3260 STRICT LIABILITY: DUTY OF MANUFACTURER TO ULTIMATE USER (FOR ACTIONS COMMENCED BEFORE FEBRUARY 1, 2011)

A manufacturer of a product who sells (places on the market) a defective product which is unreasonably dangerous to the ordinary user or consumer, and which is expected and does reach the consumer without substantial change in the condition in which it is sold, is regarded by law as responsible for harm caused by the product even though he or she 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.

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, and the defect arose out of design, manufacture, or inspection while the article was in the control of the manufacturer. A defective product is unreasonably dangerous to the ordinary user or consumer when it is dangerous to an extent beyond that which would be contemplated by the ordinary user (consumer) possessing the knowledge of the product's characteristics which were common to the community. A product is not defective if it is safe for normal use.

A manufacturer is not under a duty to manufacture a product which is absolutely free from all possible harm to every individual. It is the duty of the manufacturer not to place upon the market a defective product which is unreasonably dangerous to the ordinary user (consumer).

Question 1 on the verdict form asks:

When (product) left the possession of (manufacturer) was (product) in a defective condition so as to be unreasonably dangerous to a prospective (user) (consumer)?

Before you can answer question _____ "yes," you must be satisfied that: (1) the product was in a defective condition; (2) the defective condition made the product unreasonably dangerous to people; (3) the defective condition of the product existed when the product was under the control of the manufacturer; and (4) the product reached the user (consumer) without substantial change in the condition in which it was sold.

[There is no claim in this case that (product) failed to perform its intended purpose of (insert purpose of product, for example, protecting against the transmission of bloodborne pathogens). You may find the (product) was dangerous beyond the reasonable contemplation by an ordinary user or consumer, even if it served its intended purpose.]

[Lack of knowledge on the part of (defendant) that (insert condition of product, e.g. proteins in natural rubber latex may sensitize and cause allergic reactions) to some individuals is not a defense to the claims made by (plaintiff). A manufacturer is responsible for harm caused by a defective and unreasonably dangerous product even if the manufacturer had no knowledge or could not have known of the risk of harm presented by the condition of the product.]

COMMENT

This instruction and comment were approved by the Committee in 1971. The instruction was revised in 2001. This instruction was revised in 2002 to conform the language regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment. The comment was updated in 1995, 1999, 2001, and 2010. The title was updated in 2011. A reporter's note was removed in 2014.

For actions commenced after January 31, 2011, see Wis JI-Civil 3260.1.

This instruction reflects Wisconsin adoption of Restatement, Second, Torts § 402A: Strict Liability (1965), for "products liability." Dippel v. Sciano, 37 Wis.2d 443, 155 N.W.2d 55 (1967). Strict liability is

discussed, generally, in: 2 Frumer and Friedman, Products Liability § 16A (1966); Schreiber and Rheingold, Products Liability 2:121 (1967).

Section 402A applies to all "sellers" (manufacturers) of products. Restatement supra Comments a and f. Accordingly, the maker of a component part, or assembler of component parts who markets the whole product as his, or anyone in the "chain of distribution" may be liable under strict liability. 13 A.L.R.3d 1057, 1096-1100 (1967). This section may apply even when the seller never has possession of the product, nor participates in the design, construction, manufacture, use, or directions for use of the product. Little v. Maxam, Inc., 310 F. Supp. 875 (S.D. Ill. 1970) (case dealing with manufacturer's representative). But the seller (manufacturer) must be in the "business" of selling (manufacturing) the product for this section to apply. Restatement, supra Comment f. For related instruction defining "business," see Wis JI-Civil 3264.

Where case law or statute prescribes a standard of conduct for the purpose of protecting life, limb, or property from a certain type of risk and harm, violation of that standard, which is negligence per se, may constitute an "unreasonable risk" under this section. Dippel v. Sciano, 37 Wis.2d 443, 462, 155 N.W.2d 55 (1967); Kalkopf v. Donald Sales & Mfg., 33 Wis.2d 247, 147 N.W.2d 277 (1967); Metz v. Medford Fur Foods, 4 Wis.2d 96, 90 N.W.2d 106 (1958).

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.

For related instructions in products liability, see Wis JI-Civil 3200 et seq : Warranty; and Wis JI-Civil 3240 et seq: Negligence.

The Committee revised the general strict products liability instruction following the decision in Green v. Smith & Nephew AHP, Inc., 2001 WI 109, 245 Wis.2d 772, 629 N.W.2d 727. This lawsuit arose from a strict products liability claim by a health care worker who alleged the defendant manufactured defective and unreasonably dangerous latex medical gloves which caused her allergic reactions to the proteins in the gloves. At the time the plaintiff began experiencing her injuries in 1989, the health care community was generally unaware that persons could develop a latex allergy. Evidence at trial indicated that between 5 and 17 percent of health care workers have a latex allergy. The judge modified the then approved jury instruction on strict products liability. The jury awarded the plaintiff $1,000,000 after finding the gloves were defective and unreasonably dangerous.

