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PRODUCT LIABILITY LAWS and THEIR IMPACT on SOLAR ENERGY DEVELOPMENT

Prepared by John Hayward, Esq.
Lexington, Massachusetts
Under contract to the
Northern Energy Corporation

Edited by Arnold R. Wallenstein, Esq.,
of the Northern Energy Corporation

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Northern Energy Corporation
Northeast Solar Energy Center
70 Memorial Drive, Cambridge, MA 02142

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CONTENTS

SUMMARY

The emergence of the solar energy industry, a relative newcomer to the marketplace, has brought with it some concern about the impact of product liability law on it. Like all other industries it will be subject to this law; so that a knowledge and understanding of it is sensible and essential. This is especially pertinent to the solar industry since solar systems do not yet have a history of tested underwriting experience. Therefore, manufacturers cannot be sure of the safety and long-term viability of their products in the hands of the consumer.

The Northeast Solar Energy Center (NESEC) has undertaken this study and review of product liability laws in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, and Vermont, member states of the Northeast Region, to encourage continuing, and new interest in the solar energy field and to dispel misconceptions and negative attitudes about the impact of product liability laws on manufacturers and installers of equipment.

Recent sharp increases in the number of law suits involving product liability and the trend of juries to award even larger sums to plaintiffs in these litigations make this report particularly timely for the fledgling industry. The review is a practical, non-technical, primer intended for lawyers and non-lawyers alike and to dispel any reluctance manufacturers may have about entering, or staying in the solar industry.

The study shows there has been a gradual shift in emphasis in product liability laws. Formerly, the law tended to favor the manufacturer; today it tends to favor the consumer. Direct purchase from a manufacturer ("privity") and proof of a manufacturers negligence is no longer required to bring suit.

Now a manufacturer may also be liable even though he has done everything possible to make a product reasonably safe, and if the consumer can prove a product had a "defect" when it left the manufacturer's control and caused injury. This doctrine, known as "strict liability in tort" or more commonly, "product liability", has been adopted by all the Northeast Region member states, except Massachusetts. The effect of this doctrine has led to a proliferation in the number of product liability suits.

Moreover, a manufacturer can be sued even 10 or 15 years after the sale of a product if the consumer claims the product which caused him injury should be safe throughout its useful life. He can also be held liable if there is proof of careless design, inadequate warnings or instructions, failure to provide safety devices, and improper inspection or testing.

If a manufacturer is found to be liable, he may have to pay compensatory damages or punitive damages. Compensatory damages are intended to provide monetary compensation to the plaintiff and to put him in the same condition as he was before the injury. Punitive damages are intended to punish the manufacturer for intentionally disregarding safety.

Manufacturers can fight product liability suits with a number of effectual legal defenses. A manufacturer can prove a so-called defect isn't a defect at all by arguing his product 1) incorporates state-of-the-art technology, 2) complies with all applicable safety standards, 3) is designed and manufactured in accordance with industry trade and custom, or 4) the danger created by the "defect" was obvious. If the product does have a defect, the manufacturer can defend by proving the defect did not cause the accident. He can also claim there was abnormal or abusive use by the plaintiff, or there was an alteration of the product, contributory negligence and/or assumption of risk by the user, or that there was intervening conduct by a third party that caused the injury.

Another legal defense available to manufacturers is the statute of limitations, which cuts off a cause of action unless brought within a prescribed time limit. The time varies from state to state, and it generally begins when the accident occurs. However, in Connecticut, New Hampshire and Rhode Island, time begins when the product is first sold.

Manufacturers can take affirmative preventive measures, too, to protect themselves against possible product liability litigation. They can institute design review panels, conduct extensive product safety tests, put in place stringent quality control and quality assurance programs, etc., in an effort to design in safety and incorporate safety devices wherever feasible before a product leaves their plants. To avoid suits resulting from improper or inadequate labeling or directions manufacturers should review carefully all labeling and instructions to assure the warnings and directions are clear, concise and conspicuously displayed. As a further precaution, manufacturers should maintain comprehensive records, cataloging all products so that if a defect is discovered after a product is in the consumer pipeline, it can be recalled quickly and to use as evidence of useful manufacture and testing.

The analysis concludes that no manufacturer or installer of solar equipment should drop out of or be deterred from entering the field out of fear of possible product liability litigation. As long as manufacturers follow standard

procedures and exercise the normal precautions used by the industry, their products should be deemed "reasonably safe", and their product liability exposure will be greatly limited.

I. INTRODUCTION

When OPEC imposed its embargo on the exportation of oil in 1973, the United States, with its heavy dependence on foreign oil, was shocked into awareness of its vulnerability to the unstableness of Middle East oil politics. As a result of the embargo, the price of oil — our major energy source — skyrocketed and thus has had a major adverse impact on the U.S. economy.

Subsequently great attention by the government and the private sector has been focused on the development and utilization of alternative energy sources such as coal, nuclear power and solar power. Since solar has been the least developed of these sources, its technology has undergone rapid development and growth in recent years. As a result of the proven feasibility of solar energy systems, the national commitment of finding alternative energy sources, and the economic incentives provided by the federal government to potential users, many manufacturers have entered, or plan to enter the field of solar energy equipment in anticipation of a rise in need and demand.

Though the number of solar system installations is still small, concern has properly been expressed about the exposure of solar manufacturers to product liability, especially in light of sharp increases in the number of product liability lawsuits and the trend of juries to award ever larger sums to plaintiffs in such cases. With this in mind, this report, which can be used by both lawyers as well as non-lawyers, attempts to put in perspective the impact of product liability on manufacturers and installers of solar energy equipment by examining, reviewing, and analyzing product liability law of the nine Northeast States. It is also intended to dispell any reluctance manufacturers may have about becoming involved in the solar industry.

II. PRODUCT LIABILITY OVERVIEW

The liability of solar equipment manufacturers, designers, and installers is similar to that of their counterparts in the industrial world, i.e. they must use reasonable care in the design, manufacturer, testing and distribution of their products; incorporate available safety devices; and furnish adequate warnings and instructions for installation and use. Although their products need not incorporate the ultimate in safety, they must be "reasonably safe" for their intended use.

Formerly, manufacturers could be held liable for harm caused by defective products only if the injured person (plaintiff) purchased the product directly from them and could prove that the defect resulted from their carelessness, or negligence. In some cases, the plaintiff might not have actual proof but could establish an inference of negligence from the nature of the defect under a legal theory known as *res ipsa loquitur* ("the thing speaks for itself"). Gradually, the courts abandoned the requirement of a direct purchase ("privity") and gave anyone harmed by a supposedly defective product the right to sue the manufacturer directly for negligence.

Within the last few years, however, many courts have gone further and allowed the plaintiff to sue a manufacturer for harm caused by a defective product even though the manufacturer may have exercised all the possible care to make the product safe and the plaintiff was not the purchaser. This imposition of liability without fault upon the manufacturer and seller of a product is known as "strict liability," or more commonly as "product liability."

