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Maryland State Bar Association: Proposed Pattern Jury Charges: Product Liability

MARYLAND STATE BAR ASSOCIATION PROPOSED PATTERN JURY CHARGES: PRODUCT LIABILITY ©

This is a tentative draft of proposed pattern jury instructions prepared by The Section of Judicial Administration, Committee on Pattern Jury Instructions of the Maryland State Bar Association. The Committee emphasizes that the pattern jury instructions are suggestions for the courts' consideration and are not intended to be mandatory. Comments and suggestions are invited by the Committee with respect to the draft product liability instructions.†

PRODUCT LIABILITY

A. LIABILITY FOR NEGLIGENCE

1. Manufacturer's Liability

The manufacturer of a product that is likely to be dangerous if negligently made, has a duty to exercise reasonable care in the [design]

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[manufacture] [testing] and [inspection] of the product [and in the testing and inspection of any component parts made by another] so that the product may be safely used in a manner and for a purpose for which it was made and for which the manufacturer knew or should have known that those likely to use it would not realize the dangerous condition of the product. The duty includes the obligation to exercise reasonable care to warn or otherwise inform of the dangerous condition.

A failure to fulfill that duty is negligence.

Comment: Only the applicable bracket(s) should be used. This instruction is essentially a standard negligence instruction but it does state more particularly the degree of care required of a manufacturer.

On the question of the likelihood of the product to be dangerous, *see Babylon v. Scruton*, 215 Md. 299, 138 A.2d 375 (1958); *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974); *See also Frericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975) (These last two cases illustrate parameters of intended purpose of motor vehicles).

Concerning motor vehicles in "second collision" situations: "an automobile manufacturer is liable for a defect in design which the manufacturer could have reasonably foreseen would cause or enhance injuries on impact which is not patent or obvious to the user, and which in fact leads to or enhances the injuries in an automobile collision." *Volkswagen of America, Inc. v. Young, supra* at 272 Md. 216; *see also Frericks v. General Motors Corp., supra.*

For care in design, manufacturing, testing and inspection, see RESTATEMENT (SECOND) OF TORTS, §§ 395, 398 and 396 (1965) respectively. As respects component parts, see 3 A.L.R.3d 1016.

Concerning the specific defect which is the essence of most product liability litigation, a plaintiff, aside from proof of such, must prove that the contended defect was in the product when it left the control of the manufacturer. *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975).

The doctrine of *res ipsa loquitur* may be invoked where the liability of a manufacturer is predicated on negligence, but for case appropriateness, *see Giant Food, Inc. v. Washington Coca-Cola Bottling Co., supra; Leikach v. Royal Crown*, 261 Md. 541, 276 A.2d 81 (1971); and, *Undeck v. Consumer's Discount Supermarket, Inc.*, ___ Md. App. ___, ___ A.2d ___ (1975).

Concerning a continuing duty to warn of dangerous defects after the product has been sold and to develop and supply curative devices for dangerous products already sold, *see Rekab v. Hurbetz*, 261 Md. 141, 274 A.2d 107 (1971). *See also Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 441 F.2d 451 (2d Cir. 1969), *cert. denied*, 400 U.S. 82 (1969).

a. Duty of Component Maker or Material Processor

The [maker of a component part] [processor of materials] incor-

porated into a product finished or assembled by another has the same duty of care as to such [component parts] [materials] as that of a manufacturer.

Addendum:

A manufacturer who uses in his product any [material, part] manufactured by another is under a duty to make such inspections and tests of the [material, part] as a reasonably careful manufacturer in his business should recognize as necessary to secure a finished product reasonably safe for its intended use. The duty to inspect and test exists even though the [material, part] was obtained from a reputable [producer, manufacturer]. The failure to [make, exercise reasonable care in making] such inspections and tests is negligence.

