

3290 STRICT PRODUCTS LIABILITY: SPECIAL VERDICT (FOR ACTIONS COMMENCED BEFORE FEBRUARY 1, 2011)

Question 1: When (product) left the possession of (seller) was (product), in a defective condition so as to be unreasonably dangerous to a prospective (user) (consumer)?

Answer: _____

Question 2: If you answer question 1 "yes," answer this question:

Was the defective condition a cause of (plaintiff)'s injuries?

Answer: _____

Question 3: Was (plaintiff) negligent with respect to (his) (her) own safety?

Answer: _____

Question 4: If you answer question 3 "yes," answer this question:

Was the negligence of (plaintiff) a cause of (his) (her) injuries?

Answer: _____

Question 5: If you have answered questions 2 and 4 "yes," answer the following:

Assuming that the defective condition of the product and (plaintiff)'s negligence caused 100% of (plaintiff)'s injuries, what percentage do you attribute to:

- | | | |
|-----|-----------------------|-------|
| (a) | The product? | _____ |
| (b) | (<u>Plaintiff</u>)? | _____ |
| | | _____ |
| | Total | 100% |

COMMENT

[Reporter's Note: For a comparison of how 2011 Wisconsin Act 2 changed common law products liability, see Wis JI-Civil 3260.1, Comment.]

This special verdict and comment were approved by the Committee in 1975. They were revised in 2001. The last line ("Total 100%") was added in 2010. The comment was revised in 2006 and updated in 2011. The reporter's note was revised in 2014.

This instruction is for use in strict product liability actions commenced before February 1, 2011. For actions commenced on February 1, 2011 or after, see Wis JI-Civil 3290.1.

The plaintiff must prove five elements to establish the liability of the seller:

1. That the product was defective when it left the seller's possession;
2. That it was then unreasonably dangerous to the user;
3. That the defect was a cause of the plaintiff's injuries;
4. That the seller was engaged in selling the product (not an isolated sale unrelated to the principal business of the seller); and
5. That the product was expected to and did reach the user without substantial change.

The proposal does not include inquiries with respect to elements 4 and 5 because, generally, they will not be in issue and can and should be resolved as findings by the court. If jury issues are presented on these questions, they could be submitted with the following questions:

Question ____: Did (defendant), as part of its business, sell the product in question?

Answer: _____

Question ____: If you answer "yes" to the foregoing question, answer this question:

Did (defendant) expect the product to reach (plaintiff), as an ultimate user, without substantial change in its original condition?

Answer: _____

The verdict makes reference only to a seller. If the facts warrant, the inquiry could be adapted to apply to a manufacturer, wholesaler, jobber, or retailer. (See Restatement, Second, Torts § 402A, Comments, p. 350, and illustration on p. 355 (1965).)

The inquiry as to plaintiff's negligence is submitted in ultimate form. The elements of contributory negligence would be contained in the instructions. It could involve: misuse or abuse of the product; failure to protect himself or herself against known or apparent dangers; using the product in a manner other than the use for which it was intended; use of worn-out product; carelessness in using or handling an inherently dangerous product; and others.

Strict Liability, Negligence, and Comparative Negligence. In 2001, the Committee revised the special verdict questions for strict product liability claims following the supreme court's decision in Fuchsgruber v. Custom Accessories, 2001 WI 81, 244 Wis.2d 758, 628 N.W.2d 833. In this case, the court considered whether the 1995 amendment to the comparative negligence statute, Wis. Stat. § 895.045(1), applies to strict product liability actions. The court said it does not. The amended comparative negligence statute, Wis. Stat. § 895.045(1), reads:

(1) COMPARATIVE NEGLIGENCE. Contributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if that negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributed to the person recovering. The negligence of the plaintiff shall be measured separately against the negligence of each person found to be causally negligent. The liability of each person found to be causally negligent whose percentage of causal negligence is less than 51% is limited to the percentage of the total causal negligence attributed to that person. A person found to be causally

negligent whose percentage of causal negligence is 51% or more shall be jointly and severally liable for the damages allowed. [Emphasis added.]

The 1995 amendment to § 895.04 had two purposes: (1) to codify the pre-existing requirement in negligence actions that, where there are multiple defendants, a plaintiff's negligence is compared against the separate rather than the combined negligence of the defendants for purposes of determining liability; and (2) to modify joint and several liability. As to the latter, under the statute, only a defendant found 51 percent or more causally negligent can be jointly and severally liable for a plaintiff's total damages (adjusted for any contributory negligence). The liability of a defendant whose causal negligence is less than 51 percent is limited to the percentage of causal negligence attributed to that defendant.

The court, in Fuchsgruber, supra, said that earlier case law, while analogizing strict product liability to negligence per se, did not establish the tort as a species of negligence. If it was negligence, then the comparative negligence statute would require a comparison of the plaintiff's negligence to each defendant's negligence, as in an ordinary negligence action. Because strict liability is not negligence, the comparison in a product liability action is plaintiff-to-product, and secondarily, in multiple defendant cases, the defendants to each other, for purposes of contribution.

The court in Fuchsgruber, supra, disagreed with the then published pattern special verdict which suggested that the defective condition of the product constitutes "negligence" on the part of the seller. The court said in strict liability cases there is no "defendant" negligence to be compared against the plaintiff, either separately or in the aggregate with other defendants. The court concluded that the comparison in strict product liability actions is not a comparison of one party's conduct against another, but rather, a comparison of the extent to which the plaintiff's injuries were attributable to his or her own contributory negligence as against the product's defective condition.

Contribution; Special Verdict Format. If more than one defendant is charged with strict liability, a second comparison question (shown on page 4) should be added to determine the rights of contribution, if any, which each defendant has in relation to the other defendants. The jury instruction to cover the special verdict question reads:

If you are required to answer question ____ which asks you to compare the conduct of the defendants, you will determine how much or to what extent, if any, each defendant named in the question contributed to produce the injury caused by the defective product. You may consider the conduct of each of the parties so named, and taking the conduct of all of the parties as a whole, determine whether each one made a larger, equal, or smaller contribution than the other(s).

SPECIAL VERDICT:

Question ____: If you answered questions 2 and 4 (defective product and cause) "yes," answer this question: Assuming the total conduct by defendants involved to be 100%, what percentage, if any, do you attribute to:

(a) (the manufacturer)?	_____
(b) (the assembler)?	_____
(c) (the dealer)?	_____
(d) (the seller)?	_____
Total	_____ 100%

Form of Special Verdict in Cases Involving Claims of Both Strict Liability and Negligence. For a discussion of formulating special verdicts in a case involving both strict liability claims and negligence claims, see Decker, "Special Verdict Formulation in Wisconsin," *Marquette Law Review* Volume 60, pages 273-79 and 290-95.