The effect of the adoption of strict liability in tort has been to increase the types and classes of products involved in litigation. Manufacturers of abrasives, air conditioners, augers as well as wagons, winches, x-ray machines and even "zerks" (lubrication fittings on pneumatic presses) have been brought to court to defend their products against charges that they were "defective" and caused injury. Furthermore, while most courts require that a defective product be "unreasonably dangerous," some have abandoned this requirement altogether and require only that the product be "unfit for the reasonable expectation of the consumer" and have caused the injury. Moreover, where the product is no longer available or cannot be brought to court, proof of causation may be made by inference or circumstantial evidence. Finally, manufacturers of products which have been used safely for 10 or 15 years may suddenly find themselves in court after the product is involved in an accident. In such cases, the plaintiff claims that the product should be safe throughout its useful life. Therefore, many manufacturers have established or strengthened their accelerated life testing programs to determine how products react after 10 or 15 years of use. (Accelerated life testing is important for solar equipment manufacturers since their products have not yet completed their useful life.)

If a manufacturer is found liable, he will have to pay damages to the plaintiff. The award of damages includes amounts for physical disability, impairment of future earning capacity, pain and suffering, medical and hospital expenses, actual loss of earnings, and may also include amounts for emotional distress, mental suffering, and humiliation. These are known as compensatory damages, which are awarded to make the plaintiff whole. If the plaintiff dies as a result of injuries, the survivors may be awarded all the damages sustained from the time of the injury to the time of death.

If the jury finds that the manufacturer has deliberately caused the injury or has intentionally disregarded safety, it may award punitive damages to punish the manufacturer and deter others from such conduct. Such damages are seldom awarded, however, since manufacturers very rarely deliberately disregard safety.

In response to their increased liability, manufacturers have taken affirmative action. Design review panels, intensive safety audits, stringent quality assurance and control programs, and improved sampling plans have been instituted in an effort to design in safety, and incorporate reliable safety devices wherever feasible. Careful review of all labeling and instructions attempts to assure that clear, concise warnings and directions inform the user of the hazards of the product and how to use it properly. Extensive record-keeping catalogues all products so that if a defect should be discovered after the product is in the marketplace, it may be recalled quickly.

If manufacturers of solar equipment follow these procedures, they will produce safe products, provide consumer satisfaction, and greatly limit their product liability exposure. Furthermore, solar equipment is not especially hazardous and presents no unique failure modes since it incorporates many materials, e.g. glass, hot water, copper tubing, which have been in use for many years and have a known product liability exposure underwriting experience.

Recent Federal Actions
The Revenue Act of 1978

The U.S. Department of Commerce has prepared an "Options Paper on Product Liability and Accident Compensation Issues", published in the Federal Register on April 6, 1978 (43 FR 14612). A synthesis of public comments on this paper was published in the Federal Register on September 11, 1978 (43 FR 40438). In response to the Options Paper and the public comments, Secretary of Commerce Juanita Kreps issued a background paper describing the first Federal program to address the serious economic problems caused by escalating product liability premiums on July 20, 1978.

Briefly, this program includes six major elements. First, legislation proposed to allow net operating losses attributable to product liability losses incurred after September 30, 1979 to be carried back for 10 years (instead of only 3 years). This was enacted as Section 371 of the Revenue Act of 1978, 26 USC 172b(1) (H). In addition, existing law allows product liability losses to be carried forward to the seven years following the year of loss. The act also allows accumulation of reasonably anticipated product liability losses without incurring liability for the tax on unreasonable accumulation of earnings.

Since this 10-year carry back will likely produce an immediate tax refund, it will help to soften the impact of the product liability judgment against a business and will ensure that an injured party will be able to collect a product liability award. Moreover, the tax refund plus accumulated earnings will allow business to afford the higher insurance premiums or to purchase insurance with higher deductible at lower prices.

Second, the Commerce Department proposed the preparation of a Uniform Product Liability Law to provide a balanced code and uniformity and stability to product liability law. Third, recognition of a need to reform workmen's compensation law to ensure that injured employees receive adequate compensation but eliminating recovery from both workmen's compensation *and* a product liability suit. Fourth, the paper points out that an evaluation must be made of product liability insurance rate-making, and insurance regulation standards must be developed. Fifth, the Federal Government would distribute product risk information to manufacturers, distributors and retailers and would urge industry to voluntarily disclose risks concerning their products. Finally, the paper proposes the formation of a Federal Interagency Council composed of agencies with experience in accident compensation to inventory Federal programs, serve as a clearing house for research in accident compensation and insurance issues and to serve as a forum for discussions on product liability proposals.

III. THEORIES OF LIABILITY

Various theories of liability can be used by the plaintiff to hold solar equipment manufacturers, designers, and installers liable for harm resulting from use of their products. They are:

- Negligence
- Strict liability in tort
- Express warranty
- Implied warranty
- Deceit and misrepresentation

Negligence

Negligence can be defined as the lack of "that degree of care and skill which a reasonably prudent manufacturer would exercise in designing and manufacturing a product." Under general principles of negligence law, manufacturers are presumed to have expert knowledge of their product. This negligence, or lack of due care, can take many forms.

One of the most frequently used forms of the negligence theory is that the manufacturer furnished inadequate warnings about the hazards of his product or insufficient directions about its proper use. Adequate warnings are:

1. sufficiently prominent and intense to come to the attention of the user;
2. written in plain, easily understandable language; and
3. illustrated wherever possible with recognizable symbols (e.g., skull and crossbones).

Therefore, manufacturers should avoid small, light-colored print on a light background and use simple words rather than technical language.

Sufficient directions are those which clearly and concisely tell how to use the product properly. Generally, they tell the user not only what to do or not to do, but also give reasons why, e.g., "Don't use charcoal briquets indoors because toxic fumes may cause death." Given the nature of their product, solar equipment manufacturers should furnish detailed installation instructions accompanied by diagrams since such information is absolutely essential to minimize product liability exposure.

Other negligence theories often employed against manufacturers are:

- Negligent design
- Negligent manufacture
- Negligent failure to provide safety devices
- Negligent failure to inspect
- Negligent failure to test

Manufacturers have many defenses against negligence theories. They can prove by expert testimony that:

1. all possible care was taken to insure that the product was safe for its intended use;
2. the product complied with all applicable industry and government safety standards;
3. the product was manufactured or designed in accordance with industry trade or custom;
4. the product was exactly like millions of other similar products on the market;
5. the plaintiff's carelessness was the real cause of the accident; and
6. the plaintiff, by using the product in a careless manner, voluntarily assumed the risk of injury.

Such defenses are extremely persuasive with judges and juries. Very often they are sufficient to defeat the plaintiff's claims and exonerate the manufacturer.

Strict Liability in Tort

Under the doctrine of strict liability in tort, *Restatement of Torts* (2nd), Section 402A (1965), which has been adopted in about 40 states, manufacturers, sellers, component parts manufacturers, suppliers, distributors, retailers, and lessors are subject to liability for injuries supposedly caused by "defects" in their products. A "defect" can be defined as "anything which renders the product unfit for its intended use and is unreasonably dangerous." As was mentioned earlier, some courts do not require that the "defect" render the product "unreasonably dangerous," but they are a small minority.

Under the strict liability theory of recovery, the plaintiff must prove:

1. the product had a "defect";
2. the "defect" existed when the product left the manufacturer's control; and
3. the "defect" caused the injury.