Comment: RESTATEMENT (SECOND) OF TORTS, § 395, comment *m* (1965). *See, e.g., E. I. DuPont de Nemours & Co. v. McCain*, 414 F.2d 369 (5th Cir. 1969).

b. Duty of Seller Assuming Role of Manufacturer

One who puts out as his own product an article manufactured by another has the same duty of care as that of manufacturer.

Comment: This instruction should be used in a case involving a product which is completely made by one other than the person who holds himself out as manufacturer.

RESTATEMENT (SECOND) OF TORTS, § 400 (1965).

2. Retailer's (Dealer) or Wholesaler's (Distributor) Duty to Inspect and Test as to Defects

A seller of a product, which was made by another, has a duty to make a reasonable inspection of the product for possible defects and to make such tests for defects therein as are reasonably necessary to assure safety of the product sold. [See Comment below].

A failure to fulfill any such duty is negligence.

Comment: Instruction VIII A 1 b should be used if the seller markets the product as his own manufacture.

A manufacturer clearly has a duty to make a reasonable inspection of the product for defects and to make such tests for defects therein as are reasonably necessary to assure safety of the product manufactured prior to dissemination. However, a seller's duty to inspect is more limited than that of the manufacturer. Thus, the instruction should be adapted to specific cases; and, in so doing, could consider the use of the following:

(1) In the sale in a sealed package or closed container of a product manufactured by another the seller has no duty to open the package or container and inspect or test the contents unless the condition of the

package or container is such as to indicate to the ordinary person the possibility of a defect in or a danger from the contents.

(2)(a) A seller of food in other than sealed containers has a duty to test for impurities and contamination that would be discoverable by any usual and ordinary test.

(b) In the sale of a bottled product manufactured by another in a container, the seller has a duty to make a reasonable inspection of the container itself for defects therein.

(3)(a) In the sale of [new and used automobiles] [automotive supplies and equipment] [inflammables] [business and industrial equipment] [domestic and household furnishings, supplies, appliances and equipment] [wearing apparel] a seller has a duty to make a reasonable inspection of the product for any defect therein.

(b) In the sale of new and used automobiles, a dealer has a duty to make reasonable tests for defects which would render the vehicle unsafe for use.

A seller ordinarily is not obligated to inspect a product for latent defects and a seller has no duty to test for latent defects in a product, at least where he has obtained the product from a reputable manufacturer and there is nothing to indicate to him any special need for testing. As the court stated in *Frericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975):

> If a dealer knows that a particular part of a car is defectively designed, or if in the exercise of reasonable care he should have known of or discovered the defective design, he has the same liability in negligence as the manufacturer [Citation omitted]. But since it cannot be presumed from the mere existence of the defective design that the dealer had or should have had the requisite knowledge, it is necessary that such knowledge be specifically alleged.

Yet, in an appropriate case, the doctrine of *res ipsa loquitur* might be invocable where the liability of a retailer is premised on negligence. *See Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975).

RESTATEMENT (SECOND) OF TORTS, §§ 401, 402 (1965). See also 6 A.L.R.3d 12.

3. Patent Danger

A manufacturer must produce an article which will function properly for the purpose for which it was intended, and which is free from hidden defects or concealed dangers. However, the manufacturer need not guard against injury to others from a danger which is apparent to the user [or supply safety devices to guard against such dangers.]

Comment: See also VIII Product Liability A.1. *Patten v. Logemann Bros. Co.*, 263 Md. 364, 283 A.2d 567 (1971); *Blankenship v. Morrison*

Mach. Co., 255 Md. 241, 257 A.2d 430 (1969); *Myers v. Montgomery Ward & Co.*, 253 Md. 282, 232 A.2d 855 (1969). *Cf. Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974).

For definition of latent-patent, *see Katz Arundel-Brooks Concrete Corp.*, 220 Md. 200, 515 A.2d 731 (1959); *Babylon v. Scruton*, 215 Md. 299, 138 A.2d 375 (1958).

4. Supplier's Duty to Warn

A supplier of a product [directly or through a third person] who knows or by the exercise of reasonable care should know the product is potentially dangerous to users has a duty to give adequate warning of the dangers.

