one stand as proof of the other? See Restatement (Third) of Torts, Comment G. To Section 2. Second, since neither a manufacturing defect or a failure to warn/instruct defect implicates product design, how would the alternative reasonable design test apply in these circumstances? Or, should the consumer contemplation test (see Green, supra) be applied to these cases? If not applicable, what test is to be used to determine whether a product is defective and unreasonably dangerous due to a manufacturing defect or a failure to warn/instruct defect?

Some say the consumer contemplation test should remain applicable to all three categories of defects. See *Wisconsin Lawyer* July 2011 article "A New Era: Products Liability Law in Wisconsin." The article implies that the reasonable alternative design test applies to all three categories of defects.

The Restatement (Third) of Torts indicates that the consumer contemplation test may remain relevant even in some design defect cases. Comment g to sec. 2 of the Restatement (Third) suggests that "although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe."

Sellers and Distributors. The new law reduces the exposure of sellers and distributors. To establish liability, plaintiff must establish that "manufacturer would be liable" and that one of the following applies:

1. Seller or distributor has contractually assumed one of the manufacturer's duties to manufacture, design, or provide warnings/instructions.

2. Neither the manufacturer nor its insurer can be served within Wisconsin. (If the manufacturer subsequently submits to jurisdiction, a seller or distributor shall be dismissed.)

3. The trial court determines that a judgment against the manufacturer or its insurer would be unenforceable in Wisconsin.

Defenses. Defenses created in Act 2 include:

1. If defendant can show plaintiff had an alcohol concentration of .08 or more or was under the influence of a controlled substance or controlled substance analog, this creates a rebuttable presumption that alcohol or the drug was the cause of plaintiff's injury.

2. Compliance in material respects with relevant standards, conditions or specifications adopted or approved by a state or federal law or agency creates a rebuttable presumption that the product is not defective.

3. Defendant's damages shall be reduced by the percentage of causal responsibility attributable to plaintiff's misuse, alteration, or modification of the product.

4. Upon a showing that the plaintiff's damage was caused by an inherent characteristic of the product that would be recognized by an ordinary person with ordinary knowledge, the action shall be dismissed.

5. There is no seller or distributor liability, if the product was received from the manufacturer in a sealed container with no reasonable opportunity to test or inspect.

See concurring opinions in Godoy v. E.I. du Pont De Nemours et al, 2009 WI 78, 319 Wis.2d 91 and Horst v. Deere & Company, 2009 WI 75, 319 Wis.2d 147, which support the adoption of Restatement (Third) Torts.

Presumptions. For commentary on the use of presumptions in civil cases, such as Wis. Stat. § 895.047(3)(a) and (b), see Wis JI-Civil 350 and 352.

Contributory Negligence. Wis. Stat. § 895.047(3)(c) calls for a reduction in damages by "the percentage of causal responsibility for the claimant's harm attributable to the claimant's misuse, alteration, or modification of the product." See Wis JI-Civil 3268.