And the plaintiff no longer must prove that the manufacturer was careless in designing or manufacturing the product: a "defect" is sufficient.

Under strict liability, a manufacturer's responsibility extends not only to purchasers and users of product, but also to members of their families, guests, bystanders, donees, lessees, and any person who might reasonably be expected to use, consume, or be affected by the product. Although manufacturers are not insurers of the safety of their products, many have argued with some justification that the practical side effect is similar.

It should be understood that the justification for strict liability has been a *social policy* that seeks to maximize consumer protection by holding manufacturers and others in the marketing chain responsible for injuries caused by defective products, and thereby spread the cost of product safety among purchasers of products. Critics of strict liability argue that it 1) increases the cost of products, 2) defects are inevitable, 3) it stifles competition and product innovation, 4) increases the number of lawsuits, and 5) raises product liability insurance premiums precipitously. Proponents of strict liability answer that it serves important societal goals, namely, 1) the creation of incentives for the development of safety technology, 2) elimination of dangerous products from the marketplace, and 3) compels manufacturers to factor in safety when designing and manufacturing a product.

Although strict liability increases manufacturers' liability, many defenses are still available to counter strict liability claims. Manufacturers can prove by expert testimony that the alleged "defect" is not a defect at all. This can be done with many of the same defenses used to counter negligence claims. Manufacturers can argue:

1. the product incorporates "state-of-art" technology and engineering;
2. the product complied with all applicable industry and government safety standards;
3. the product was designed and manufactured in accordance with industry trade or custom;
4. the product was exactly like millions of other similar products on the market; and
5. the danger created by the alleged "defect" was obvious and no duty exists to protect against it.

Manufacturers can also argue that although the product may have been defective, the "defect" did not cause the accident. For example:

1. the plaintiff used the product in a manner which could not reasonably be foreseen and the injury resulted from such use, i.e., *abnormal use;*
2. the "defect" resulted from someone tampering with the product after it left the manufacturer's control; i.e., *alteration of the product;*
3. the seller had knowledge of the "defect" but sold the product nonetheless, i.e., *intervening conduct;*
4. plaintiff himself contributed toward causing the accident, i.e. *contributory negligence;*
5. plaintiff knew the product was defective but nevertheless voluntarily proceeded to encounter a known danger, i.e., *assumption of the risk.*

Finally, where state law permits, manufacturers can argue that the plaintiff was at fault to a certain degree in causing the accident, and therefore the award of damages should be reduced proportionate to his degree of guilt. This is known as "comparative negligence" and may be used either in a negligence or strict liability claim.

Whether the claim is brought in negligence or strict liability, it must be filed within the time required by state law to bring tort actions, i.e., the statute of limitations. Generally, this time begins to run when the accident occurs, except in the case of minors who have a reasonable time after reaching their majority in which to bring suit. Only three of the nine member states provide that a product liability claim must be brought within a certain time after the *sale* of the product. Connecticut Public Act 76-293, effective June 4, 1976, provides that no product liability suit may be brought later than eight (8) years from the date of sale of the product. New Hampshire Public Acts, Chapter 31, effective August 22, 1978, provides suit may be brought no later than twelve (12) years after sale, and Rhode Island General Laws, Chapter 299, effective July 1, 1978, limits the time to ten (10) years after sale.

Express Warranty

An express warranty is an assertion of fact or a promise by a seller relating to the quality of goods, if it tends to induce the buyer to purchase them. It can arise

in several ways, such as advertising, sales literature, product labeling, or through the statements of a salesperson. It is seldom used in product liability claims.

Implied Warranty

An implied warranty arises by operation of law rather than as a part of the bargain. The two primary types of implied warranties are fitness and merchantability. A warranty of merchantability is a warranty that the goods are reasonably fit for the general purpose for which they are sold, while a warranty of fitness is a warranty that the goods are suitable for the special purpose of the buyer, which is not satisfied by mere fitness for general purposes. Plaintiff usually does not need to distinguish between these two types of warranties, because they usually coexist and recovery may be had under either one.

Deceit and Misrepresentation

In a claim for deceit, plaintiff must allege that the manufacturer misrepresented material facts, knowing them to be false, with the intention that they be relied on by the plaintiff, who does in fact rely on them, to his detriment. This theory is seldom used to hold manufacturers responsible for harm resulting from use of their products.

Generally, a plaintiff who makes a claim against a manufacturer for injury from a product, claims the manufacturer 1) was negligent in the design, manufacture, testing, or distribution of the product, 2) negligently failed to provide a safety device on the product which would have prevented the injury, 3) negligently failed to provide adequate warnings and instructions with the product, 4) sold a product defective in design, manufacture, or failed to provide a safety device, or failed to provide adequate warnings which render the product "defective", and 5) breached his implied warranty of fitness for the intended use. Plaintiff, if successful, usually recovers on theories of negligence, and strict liability in tort.

IV. PRODUCT LIABILITY LAW OF NORTHEAST REGION

In order to narrow the focus of an examination of the product liability law of the nine Northeast Region Member States, the following framework for analysis will be used:

1. Does the state require "privity" in negligence or warranty claims?
2. What are the legal requirements for warning labels on products, if any?
3. What is the Statue of Limitations for tort claims?
4. Has the state adopted strict liability in tort, *Restatement of Torts (2nd)*, section 402A?
5. If "yes," must a defect render the product "unreasonably dangerous?"

6. What defenses to strict liability does the state recognize?
    a. abnormal use
    b. contributory negligence
    c. assumption of the risk
    d. alteration of the product
    e. intervening conduct
    f. state-of-the-art technology
7. Is bystander recovery permitted?

An examination of the law of product liability utilizing the above framework for analysis of the nine Northeast Region Member States now follows.

CONNECTICUT

1. **Does the state require "privity" in negligence or warranty claims?**

Connecticut did **not** require privity of contract where a consumer injured by a piece of tin in a can of corned beef sued the manufacturer for negligence. *Burkhardt v. Armour & Company*, 16 At1 385 (Conn. 1932).

As to non-food product, privity is *not* required by the case of *Garthwait v. Bugio*, 216 A.2d, 189 (Conn. 1965) in which the state adopted strict liability in tort.

Privity is *not* required in a suit against a *seller* for breach of *express or implied warranty* by Conn. G.S. section 42a-2-318 (1958).

2. **What are the legal requirements for warning labels on products, if any?**

Under Connecticut law a manufacturer is under a duty to use reasonable care to warn of potential dangers of an inherently dangerous product. *Handler v. Remington Co.*, 130 A.793 (Conn. 1957) (Solar conversion equipment could hardly be considered "inherently dangerous").

Furthermore, the Connecticut Supreme Court in *Tomer v. American Home Products Corp.*, 368 A.2d 35 (Conn. S.Ct. 1976) held:

> "A product may be defective because a manufacturer or seller failed to warn of the product's unreasonably dangerous propensities. (Citing *Prokolkin v. General Motors*, 37 Conn. L.J. No. 36, p. 8, and *Basko v. Sterling Drug Co.*, 416 F. 2d 417 (CA-2 1969) (applying Conn. law)). If a manufacturer knows or should know that a product may cause serious injury to users, but does not warn of the potentially injurious effects either through negligence or because of concern that sales of the product would thereby be reduced, he cannot be absolved from the imposition of strict liability in tort. . . ."