A failure to fulfill that duty is negligence.

This rule applies to a (insert type of supplier) of a product.

Comment: This instruction is applicable to all persons supplying chattels for the use of others, whether as manufacturer, seller, lessor, or bailor, either for hire or gratuitiously.

Moran v. Faberge, Inc., 273 Md. 538, 322 A.2d 11 (1975) enunciates the principle and discusses it parameters. *See* RESTATEMENT (SECOND) OF TORTS, § 388 (1965); and specifically, duty to warn of manufacturer, of seller, and of lessor and bailor, *see* RESTATEMENT (SECOND) OF TORTS, §§ 394, 399-401 and 407 (1965) respectively. *See also Rekab, Inc. v. Frank Hrubetz & Co.*, 261 Md. 141, 274 A.2d 107 (1971); *Levin v. Walter Kidde & Co.*, 251 Md. 560, 248 A.2d 151 (1968)—requirement is only to give a reasonable warning, not the best possible warning. The obviousness of the danger to the user is a factor to be considered in determining the adequacy of the warning.

For helpful annotations, see 76 A.L.R.2d 9 and 80 A.L.R.2d 488.

5. Repairer of Equipment

A contractor who undertakes to make repairs on a [state kind of equipment], which are of such a nature that if defectively made they are likely to render the [equipment] dangerous when used, is under a duty to exercise reasonable care in repairing the defects so that the [equipment] after repair will be reasonably safe for use.

A failure to fulfill that duty is negligence.

Comment: Cf. Erdman v. Johnson Bros. Radio & Television Co., 260 Md. 190, 271 A.2d 744 (1970).

6. Lessor or Bailor For Hire's Liability

The [lessor] [bailor] of a product must use reasonable care to make it safe. If the [lessor] [bailor] does not provide a safe article, he must warn of the product's potential danger.

A failure to fulfill that duty is negligence.

Comment: Instruction VIII A. 6. b. should be used if there is an issue whether bailment is for hire or is gratuitous.

RESTATEMENT (SECOND) OF TORTS, § 408 (1965).

7. User's Duty

A user has a duty to use ordinary care for his own safety and protection. He must exercise such care with reference to those apparent defects or dangerous conditions about which he knows and understands or about which he should know and understand. He also has a duty to use a product in accordance with adequate instructions and warnings, and to use the product in a reasonable manner.

Failure to fulfill any of these duties constitutes negligence.

Comment: The instruction is applicable only in those cases where liability is predicated on negligence and the defendant contends that the user failed to observe defects or dangerous conditions, failed to use the product according to the manufacturer's direction and warning, or used the product in an abnormal manner.

The traditional rule of contributory negligence precluding recovery in negligence cases is fully applicable to products liability cases based on negligence.

Moreover, a manufacturer may be released from liability in the event of an improper use of the product or by reason of a substantial modification of the product. *See Marker v. Universal Oil Prods. Co.*, 250 F.2d 603 (10th Cir. 1957); *Young v. Aeroil Prods. Co.*, 248 F.2d 185 (9th Cir. 1957).

B. LIABILITY FOR WARRANTY

1. Express Warranty—Defined

Any statement [or promise] of fact made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the statement or promise. Such statement [or promise] may be oral or in writing.

[Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.]

[Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.]

No particular words are necessary to create an express warranty, nor is it necessary that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty.

[No statement of the value of the goods shall be construed to create a warranty.] [No statement purporting to be merely the seller's opinion

or commendation of the goods shall be construed to create a warranty.]

A seller who breaches this warranty is liable to a person who sustains injury as a result of the breach.

Comment: MD. ANN. CODE, Comm. L. Art., § 2-313 (1975). *See McCarty v. E. J. Korvette, Inc.*, ___ Md. App. ___, 347 A.2d 253 (1975). Concerning requisites for warranty recovery, *see Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874 (1974), *aff'd Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975).

a. Statement of Opinion

An opinion is the expression of a conclusion or judgment which does not purport to be based on actual knowledge. In determining whether a particular statement is one of fact or merely an expression of opinion, the surrounding circumstances under which it was made, the manner in which the statement was made, the ordinary effect of the words used, the relationship of the parties, and the subject matter with which the statement was concerned are to be considered.

