## 3260.1 PRODUCT LIABILITY: WIS. STAT. § 895.047[1]

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 that 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 more safe, 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.

[NOTE: USE THE FOLLOWING DEFINITION FOR STRICT LIABILITY CLAIMS FOR DEFECTIVE DESIGN[2]:

This means the product design was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.[3]]

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 rendered (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 that you may believe 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)]

**NOTES**

1. This instruction applies to all actions commenced after January 31, 2011. While earlier versions of the instruction specified this date in the title, its removal does not change the content or application of the instruction.

2. In Murphy v. Columbus McKinnon Corp., 2022 WI 109, ¶52, 405 Wis.2d 157, 982 N.W.2d 898, the Wisconsin Supreme Court concluded that when the claim is for a defective design:

> (1) Wis. Stat. § 895.047(1)(a) requires proof of a more safe, reasonable alternative design, the omission of which renders the product not reasonably safe; (2) proof that the consumer contemplation standard as set out in § 895.047(1)(b) (for strict liability claims for a defective design) has been met, and (3) proof that the remaining three factors of a § 895.047(1) claim have been met.

While the Court's decision focuses on claims related to defective design, its opinion broadly discusses the consumer contemplation test and how it applies to Wis. Stat. § 895.047 in its entirety. As a result, the Committee concluded that the question of whether the consumer contemplation test applies to other types of defective products under § 895.047 remains undecided.

3. Wis. Stat. § 895.047(1) requires proof that the consumer-contemplation standard as set out in § 895.047(1)(b) (for strict liability claims for a defective design) has been met. See Murphy, supra, at ¶52. To prove a product design was "unreasonably dangerous" under the consumer contemplation test, a litigant must show that the product design was "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Murphy, ¶21, quoting Vincer v. Esther Williams All-Aluminum Swimming Pool Co., 69 Wis. 2d 326, 33, 230 N.W.2d 794 (1975).

**COMMENT**

This instruction and comment were approved in 2012. This revision was approved by the Committee in October 2023; it amended language concerning the consumer contemplation test and its application for strict liability claims for defective design and added to the comment.

Product liability in Wisconsin is based on Wis. Stat. § 895.047(1). The statutory elements are as follows:

(a) 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.

(b) That the defective condition rendered the product unreasonably dangerous to persons or property.

(c) That the defective condition existed at the time the product left the control of the manufacturer.

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

(e) That the defective condition was a cause of the claimant's damages.

**Product liability claim: defective product design**. Under Wis. Stat. § 895.047, to establish a claim of strict liability for a design defect, a plaintiff must allege and prove the following:

1. The foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design.

2. The omission of the alternative design renders the product not reasonably safe.

3. Proof that the consumer-contemplation standard has been met, meaning the product's defect renders it unreasonably dangerous to persons or property according to the reasonable expectations of the ordinary consumer concerning the characteristics of this type of product.

4. Proof of the remaining three factors of a § 895.047(1) claim.

See Murphy v. Columbus McKinnon Corporation, 2022 WI 109, ¶¶30, 33, 405 Wis.2d 157, 982 N.W.2d 898.

In Murphy, 2022 WI 109, at ¶28, the Court concluded that "While § 895.047 appears to borrow language from the Restatement (Third) of Torts, the legislature did not adopt the entirety of § 2, nor did it enact the Restatement's voluminous comments." The Court concluded that "Wis. Stat. § 895.047 remains loyal to Wisconsin's roots in the common law consumer-contemplation test" and retains the distinction between strict liability and negligence claims. Murphy, ¶¶32, 39, and 40; WIS. STAT. § 895.047(6).

**"Reasonable/reasonably" in subsection (1)(a)**. The inclusion of the terms "reasonable" and "reasonably" in subsection (1)(a) should not be construed as embracing the risk-utility balancing test outlined in Restatement (Third) of Torts § 2(b) or the requirements presented in comment f. In the Murphy decision, the Court explicitly determined that incorporating "reasonable" and "reasonably" into §

895.047(1)(a) does not signify the legislature's intention to adopt the risk-utility balancing test or the provisions detailed in comment f of the Restatement (Third) of Torts, § 2. Murphy, 2022 WI 109, supra, at ¶¶ 34-35.

**Retention of the consumer contemplation test**. In Murphy v. Columbus McKinnon Corporation, supra, the Wisconsin Supreme Court confirmed that the state legislature had retained the consumer contemplation test. This test, which determines whether a product design is unreasonably dangerous due to a defective product design, was codified in §895.047(1)(b) and was supported by both the canon of imputed common law and the legislative history of the statute. It is important to note that although §895.047 eliminates the consumer contemplation test for the "defect" element of the claim, it should still be used to determine whether a product design is unreasonably dangerous.

**"Not reasonably safe" vs. "unreasonably dangerous."** In a previous version of this comment, it was noted that paragraph (a) uses the term "not reasonably safe," and paragraph (b) uses the term "unreasonably dangerous." The comment then questioned whether proving one term could serve as proof of the other. In Murphy v. Columbus McKinnon Corp., the court addressed this question by stating that paragraph (a) codifies language from the Restatement (Third), while paragraph (b) codifies the consumer-contemplation test from this state's common law. The court further explained that the legislature retained the consumer-contemplation test in the statute. See Murphy, 2022 WI 109, supra, at ¶¶ 37. Therefore, the codified terms can be read in harmony because they both require proof that a product design was dangerous to a degree beyond what an ordinary consumer would expect under the consumer-contemplation test.

**Bringing a claim in negligence for product design.** Wis. Stat. § 895.047(6) clarifies that the products liability section does not apply to negligence or breach of warranty claims. Consequently, plaintiffs can bring a common law negligence claim alongside a strict liability cause of action against a product manufacturer, as the statute does not preclude such claims. See Murphy, 2022 WI 109, supra at ¶¶39-40.

**Contributory negligence: damages for injuries caused by a defective product**. In a strict liability action for injuries from a defective product, the fact finder must initially ascertain the injured party's eligibility for damages. This involves apportioning the total causal responsibility for the injury among the injured person, the defective product, and any other contributory negligence.

If the injured party's contributory negligence exceeds the causal responsibility attributed to the product's defect, he or she is precluded from recovering damages from any entity involved in the product's commercial distribution. Should the injured party's causal responsibility be equal to or lesser than that of the product's defect, he or she may recover damages, albeit reduced by their own contributory percentage.

If multiple defendants are implicated in the product's defect, and the injured party is eligible for recovery, the fact finder must apportion causal responsibility among each defendant. This is then multiplied by the defective product's share of causal responsibility for the injury. Defendants with 51% or greater liability are jointly and severally responsible for all damages, while those with less than 51% liability are accountable only for their proportional share of damages.

Should the injured party be eligible for recovery, surpassing an individual defendant's liability does not disqualify the injured party from seeking damages from that specific defendant.

This subsection does not apply to actions based on negligence or a breach of warranty. See Wis. Stat. § 895.045(3).

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

1. The 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 the defendant can show that the 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 the 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. The defendant's damages shall be reduced by the percentage of causal responsibility attributable to the 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.

**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.