3. **What is the Statute of Limitations for tort claims?**

Connecticut law provides that for product liability tort claims, the Statute of Limitations is three (3) years from the date of the injury but in no event longer than eight (8) years from the date of the *sale* of the product.

Connecticut Laws 1976, Public Act 76-293, approved and effective June 4, 1976, provides:

> "(a) No action to recover damages for injury to the person or to real or personal property caused by any product in a defective condition shall be brought against one who manufactures, sells, leases, or bails any such product but within three years from the date when the injury is first sustained, discovered, or in the exercise of reasonable care should have been discovered. However, no such action may be brought later than eight years from the date of sale, lease, or bailment of such product."

4. **Has the state adopted strict liability in tort?**

Connecticut judicially adopted the strict liability in tort doctrine in the case of *Garthwait v. Burgio*, 216 A.2d 189 (1965) in which it was held that privity of contract between a hair dye manufacturer and a beauty parlor patron was not essential to enable the patron to maintain an action for breach of warranty against the manufacturer, since the doctrine of strict liability in tort allows such an action without contractual privity.

5. **If "yes," must defect render the product "unreasonably dangerous?"**

Connecticut *does* require that the defect render the product unreasonably dangerous. *Rossingnol v. Danbury School of Aeronautics*, 227 A.2d 418 (1967), and *Tomer v. American Home Products Corp.*, 368 A.2d 35 (1967).

6. **What defenses to strict liability does the state recognize?**

The Connecticut Supreme Court held in *Hoelter v. Mohawk Service, Inc.*, 365 A.2d 1064 (1976) that contributory negligence is a defense in strict liability, but the state legislature overturned the decision by passing Public Act 77-335, effective June 7, 1977, Section 1 which reads:

> "In causes of action based on strict liability in tort, contributory negligence shall not be a bar to recovery."

On the issue of the state-of-the-art defense, the Court held in *Tomer v. American Home Products Corp.*, 368 A.2d 35 (1976) that a manufacturer's duty to design a safe product is defined by the state of knowledge at the time of manufacture, and, therefore, a jury may conclude that the product was not defective and exonerate the manufacturer.

In regard to the other defenses, although no cases have dealt specifically with them, it is reasonable to conclude that they would apply under the general principles of product liability law.

In May, 1978, the state legislature approved and sent to the Governor a bill (S 230) which established substantial modification of a product as a defense, but Governor Ella T. Grasso vetoed it and the legislature could not muster the two-thirds majority needed to override her veto.

7. Is bystander recovery permitted?

The Connecticut Supreme Court permitted bystander recovery in *Mitchell v. Miller*, 214 A.2d 694 (1965) where the estate of a golfer killed by a runaway car with a defective transmission was allowed to recover against the manufacturer of the automobile.

MAINE

1. **Does the state require "privity" in negligence or warranty claims?**

No, by virtue of 11 M.R.S.A. Sec. 2-318 which reads:

> "Lack of privity between plantiff and defendant shall be no defense in any action brought against the manufacturer, seller, or supplier or goods for breach of *warranty, express or implied,* although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer might reasonably have expected to use, consume, or be affected by the goods."

and 14 M.R.S.A. Sec. 161 which reads:

> "Lack of privity between plaintiff and defendant shall be no defense in any action brought against the manufacturer, seller or supplier of goods under Title 14, Section 221, or for *negligence*, although the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume, or be affected by the goods."

2. **What are the legal requirements for warning labels on products, if any?**

No judicial language specifically dealing with the adequacy of warnings and instructions accompanying products could be found, so it is reasonable, therefore, to conclude that the general principles on warning labels and instructions contained above under "THEORIES OF LIABILITY" would apply.

3. **What is the Statute of Limitations for tort claims?**

Maine law provides that for tort claims, including product liability claims, the Statute of Limitations is six (6) years after the cause of action arises. To quote 14 M.R.S.A., Section 752:

> "All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards. . . except as otherwise specifically provided."

The Supreme Court of Maine has recently interpreted "after the cause of action accrues" to mean that the statute begins to run at the time of the accident, not the date of the sale of the product. *Williams v. Ford Motor Co.*, 342 A.2d 712 (1975).

4. **Has the state adopted strict liability in tort?**

Maine legislatively adopted strict liability in tort by 14 M.R.S.A. Sec. 221, applicable to causes of action arising as of October 3, 1973, which reads:

> "One who sells goods or products in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to a person whom the manufacturer, seller or supplier might reasonably have expected to use, consume, or be affected by the goods, or his property, if the seller is engaged in the business of selling such a product and it is expected to and does reach the user or consumer without significant change in the condition in which it is sold. This section applies although the seller has exercised all possible care in the preparation and sale of the product and the user or consumer has not bought the product from or entered into any contractual relation with the seller."

The Maine Supreme Court recently decided that this statute does not apply to claims arising before October 3, 1973, *McNally v. Nicholson Mfg. Co.*, 313 A.2d 913 (1973), which means that for those claims, plantiffs still have to prove that the manufacturer was negligent when the product was made.

5. **If "yes," must the defect render the product "unreasonably dangerous?"**

Yes, as provided by the statute, 14 M.R.S.A. Sec. 221 (see above).

6. **What defenses to strict liability does the state recognize?**

Although no cases have dealt with this question in the state of Maine, it is reasonable to assume that all the defenses listed in "THEORIES OF LIABILITY" would apply under general principles of product liability law.

7. **Is bystander recovery permitted?**

Uncertain, since the question has never come up in Maine. However, a growing number of states do permit bystander recovery.

MASSACHUSETTS

1. **Does the state require "privity" in negligence or warranty claims?**

No, by virtue of Law 1973, Chapter 750, amending Ch. 106, Sec. 2-318 of the General Laws to apply to injuries and leases arising after the effective date of December 6, 1974. The amended text of Sec. 2-318 reads:

> "Lack of privity between plantiff and defendant shall be no defense in any action brought against the manufacturer, seller, or lessor or supplier of goods to recover damages for breach of *warranty, express or implied,* or for *negligence,* although the plaintiff did not purchase the goods from the defendant if the plaintiff was a person whom the manufacturer, seller, lessor or supplier of goods might reasonably have expected to use, consume, or be affected by the goods. The manufacturer, seller, lessor, or supplier may not exclude or limit the operation of this section."

2. **What are the legal requirements for warning labels on products, if any?**

In *Schaeffer v. General Motors* 360 N.E.2d 1062 (Ma.Sup.Ct.1977), the Massachusetts Supreme Judicial Court held a manufacturer's duty to warn includes the duty to warn of dangers involved in the use of the product, and where called for, directions for its use. The Court further went on to say that the duty to exercise reasonable care includes "a duty to warn of danger, if the person on whom the duty rests has some reason to suppose a warning is needed," quoting from *Haley v. Allied Chemical Corp.*, 353 Mass. 325, 330 (1967) which in turn quoted from *Carney v. Bereault*, 348 Mass. 502, 506 (1965). Concluding, the Court said if a manufacturer in the exercise of due care can foresee probable danger in the use of a product, he must warn against such use.