Consumer Contemplation Test. The supreme court in Green considered several issues concerning the jury instructions given by the trial judge. First, the court considered whether the trial judge erred in instructing the jury that a product can be defective and unreasonably dangerous based solely on consumer expectations about that product. The trial court deviated from the then approved Wis JI-Civil 3260 which provided in part that "a product is said to be defective when it does not reasonably fit for the ordinary purposes for which such product was sold and intended to be used," and instead instructed the jury that "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."

The manufacturer said this "consumer-contemplation" language used by the trial judge defined "defect" by the same terms that the trial court defined unreasonable danger and thus erroneously merged the elements of "defect" and "unreasonable danger" based solely on consumer contemplation. The supreme court disagreed and approved the revised instruction published above.

The court noted five factors from Sumnicht v. Toyota Motor Sales, 121 Wis.2d 338 (1984), that may be "relevant" to determining whether the ordinary consumer could anticipate, and therefore, contemplate an alleged unreasonably dangerous defect. These factors are:

> 1) [C]onformity of defendant's design to the practices of other manufacturers in its industry at the time of manufacture; 2) the open and obvious nature of the alleged danger; . . . 3) the extent of the claimant's use of the very product alleged to have caused the injury and the period of time involved in such use by the claimant and others prior to the injury without any harmful incident . . .; 4) the ability of the manufacturer to eliminate danger without impairing the product's usefulness or making it unduly expensive; and 5) the relative likelihood of injury resulting from the product's present design.

Manufacturer's Knowledge of the Risk of Harm. The supreme court in Green, supra, next reviewed whether the trial judge erred by instructing the jury that a product can be deemed defective and dangerous regardless of whether the manufacturer knew or could have known of the risk of harm the product presented to consumers. The supreme court said the instruction was proper.

It noted that foreseeability of harm is an element of negligence, not strict products liability, which "focuses not on the defendant's conduct, but on the nature of the product." It also noted that foreseeable use must not be confused with foreseeable risk of harm.

The court refused to adopt a provision from the new Restatement, Third, Torts § 2(6) that a product:

> is defective in design when 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 seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

The court said this new Restatement provision blurs the distinction between strict products liability and negligence claims.

How to Prove an Allergy-Causing Product is Unreasonably Dangerous. The court in Green, supra, also explained how to handle a strict products liability claim based on an allergy-causing product.

The court said:

> . . . , [w]e conclude that in order to prove that an allergy-causing product is unreasonably dangerous, a plaintiff must prove the following elements: (1) the product contains an ingredient that can cause allergic reactions in a substantial number of consumers; and (2) the ordinary consumer does not know that the ingredient can cause allergic reactions in a substantial number of consumers. Upon the plaintiff making this showing, the burden then shifts to the manufacturer to prove that the product includes a warning or directions that effectively alert the ordinary consumer that the ingredient can cause allergic reactions in a

substantial number of consumers; if the manufacturer fails to meet this burden, a trier of fact can properly conclude that the product is unreasonably dangerous.

Liability of a Machine Reconditioner. A reconditioner who does not manufacture, distribute, or sell the products it reconditions is not liable in strict liability for the defects in the machines it reconditions. Rolph v. EBI Cos., 159 Wis.2d 518, 464 N.W.2d 667 (1991).

Effect of the Adoption of Restatement, Third, of Torts. In Sharp v. Case Corp., 227 Wis.2d 1, 19, 595 N.W.2d 380, 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 v. LaDow, supra 227 Wis.2d at 19.

Injury to Bystander. In a 2009 decision, the Wisconsin Supreme Court addressed the issue of whether a "bystander" falls within the "consumer contemplation test" for strict products liability and held that the bystander does not. Horst v. Deere & Co., 2009 WI 75, 319 Wis.2d 147, 769 N.W.2d 536. The plaintiff argued that Wis JI-Civil 3260 should include a "bystander contemplation test."

The jury instructions given by the trial judge were based on Wisconsin Jury InstructionBCivil 3260 with a supplemental statement regarding bystander claims. The jury was informed that a bystander personal injury claim in strict products liability is only available if the product is unreasonably dangerous based on the expectations of an ordinary user or consumer (the "consumer contemplation test"). Plaintiffs claimed that this jury instruction was an incorrect statement of the law. The plaintiff contended that when a product is dangerous only to a bystander and not to user or consumer, the consumer contemplation test is inappropriate. The plaintiff argued the jury should be instructed that a product is unreasonably dangerous based on the contemplation and expectations of an ordinary bystander.

The supreme court held that the consumer contemplation test, and not a bystander contemplation test, governs all strict products liability claims in Wisconsin, including cases where a bystander is injured. While bystanders may recover when injured by an unreasonably dangerous product, the determination of whether the product is unreasonably dangerous is based on the expectations of the ordinary consumer.