2. Implied Warranty of Merchantability

In a sale of goods such as that which [is claimed] occurred in this case, there is an implied warranty that the goods are fit for the ordinary purposes for which they are intended to be used [and shall at least conform to the promises or affirmations of fact made on the container or label, if any.]

A seller who breaches this warranty is liable to a person who sustains injury as a result.

Comment: MD. ANN. CODE, Comm. L. Art., § 2-314 (1975). *See Myers v. Montgomery Ward & Co.*, 253 Md. 282, 252 A.2d 855 (1969) for limiting factors. *Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975). *See also Sheeskin v. Giant Food, Inc.*, 20 Md. App. 611, 318 A.2d 874 (1974).

Note that the implied warranty of merchantability arises from the fact of a sale, whereas the implied warranty of fitness for a particular purpose has to do with the particular purposes envisaged by the buyer and seller in an individual transaction.

Concerning motor vehicles in "second collision" situations, the elements of a breach of warranty action are essentially the same as those of a negligence action, that is, a warranty that an automobile is "fit for the ordinary purposes for which such goods are used" includes a promise that "a reasonable measure of safety" has been provided when collisions do occur. *Frericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975).

a. Implied Warranty of Merchantability in Contracts Other Than Sales

When goods are supplied under a contract [to] [for] [of] _____ there is an implied warranty that the goods will be reasonably suitable for the purposes for which they are ordinarily used.

Comment: MD. ANN. CODE, Comm. L. Art., § 2-314 (1975). *Cf. Bona v. Graefe*, 264 Md. 69, 285 A.2d 607 (1972).

3. Implied Warranty of Fitness For a Particular Purpose

A seller who at the time of the sale knows or has reason to know of the purpose for which the goods are required and who knows or has reason to know that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, impliedly warrants that the goods furnished are fit for the intended purpose.

A seller who breaches this warranty is liable to a person who sustains injury as a result.

Comment: MD. ANN. CODE, Comm. L. Art., § 2-315. *See, e.g., Fred J. Miller, Inc. v. Raymond Metal Prods. Co.*, 265 Md. 523, 290 A.2d 527 (1972). *Cf. Myers v. Montgomery Ward & Co.*, 253 Md. 292, 252 A.2d 855 (1969).

4. Implied Warranty of Wholesomeness of Food and Bottled Beverages

When [articles of food] [bottled beverages] for immediate human consumption are [manufactured] [packed] [bottled] by a [manufacturer] [packer] [bottler] and by a series of transactions reach a retailer who sells to the consumer, each intermediate dealer, as well as the manufacturer and retailer, impliedly warrants that such [article] [beverage] is reasonably fit for immediate human consumption.

[[Food] [bottled beverage] is not reasonably fit for human consumption when it contains a foreign substance, which is likely to cause injury to the consumer.]

[[Food is reasonably fit for human consumption although it may contain a bone or other substance which is natural to that type of food and might reasonably be anticipated by the consumer.] Only those substances which are not natural to the type of [food] [bottled beverage] concerned may be classed as foreign substances. It is for you to decide from the evidence whether there was a foreign substance in the item involved in this case at the time it was [sold to] [and] [consumed by] the plaintiff.]

Comment: Only the applicable bracket(s) should be used.

This warranty is actually part of the implied warranty of merchantability under MD. ANN. CODE, Comm. L. Art., § 2-314: "fitness for the ordinary purposes for which such goods are used." For instructive pre-Code cases *see Vaccarino v. Cozzubo*, 181 Md. 614, 31 A.2d 316

(1943); *Child's Dining Hall Co. v. Swingler*, 173 Md. 490, 197 A. 105 (1938).