However, if a manufacturer provides warnings and instructions which the plaintiff disregards and ignores, then the manufacturer is absolved of liability. *Taylor v. Jacobson*, 147 N.E.2d 770 (Ma 1958).

3. **What is the Statute of Limitations for tort claims?**

Massachusetts law provides that for tort claims, including product liability claims, the Statute of Limitations shall be two (2) years from the date of the injury. To quote M.G.L. Ch. 106, SEc. 2-318, effective December 6, 1974:

". . .All actions under this section shall be brought within two years next after the date the injury occurs."

The Supreme Judicial Court, recently interpreting this section, ruled the statute begins to run on the date of injury, not the manufacture or sale of the product. *Cannon v. Sears, Roebuck & Co. Inc.*, Mass. Adv. Sh. (1978) 819.

4. **Has the state adopted strict liability in tort?**

At this writing, Massachusetts has not yet adopted or rejected strict liability in tort, as one U.S. District Court recently observed. *Turcotte v. General Motors*, 494 F.2d 173 (DC RI 1974).

However, a U.S. District Court in Massachusetts recently suggested that the state "may very well be on its way to adopting strict liability in tort." *Calhoun v. General Motors*, Dist. Ct., No. 75-1721-2, 1975.

5. **If strict liability is adopted, must defect render product "unreasonably dangerous?"**

Not applicable to Massachusetts, since strict liability not adopted.

6. **What defenses to strict liability does the state recognize?**

Not applicable to Massachusetts.

7. **Is bystander recovery permitted?**

Bystanders, or non-users of a product, may recover against the manufacturer in *negligence* by virtue of Laws 1973, Ch. 750, amending Ch. 106, Section 2-318, but not in strict liability.

NEW HAMPSHIRE

1. Does the state require "privity" in negligence or warranty claims?

No, by virtue of New Hampshire Rev. Stats. Ann. Sec. 382-A:2-318 which reads:

> "Lack of privity shall not be a defense in any action brought against a manufacturer, seller, or supplier of goods to recover damages for breach of *warranty, express or implied*, or for *negligence*, even though the plaintiff did not purchase the goods from the defendant, if the plaintiff was a person whom the manufacturer, seller, or supplier might reasonably have expected to use, consume, or be affected by the goods. A manufacturer, seller, or supplier may not limit or exclude the operation of this section."

2. **What are the legal requirements for warning labels on products, if any?**

No judicial language specifically dealing with the adequacy of warnings and instructions accompanying products could be found, so it is reasonable to assume that the general principles on warning labels and instructions found in "THEORIES OF LIABILITY" would apply.

3. **What is the Statute of Limitations for tort claims?**

New Hampshire law used to provide that for tort claims, including product liability claims, the Statute of Limitations was six (6) years after the cause of action accrues. To quote NH RSA 508:4 (Sup 1975):

> "Except as otherwise provided by law all personal injury actions may be brought within six years after the cause of action accrues, and not afterwards."

A U.S. District Court interpreting New Hampshire law has ruled that the cause of action "accrues" at the time of injury. *Raymond v. Eli Lilly Co.*, 412 F. Supp 392 (DC NH 1976).

But the Legislature changed this by enacting Chapter 31, effective August 22, 1978, which states:

> "Products liability actions must be commenced within three (3) years of the time the injury is, or should in the exercise of reasonable diligence, have been discovered by the plaintiff, and within 12 years

after the later of the manufacturer's parting with possession and control of the final product or its sale of the product."

4. Has the state adopted strict liability in tort?

New Hampshire judicially adopted strict liability in tort in *Buttrick v. Lessard*, 260 A.2d 111 (S.Ct. 1969) where the Supreme Court of the state allowed the purchaser of a new car to proceed under strict liability in tort against the retail seller in an action to recover for injuries caused by defective auto headlights.

5. If "yes," must the defect render the product "unreasonably dangerous?"

Under the New Hampshire law, the defect must render the product "unreasonably dangerous" which the state's Supreme Court defined in the *Buttrick* case as "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." This is similar to *Restatement of Torts*, (2d) (1965) Sec. 402A, Comment i.

6. What defenses to strict liability does the state recognize?

In *Bellotte v. Zayre Corp.*, 531 F.2d 1100 (CA-1 1976), the Court held that under New Hampshire law, a five year old child playing with matches was intervening conduct that was not foreseeable and therefore a superseding cause which exonerated a pajama retailer from liability in a strict liability claim for selling allegedly flammable pajamas without a warning.

In *Hagenbach v. Snap-on Tools, Inc.* 339 F. Supp. 676 (D. NH 1972) a U.S. District Court interpreting New Hampshire law held that contributory and comparative negligence were defenses to strict liability *if* the plaintiff voluntarily and unreasonably proceeds to encounter a known risk or danger or if he discovers the defect in the product and is aware of the danger but proceeds to use the product nonetheless. However, if the plaintiff merely fails to discover the defect or to guard against the possibility of its presence, he is not contributorily negligent and may recover. This reasoning is based on the *Restatement of Torts* (2d) (1965) Section 402 A, Comment n. The Court also held that in New Hampshire the defense of "assumption of the risk" is not distinguished from contributory negligence.

7. Is bystander recovery permitted?

At this writing, New Hampshire has not yet decided whether bystanders may recover in strict liability.

NEW JERSEY

1. **Does the state require "privity" in negligence or warranty claims?**

New Jersey does *not* require privity in *negligence* claims against manufacturers as decided in *Schipper v. Levitt & Sons, Inc.*, 207 A.2d 314 (N.J. 1965) where it was held that a 16 month old boy, who was severely burned because water from faucets came out at a temperature of 190 to 210 degrees Fahrenheit, had a good cause of action against the builder-vendor despite lack of privity of contract.

The state similarly does *not* require privity in breach of *warranty, express* or *implied*, claims against manufacturers or dealers as decided in *Henningson v. Bloomfield Motors, Inc.*, 161 A.2d 69 (1960) where the court in abandoning the privity requirement in an action to recover for injuries sustained when the steering mechanism of an automobile failed, held that the driver, the wife of the purchaser, although not a party to the purchase, could maintain the action against the manufacturer and the dealer for breach of *implied warranty*.

Privity is *not* required in a suit by the purchaser's guest, or a member of his family or household against a seller for breach of *implied warranty* by N.J. Stats. Ann. Sec. 12A: 2-318.

2. **What are the legal requirements for warning labels on products, if any?**

The law of New Jersey clearly states that there is a duty to warn of the inherent dangers of physical harm for misuse of a product where the manufacturer knows of a possible misuse and resulting danger or should have known if it is in the reasonable course of his business. *Mohr v. B.F. Goodrich Co.*, N.J. Superior Court, 1977, CCH PRODUCTS LIABILITY REPORTS Para. 7889, and *Kuhner v. Marilyn Manor*, 129 N.J. Super 554 (Law Div. 1974), rev'd on other grounds, 135 N.J. Super 582 (App. Div. 1975).

