

**TESTIMONY OF JAMES J. MATHIE OFFERED ON BEHALF OF CIVIL
TRIAL COUNSEL OF WISCONSIN WITH RESPECT TO 2005 SB 58 & AB 101
RELATING TO PRODUCT LIABILITY OF MANUFACTURERS,
DISTRIBUTORS AND SELLERS**

[The public hearing on SB 58 was held on February 23, 2005 and the public hearing on AB 101 was held on March 17, 2005.]

Comparative Fault

When § 895.045, Wis. Stats. was first drafted, its purpose was to “abolish” joint and several liability except with respect to certain specifically named exceptions. Product liability actions were not specifically excepted from the general abolition of joint and several liability.

The proposed legislation protects the plaintiff’s advantage to compare his or her negligence to the defective nature of the product. If individual defendant manufacturers contribute to the defective nature of the product, their causal responsibility will be combined to determine whether the plaintiff may recover. However, the individual liability of each so-called “product defendant” will determine the amount that the plaintiff may recover against an individual product defendant.

For instance, if the plaintiff is 40 percent contributorily negligent and the defective nature of the product is 60 percent responsible for the accident, with three equally responsible product defendants. A straight comparison of the plaintiff to each defendant would result in the plaintiff being barred from recovery because the plaintiff’s 40 percent negligence would exceed the 20 percent causal responsibility of any individual product defendant. Because the legislation preserves the plaintiff-product comparison, the plaintiff may still recover. However, the plaintiff’s recovery against any individual product defendant is limited to the percentage of responsibility attributed to that product defendant. If a product defendant is 51 percent or more at fault, joint and several liability continues to apply to that defendant.

Definition and Proof of Product Defect

Currently, Wisconsin follows the consumer expectations test. Whether a product contains an unreasonably dangerous defect depends upon the ordinary consumer’s reasonable expectations regarding the product. A defective product is unreasonably

dangerous to the user or consumer when it is dangerous to an extent beyond which would be contemplated by the ordinary user or consumer possessing the knowledge of the product's characteristics which were common in the community.ⁱ

As a consequence of this test, Wisconsin juries are regularly instructed that a manufacturer of a product is regarded as negligent even though he or she has exercised all possible care in the preparation and sale of the product.ⁱⁱ The Wisconsin courts have held, in adopting the consumer expectations test that a product may be defective and unreasonably dangerous even though there are no alternative safer designs available.ⁱⁱⁱ

The consumer expectations test is a decided minority position. Only four jurisdictions apply the test without requiring proof of a reasonable alternative design.^{iv} Even the liberal California courts have recognized that the consumer expectations test is simply inappropriate where the product at issue involves any degree of complexity.^v

The majority position, as set forth by the American Law Institute defines a product as defective when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders the product not reasonably safe. Thus, the plaintiff is required to offer proof of a reasonable alternative design in order to recover. Wisconsin should make this simple yet crucial change to its products liability law.

The proposed legislation addresses this by defining product defect, with reference to reasonable alternative design.

Distributor/Seller Liability

Currently, Wisconsin law treats the seller or distributor of a defective product in the same fashion that it treats the manufacturer of the product. Wisconsin law makes no provision for the practical reality that the seller or distributor, in many cases, has no means to inspect or test the products it sells (many of them arriving in sealed containers) and is simply not in a position to assure the safety of those products. The legislation provides a sealed container defense to address this unfairness.

In order to address this unfairness, the legislation provides that a product seller is not liable unless the manufacturer would be liable *and* either the manufacturer is not subject to service of process within the state or a court determines that the claimant would be unable to enforce a judgment against the manufacturer.

The legislation addresses the reality of the chain of distribution while protecting the claimant's right to a remedy.

Subsequent Remedial Measures

The Wisconsin rules of evidence currently provide that when, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence or culpable conduct in connection with the event.^{vi}

The Wisconsin courts have ruled that this exclusion applies to the negligence aspect of a product liability case, but also ruled that the exclusion does not operate to exclude such evidence in a claim asserting strict liability.^{vii}

The federal rules of evidence have already addressed this anomaly. Rule 407 of the Federal Rules of Evidence provides^{viii} that evidence of subsequent remedial measures is not admissible to prove a defect in a product, a defect in a product's design, or a need for a warning or instruction. At the very least, Wisconsin needs to make this change also. But an even more significant move is necessary.

Although the federal rule resolves the issue of the application of the subsequent remedial measures rule to product liability actions, it leaves open the possibility that changes in design that occur after the date of sale, but before the injury, are admissible to prove that the original design was defective. This oversight defeats part of the original purpose for the rule. The original rule was grounded in the social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.^{ix} If that is truly the purpose of the rule, then changes subsequent to sale should likewise be excluded.

On balance however, the new rule does not prohibit the admission of such evidence to show a reasonable alternative design that existed at the time that the product was sold.

Statute Of Repose

At least 20 states recognize that no product lasts forever and therefore they have enacted statutes of repose that apply to product liability actions^x or created a presumption that the useful life of a product has expired after a certain number of years.^{xi} Currently, Wisconsin does not have a statute of repose applying to manufactured products.^{xii} The new legislation creates one.

Miscellaneous Defenses

Finally, the proposed legislation provides for some common-sense defenses and codifies defenses that already exist.

The legislation recognizes, as the law should, that persons who are under the influence of intoxicants or controlled substances, are more often than not, the cause of their own injuries. The legislation creates a rebuttable presumption of causation in this circumstance.

The legislation recognizes the practical reality that a manufacturer should be rewarded for complying with all of the state and federal standards in existence with respect to the product. Therefore, a product that so complies is presumed to not be defective. However, the defense is also rebuttable, allowing the injured person to demonstrate through evidence that the product, though it complied with state and federal standards, was still defective.

And the legislation codifies the “open and obvious” defense, recognizing that if the damage or injury is caused by an inherent characteristic of the product that would be recognized by an ordinary person with ordinary knowledge common to the community that uses or consumes the product, then the product was not at fault.

ⁱ Wis. J.I. Civil 3260 Strict Liability: Duty of Manufacturer to Ultimate User.

ⁱⁱ Id.

ⁱⁱⁱ *Sumnicht v. Toyota Motor Sales*, 121 Wis.2d 338, 370-71, 360 N.W.2d 2 (1984).

^{iv} According to the American Law Institute, Restatement of Torts 3d, Product Liability.

^v *See Soule v. General Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994).

^{vi} Section 904.07, Wis. Stats.

^{vii} *See Chart v. GMC*, 80 Wis.2d 91, 258 N.W.2d 680 (1977).

^{viii} Effective December 1, 1997.

^{ix} See advisory committee notes to 1972 Proposed Rule 904.07, Wis. Stats.

Colorado (7 years); Connecticut (10); Florida (12); Georgia (10); Illinois (10/12); Indiana (10); Iowa (15); Montana (10); Nebraska (10); North Carolina (6); Oklahoma; Oregon (8); Tennessee (10); Texas (15); Vermont (20); Washington (12); and Wyoming. ^{xi} Idaho (10 years); Kansas (10); Kentucky (5/8). ^{xii} § 893.89, Wis. Stats. sets an “exposure period” of 10 years during which actions for injury resulting from improvements to real property must be brought. Some states have applied such statutes to product liability actions also.