For helpful annotations, *see* 77 A.L.R.2d 7, 77 A.L.R.2d 215, 80 A.L.R.2d 681 and 81 A.L.R.2d 299.

5. Notice of Breach of Warranty

A [seller] [manufacturer] is not liable for a breach of warranty unless the buyer gave him notice of such breach within a reasonable time after the buyer knew, or as a reasonable person ought to have known of the alleged [defect in the goods] [breach of warranty]. What amounts to a reasonable time depends on the circumstances and the kind of product involved.

Notice may be oral or in writing; no particular form of notice is required. It merely must inform the seller of the alleged breach of warranty. Whether the buyer gave this information to the seller and if so whether he acted within reasonable time in this case is for you to determine.

Paragraph 3 is not necessary if instruction VIII b 7 c has been given.

Comment: Lynx, Inc. v. Ordnance Prods., Inc., 273 Md. 1, 327 A.2d 502 (1974). *See also Smith v. Butler*, 19 Md. App. 467, 311 A.2d 813 (1973); MD. ANN. CODE, Comm. L. Art., § 2-607(3)(a). Notice by buyer (or by a third party beneficiary of a buyer's warranty) must be given within a reasonable time after the alleged breach. The institution of an action to recover damages is not to be regarded as a notice of a breach; notice is a condition precedent to the right to bring the action. *Lynx, Inc. v. Ordnance Prods., Inc., supra.*

6. Special Limiting Effects—Defenses

a. Effect of User's Allergy

Any warranty that the goods involved in this case possessed certain characteristics or were suitable for a certain purpose was based on the assumption that the goods would be used by a normal person. There is no breach of warranty when a product is harmless to a normal person.

A person cannot recover damages for breach of warranty if the injury or damage resulted solely from an allergy or physical sensitivity to which normal persons are not subject.

Comment: This instruction is not applicable to products sold or designed for use by allergic persons. Implied warranty of fitness does not extend to an illness attributable to a peculiar allergy or idiosyncrasy of a user that was not reasonably foreseeable by the manufacturer. *See, e.g., Ray v. J. C. Penney Co.*, 274 F.2d 519 (10th Cir. 1959).

For helpful annotations, see 79 A.L.R.2d 431 and 79 A.L.R.2d 482.

b. Effect of Improper Use

Any warranty of the goods involved in this case was based on the assumption that they would be used in a reasonable manner appropriate to the purpose for which they were intended. A person cannot recover damages for breach of warranty if the injury or damage he suffered resulted solely from his improper use of the goods.

Comment: The essential question is whether the plaintiff used the product in such a way as to come within the scope of the warranty.

c. Effect of Use After Defect is or Should be Known

A person using a product after he knew or should have known of the defect or condition which he claims was a breach of warranty, may not recover unless a person of ordinary prudence would use the product despite such knowledge.

Comment: As a general rule, no recovery can be had for personal injuries resulting from the unreasonable use of a warranted article known to be defective. *See Erdman v. Johnson Bros. Radio and Television Co.*, 260 Md. 190, 271 A.2d 744 (1970).

7. Definitions

a. Sale or Contract for Sale

A sale is a transfer of goods or an agreement to transfer goods in the future to a buyer for a price. In this case [it has been established that] [it is for you to determine whether] a sale of _____ was made by _____ as seller, to _____, as buyer at the time and place alleged by the plaintiff.

Comment: MD. ANN. CODE, Comm. L. Art., § 2-106 (1975). *See also Giant Food, Inc. v. Washington Coca-Cola Bottling Co.*, 273 Md. 592, 332 A.2d 1 (1975).

b. Goods

As used in these instructions the term "goods" means any personal property [including food]. The word "goods" is used interchangeably with the words "product" and "article". [The term "goods" includes the _____ involved in this case.]

Comment: MD. ANN. CODE, Comm. L. Art., § 2-105(1) (1975).

c. Seller and Buyer

As used in these instructions, the word "seller" includes the manufacturer of the product involved [and the word "buyer" includes the user or consumer of the product].