Moreover, under New Jersey law, if a plaintiff is contributorily negligent as a result of not having the proper instructions as to use and a warning of possible dangers from misuse, then the contributory negligence is *not* a bar to recovery. *Mohr* case, *supra*. Accord, Hursh & Bailey, AMERICAN LAW OF PRODUCTS LIABILITY 2d (2d ed 1874) Section 8.36.

3. **What is the Statute of Limitations for tort claims?**

New Jersey law provides that for tort claims, including product liability claims, the Statute of Limitations shall be two (2) years. To quote N.J.S.A. 2A:14-2:

> "Every action at law for injury to the person caused by the wrongful act, negligence, or default of any person within this state shall be commenced within 2 years next after the cause of action shall have accrued."

The New Jersey Supreme Court in *Heavner v. Uniroyal, Inc.*, 60 N.J. 130 (1973), affirming 286 A.2d 718 (N.J. App. Div. 1972), held that the two year statute begins to run at the date of the injuries, not the date of the sale of the product.

4. **Has the state adopted strict liability in tort?**

The New Jersey Supreme Court adopted strict liability in tort in *Santor v. A & M Karagheusian, Inc.*, 207 A.2d 305 (1965) where in rejecting a distinction between products which are likely to cause personal harm and products which, if defective, result only in the consumer's loss of the bargain (money loss), held that the purchaser of a carpet which was of unmerchantable quality was entitled to recover against the manufacturer under the strict liability in tort doctrine.

5. **If "yes," must the defect render the product "unreasonably dangerous?"**

The New Jersey Supreme Court, in *Glass v. Ford Motor Co.*, 304 A.2d 462 (1973) held that the defect does *not* have to render the product "unreasonably dangerous." The Court held that this is not an element in the burden of proof of an injured person seeking to hold a manufacturer and seller to strict liability in tort for a defective product. If the jury finds (1) that the product was defective while in the hands of the manufacturer and seller, (2) that this defect proximately contributed to the harm of, and (3) that the injured person was a reasonably foreseeable user or consumer of the product, that is sufficient to impose liability, said the Court.

However, the Court recently suggested that where a case involves defective *design*, the "defect" may have to render the product "unreasonably dangerous" for th manufacturer to be liable. *Cepeda v. Cumberland Engineering Co.*, No. A-88, April 26, 1978.

6. **What defenses to strict liability does the state recognize?**

New Jersey has adopted the rule that contributory negligence is not a defense in a strict liability action where special circumstances exist (economic necessity) as in *Bexiga v. Havir Mfg. Co.*, 290 A.2d 281 (1972), or where the defect is not known to the user or owner. *Ettin v. Ava Truck Leasing Co.*, 251 A.2d 278 (1969), aff'g 242 A.2d 663 (NJ Super 1968). However, if

the user knows of the defect, and voluntarily and unreasonably uses the product with the realization of the dangers, his conduct whether termed "conbributory negligence" or "assumption of the risk" bars recovery. *Devaney v. Sarno,* 311 A.2d 208 (NJ Super 1973), *Maiorino v. Weco Products, Inc.*,214 A.2d 18 (NJ 1965), and *Cintrone v. Hertz Truck Rental Co.,* 212 A.2d 769 (1965).

New Jersey has also held that where a manufacturer follows the specifications of a purchaser, he is immune from suit for failing to install a safety device that was not required by the specifications. *Sanner v. Ford Motor Co.*, 364 A.2d 43 (NJ Super Ct 1976) (no seat belts in autos).

The remaining defenses listed in "THEORIES OF LIABILITY" would apply also under general principles of product liability law.

7. **Is bystander recovery permitted?**

New Jersey law does permit non-users of a product to recover against the manufacturer in strict liability. *Lamendola v. Mizell,* 280 A.2d 241 (NJ Super 1971) where the occupants of a second car were allowed to recover against the manufacturer of the first car out of control due to a defective accelerator.

NEW YORK

1. **Does the state require "privity" in negligence and warranty claims?**

New York does *not* require privity in negligence claims against manufacturers as decided in *Mull v. Colt, Inc.*, 31 F.R.D. 154 (DC NY 1962) where a pedestrian struck by an automobile had a good cause of action in negligence against the manufacturer of the vehicle and its distributor without showing privity of contract, See also the celebrated case of *MacPherson V. Buick, Inc.*, 11 N.E. 1050 (1916).

The state similarly does *not* require privity in breach of *implied warranty* claims as decided in *Goldberg v. Kollsman Instrument Co., Inc.*, 240 NYS2d 592, 191 NE2d 81 (1963) where in an action for damages resulting from the death of an airline passenger in a crash, the Court explicitly abandoned the privity requirement and held that a manufacturer's warranty of fitness of its product runs in favor of all intended users. Other cases in agreement are *Fortunato v. Craft*, 250 NYS2d 746 (1964), *Schwartz v. Macross Lumber & Trim Co.*, 272 NYS2d 227 (1966).

Privity is *not* required in a suit against a seller for breach of *implied warranty* by NY UCC Sec. 2-318, as amended by Law, 1975, Ch. 774, effective September 1, 1975.

2. **What are the legal requirements for warning labels on products, if any?**

According to New York law, a manufacturer of a liquid concrete floor hardening compound was liable for the death of a welder where the manufacturer negligently failed to warn users to keep the product away from fire because the interaction of the compound with its steel container produced hydrogen gas which can be set off by the slightest spark. Under such circumstances, the Court held that the manufacturer was negligent for failure to perform the small additional task of affording appropriate warnings that care in handling the product was needed, both to prevent it from becoming dangerous and to protect if it did. *Butler v. Sonneborn Sonc., Inc.*, 296 F.2d 623 (CA-2 1961) (applying to New York law).

Also, if a manufacturer suggests that his product be used in a certain way, he must warn of any dangers inherent in using the product in that way. *Alfieri v. Cabot Corp.,* 235 NYS2d 753 (1962) where a manufacturer of charcoal briquets, who suggested on the package that they were "ideal for cooking in or out of doors," was held liable for failure to warn of the dangers of carbon monoxide poisoning in using them in a poorly ventilated place.

3. **What is the Statute of Limitations for Tort Claims?**

The New York Court of Appeals, the state's highest Court, ruled in *Victorson v. Bock Laundry Machine Co.,* 37 NY 2d 398 (1975) that the Statute of Limitations for product liability claims is three (3) years from the date the injury occurs, as provided in CPLR 214, Subd. 5.

4. **Has the state adopted strict liabilty in tort?**

The New York Court of Appeals in *Goldberg v. Kollsman Instrument Corp.*, 12 NYS2d 432, 191 NE2d 81 (1962) held that the next of kin of an airplane passenger who was killed in a crash could recover in strict liability from the manufacturer of the aircraft.

5. **If "yes," must the defect render the product "unreasonably dangerous?"**

Under New York law, this question has not been settled. The case of *Bowman v. Kaufman,* 387 F.2d 582 (CA-2 NY 1967) held that the defect must be unreasonably dangerous but this conclusion was cast into doubt by *Codling v. Paglia,* 345 NYS2d 461, 298 NE2d 622 (Ct App 1973) in which the state's highest court held that "manufacturers of defective products are liable to any person injured or damaged if the defect was a substantial factor in bringing about his injury or damages, provided: (1) that at the time of the occurence the product is being used (whether by the person injured or damaged or by a third person) for the purpose and in the manner normally intended, (2) that if the person injured or damaged is himself the user of the product he would not by the exercise of reasonable care have discovered the defect and perceived its danger, and (3) that by the exercise of reasonable care the person injured or damaged would not otherwise have averted the injury or damages." Note the absence of any requirement that the product be "unreasonably dangerous." However, the Court did not mention the *Bowman* case. Until a more definitive ruling on this question is handed down, it would be reasonable to assume that New York probably does *not* require that the defect render the product "unreasonably dangerous."

6. **What defenses to strict liability does the state recognize?**

In *Bass v. Firestone Tire & Rubber Co.*, 497 F.2d 1223 (CA-2 NY 1974), a U.S. Court of Appeals interpreting New York law held that the plaintiff's contributory negligence barred recovery against the manufacturer of parts of a wheel which blew apart as he was inflating the tire; the plaintiff had been

warned to stand away during the inflation period, a common sense precaution, but was squatting on the tire at the time of the accident.

The New York Court of Appeals has ruled that where a plaintiff isn't using the product as intended or fails to exercise reasonable care to locate the defect in a product, he is barred from recovery in strict liability. *Codling v. Paglia*, 345 NYS2d 461, 298 NE2d 622 (1973).

The other defenses listed in "THEORIES OF LIABILITY" would also apply under general principles of product liability law.

7. **Is bystander recovery permitted?**

Under New York law, a non-user of a product may recover in strict liability against the manufacturer. *Codling* case, *supra*.

PENNSYLVANIA

1. **Does the state require "privity" in negligence or warranty claims?**

Pennsylvania does *not* require privity in *negligence* claims against manufacturers as decided in *Mannsz v. Macwhyte Co.*, 155 F.2d 445 (CA-3(PA) 1946) in which lack of privity was not a bar to a negligence action against the manufacturer of rope by the next of kin of a workman who fell to his death when a section of the rope used to suspend a scaffold broke. See also *King v. Macwhyte Co.*, 60 F. Supp. 75 (DC Pa. 1943), *Atlas Aluminum Corp. v. Borden Chemical Corp., Inc.*, 233 F. Supp. 53(DC Pa 1964), and *Magee v. General Motors*, 117 F. Supp. 101 (D.C. Pa 1953).

The state similarly does *not* require privity in breach of *implied warranty* claims as decided in *Salvador v. I.H. English Co.* Pa S. Ct., 1974, CCH PRODUCTS LIABILITY REPORTS Para. 7197, affirming 319 A.2d 903 (Pa Super Ct 1973). See also *Miller v. Preitz,* 221 A.2d 320 (pa. 1966), *Kassab v. Central Soya*, 246 A.2d 848 (Pa 1968), and *Jarnot v. Ford Motor Co.*, 156 A.2d 568 (Pa Super 1959).

Privity is *not* required in a suit by the purchaser's guest, or a member of his family or household against a seller for breach of *implied warranty* by Purdon's Penna. Stats. Title 12A Sec. 2-318.

2. **What are the legal requirements for warning labels on products, if any?**

Under Pennsylvania law, in a strict liability claim to recover for injuries sustained when a small vehicle with an alleged tendency to overturn did in fact overturn in an accident, it was stated that there could be liability for failure to adequately warn of inherent limitations in a product without a finding of a defect in design. *Greiner v. VW, Inc.* 540 F.2d 85 (CA-3 (PA) 1976).

Pennsylvania law has also held that if a product is inherently dangerous, it must be accompanied by adequate warnings, otherwise it is defective. *Dougherty v. Hooker Chemical Corp.*, 540 F.2d 174 (CA-3 (PA) 1976). The Court went on to say:

"The care to be exercised in discharging the duty to warn is measured by the dangerous potentialities of the commodity as well as the foreseeable use to which it might be put."

"The determination of whether the methods or means utilized to warn is sufficient will depend on a balancing of considerations involving among other factors the dangerous nature of the product, the form in which the product is used, the intensity and form of the warnings given, the burdens to be imposed by requiring the warnings, and the likelihood that the particular warning will be adequately communicated to those who will foreseeably use the product. *Thomas v. Arvon Products,* 227 A.2d 897 (Pa 1976)"

3. **What is the Statute of Limitations for tort claims?**

Pennsylvania law, 12 P.P.S. Sec. 31, provides that for tort claims, including product liability claims, the Statute of Limitations shall be two (2) years from the date the cause of action accrues, which has been interpreted to mean from the time of the injury. *Foley v. Pittsburgh Des Moines Co.*, 68 A.2d 17 (Pa 1949), and *Mitchell v. American Tobacco Co.*, 183 F. Supp. 406 (DC Pa 1960).

4.**Has the state adopted strict liability in tort?**

The Pennsylvania Supreme Court adopted strict liability in tort in *Webb v. Zern*, 220 A.2d 853 (1966) where it held the son of the purchaser of a quarter-keg of beer who was severely injured when the keg exploded was entitled to have his action against the seller and the manufacturer of the keg submitted under the strict liability in tort doctrine.

5. **If "yes," must the defect render the product "unreasonably dangerous?"**

Pennsylvania law requires that the defect render the product "unreasonably dangerous." *Bowman v. General Motors*, 427 F. Supp. 234 (E. D. Pa 1977), *Bair v. American Motors Corp.*, 535 F.2d 249 (CA-3 (PA) 1976), *Beron v. Kramer-Trenton Co.*, 402 F. Supp 1268 (E.D. Pa 1975), *aff'd mem.* 538 F.2d 318 (CA-3 PA 1976), since the one case which held the opposite, *Berkebile v. Brantly Helicoper Corp.*, 337 A.2d 893 (Pa S. ct. 1975), has been expressly rejected because (1) under Pennsylvania law, an opinion of the State's Supreme Court representing the views of only two of the justices has no binding precedential value, and (2) the previous binding Pennsylvania cases required the defect to render the product "unreasonably dangerous."

6. **What defenses to strict liability does the state recognize?**

In Pennsylvania, a plaintiff who consciously appreciates a danger and willingly chooses to risk such danger is barred from recovery against a manufacturer in strict liablity under assumption of risk. *Clark v. Broackway Motor Trucks, Inc.*, 372 F. Supp. 1342 (DC Pa 1974), *Elder v. Crawley Book Machinery Co.*, 441 D.2d 771 (CA-3 (PA) 1971), *Ferraro v. Ford Motor Co.*, 223 A.2d 746 (Pa 1966). Furthermore, if a plaintiff voluntarily does what is obviously dangerous, he cannot recover. *Barthewich v. Billinger,* 247 A.2d 603 (Pa 1968) (plaintiff attempted to clear a glass jam in a glassbreaking machine with his hand instead of with a wooden stick provided for the task).

Where a product is altered after leaving the manufacturer's control, he is not liable. *Hanlon v. Cyril Bath Co.*, 541 F.2d 343 (CA-3 (Pa) 1975) (purchaser alters press brake machine to use it as punch press).