Comment: MD. ANN. CODE, Comm. L. Art., § 2-103(1) (1975).

d. Warranty in General—Sale

One of the elements of a sale of goods may be an affirmation of fact or promise by the seller that the goods possess certain characteristics. Such an affirmation of fact or promise is called a warranty. It may be made expressly in so many words by the seller or it may be implied from the circumstances of the sale.

Comment: MD. ANN. CODE, Comm. L. Art., § 2-313 (1975).

e. Warranty in General in Contracts Other Than Sales

One of the elements of a contract to _____ may be an affirmation of fact or promise that the [goods] [ ] possess certain characteristics. Such an affirmation of fact or promise is called a warranty. It may be made expressly in so many words or it may be implied from the circumstances of the contract.

Comment: This instruction can be used where the contract involved is not a sale. *See, e.g.*, MD. ANN. CODE, Comm. L. Art., § 2-314 (1975). *Cf. Bona v. Graefe*, 264 Md. 69, 285 A.2d 607 (1972)—exemplifies inapplicability of § 2-314 to bailments prior to July 1, 1974.

C. STRICT LIABILITY IN TORT

1. Elements of Liability

The [manufacturer] [retailer] of an article who places it on the market for use under circumstances where he knows that such article will be used without inspection for defects in the particular part, mechanism, or design which is claimed to have been defective, is liable for injuries proximately caused by defects in the manufacture or design of the article which caused it to be unreasonably dangerous and unsafe for its intended use and of which the user was not aware, provided the article was being used for the purpose for which it was designed and intended to be used.

The plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the foregoing condition.

Comment: Instruction VIII C 2 should also be given.

RESTATEMENT (SECOND) OF TORTS, § 402A (1965). However, such is not applicable to design defects in motor vehicles. *Volkswagen of America, Inc. v. Young*, 272 Md. 201, 321 A.2d 737 (1974); *Frericks v. General Motors Corp.*, 274 Md. 288, 336 A.2d 118 (1975).

2. Unreasonably Dangerous Condition—Defined

An article is unreasonably dangerous if it is so dangerous that a reasonable man would not sell the product if he knew the risks involved; or to put it another way dangerous to an extent beyond that

which would be contemplated by the ordinary consumer with the knowledge common to the community as to the product's characteristics.

Comment: This definitional instruction should be given in conjunction with instruction VIII C 1.

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The Editors and Staff wish to gratefully acknowledge the assistance of Mr. Edward S. Digges, Associate, Piper and Marbury and Assistant Professor Steven A. Davison of the University of Baltimore School of Law.

The University of Baltimore is a non-sectarian, non-profit state institution of higher education, open to qualified men and women without regard to race, religion, or national origin. The University consists of (1) the College of Liberal Arts, which awards the Bachelor of Arts and the Bachelor of Science degrees, (2) the School of Business, which awards the Bachelor of Science and the Master of Business Administration degrees, and (3) the School of Law, which awards the Juris Doctor degree. The University's classroom, library, social, and administrative buildings are located in mid-town Baltimore. Athletic facilities are located in the Mount Washington section of Baltimore. The University has no dormitories, but out-of-town students are assisted by the Dean of Students in finding suitable living quarters.

The School of Law was first opened with the founding of the University of Baltimore in 1925. The Mount Vernon School of Law of Eastern College was established in 1935. Effective September 1, 1970, the Mount Vernon School of Law was merged with the University of Baltimore School of Law.

The School has both a day and evening division. The day division offers a full-time, three-year program, leading to the Juris Doctor degree upon satisfactory completion of 84 semester hours of work. The evening division has a four-year Juris Doctor degree program requiring satisfactory completion of 80 semester hours. The normal evening program is 10 hours of class time each week, meeting on three nights.

The University is regionally accredited by the Middle States Association of Colleges and Secondary Schools. The School of Law is on the list of law schools approved by the American Bar Association.

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