7. **Is bystander recovery permitted?**

Under Pennsylvania law, a non-user of a product may recover in strict liability against a manufacturer for a product defect. *Webb v. Zern*, 220 A.2d 853 (PA 1966) (bystander could recover against manufacturer of defective beer keg which exploded), and *Fedorchick v. Massey-Ferguson, Inc.*, U.S. District Court, Eastern District of Pennsylvania, No. 73-2376, July 15, 1977, CCH PRODUCT LIABILITY REPORTS, Para 8044.

RHODE ISLAND

1. **Does the state require "privity" in negligence or warranty claims?**

Rhode Island does *not* require privity in *negligence* claims against manufacturers as decided by *Buszta v. Souther*, 232 A.2d 396 (R.I. S. Ct. 1967) where the Court held that a filling station operator, licensed by the State to make annual motor vehicle inspections, was not allowed to claim lack of privity as a defense to an action by a child who was injured in an auto accident allegedly because of failure of the brakes of the vehicle which were negligently inspected one month before the accident. In accord, *Temple Sinai v. Richmond*, 308 A.2d 508 (S. Ct. 1973).

Privity is *not* required in a suit against a manufacturer or seller for breach of *implied or express warranty* by R.I.G.L., 1956, Sec. 6A-2-318.

2. **What are the legal requirements for warning labels on products, if any?**

No judicial language specifically dealing with the adequacy of warnings and instructions accompanying products could be found, so it is reasonable to assume therefore that the general principles on warning labels and instructions contained above under "THEORIES OF LIABILITY" would apply.

3. **What is the Statute of Limitations for tort claims?**

Rhode Island law used to provide that for tort claims, including product liability claims, the Statute of Limitations was six (6) years from the date the cause of action accrues. To quote R.I.G.L. Sec. 9-1-13:

> "Limitations of actions, general — Except as otherwise provided, all civil actions shall be commenced within six (6) years next after the cause of action shall accrue, and not after."

The Rhode Island Supreme Court has held that "accrues" means when the injury occurred. *Romano v. Westinghouse Electric Co.*, 336 A.2d 555 (S.Ct. 1975).

But this has been changed by Chapter 299, effective July 1, 1978, which provides suit must be brought in a products liability case within ten (10) years from the date the product was first *purchased* for use or consumption.

4. **Has the state adopted strict liability in tort?**

The Rhode Island Supreme Court expressly adopted the strict liability in tort doctrine in an action involving injury to two infants when a kitchen stove overturned on them because one of the infants stepped on the open oven door. *Ritter v. Narragansett Electric Co.*, 283 A.2d 255 (S.Ct 1971).

5. **If "yes," must the defect render the product "unreasonably dangerous?"**

Under Rhode Island law, the defect must render the product "unreasonably dangerous" according to the *Ritter* case, *supra*.

6. **What defenses to strict liability does the state recognize?**

Although Rhode Island's Supreme Court has not yet been asked to decide what defenses are permitted in strict liability claims, the Court has decided that abnormal use is a defense to a breach of implied warranty in *Richard v. H.P. Hood & Sons, Inc.*, 243 A.2d 910 (S.Ct. 1968), and that alteration of the product is a defense in a claim for negligence in manufacturing. *Atlantic Tubing & Rubber Co. v. International Engraving Co.*, 582 F.2d 1272 (CA-1(RI) 1976). Recently the legislature enacted Chapter 299, effective July 1, 1978, which establishes alteration or modification of the product as a defense. Other defenses under "THEORIES OF LIABILITY" would be applicable in strict liability under general principles of product liability law.

7. **Is bystander recovery permitted?**

Although the Rhode Island Supreme Court has not yet ruled on this issue, the U.S. District Court in Providence, in anticipation of the State adopting strict liability (CF *Ritter* case, *supra*) held that an electrician, blinded when a glass fuse exploded, could maintain an action against the manufacturer despite lack of privity of contract. *Klimas v. International Telephone & Telegraph Co.*, 297 F. Supp. 937 (DC RI 1969). Therefore, it is reasonable to assume that Rhode Island would adopt bystander protection if the proper case were presented.

VERMONT

1. **Does the state require "privity" in negligence or warranty claims?**

Vermont did *not* require privity of contract where the purchaser of a can of beans which allegedly contained glass sued the manufacturer for *negligence* in packing the product. *O'Brien v. Comstock Foods, Inc.*, 212 A.2d 69 (Vt 1965).

As to non-food cases, privity is *not* required by the case of *Zaleskie v. Joyce*, 333 A.2d 110 (S.Ct. 1975) in which the State adopted strict liability in tort.

The state does *not* require privity in breach of *warranty, express* or *implied*, claims against *manufacturers* as decided by *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124 (CA-2(VT) 1963) where in an action against a water heater manufacturer and a control valve manufacturer to recover for damages for personal injury sustained when a water heater exploded, the Court held the issue of breach of implied warranty of fitness was properly submitted to the jury despite the lack of privity.

Privity is *not* required in a suit against a *seller* for breach of *express or implied warranty* by 9A V.S.A. Sec. 2-318.

2. **What are the legal requirements for warning labels on products, if any?**

No judicial language specifically dealing with the adequacy of warnings and instructions accompanying products could be found, so it is reasonable to assume therefore that the general principles on warning labels and instructions contained above under "THEORIES OF LIABILITY" would apply.

3. **What is the Statute of Limitations for tort claims?**

Vermont law provides that for tort claims, including product liability claims, the Statute of Limitations shall be three (3) years from the time the cause of action accrues. To quote V.S.A. Sec. 512 (4):

> "Actions for the following causes shall be brought within three years after the cause of action accrues, and not after.

(4) Injury to the person suffered by the act or default of another, except as otherwise provided by this chapter."

The Vermont Supreme Court has recently held that the time the cause of action "accrues" is the time the injury occurs. *Kinney v. Goodyear Tire & Rubber Co.*, 367 A.2d 677 (S.Ct. 1976).

4. **Has the state adopted strict liability in tort?**

The Vermont Supreme Court in *Zaleskie v. Joyce*, 333 A.2d 110 (1975) held that strict liability was the law in Vermont in a case against the manufacturer of a motorcycle to recover for the wrongful death of an operator as a result of a mechanical failure.

5. **If "yes," must the defect render the product "unreasonably dangerous?"**

Under Vermont law, the defect must render the product "unreasonably dangerous." *Kinney v. Goodyear Tire & Rubber Co.*, 367 A.2d 677 (1976), and *Zaleskie* case, *supra*.

6. **What defenses to strict liability does the state recognize?**

In the *Zaleski* case, the Vermont Supreme Court refused to decide the question whether contributory negligence is a defense to strict liability because that precise issue was not present in that case. However, it is reasonable to assume that all the defenses listed in "THEORIES OF LIABILITY" would apply under general principles of product liability law.

7. **Is bystander recovery permitted?**

Although Vermont Courts have not yet been asked to decide this question, the following language in *Kinney v. Goodyear Tire & Rubber Co.*, 367 A.2d 677 (S.Ct. 1976) can be construed to mean that bystanders, i.e. non-users of a product, can recover under strict liability:

> "The recovery sought is for injury to the person, allegedly sustained by the acts of defendant in selling a product in a defective condition unreasonably dangerous to the user or *consumer*. The underlying theory of strict liability is that the *public* has a right to protection against the business sale of such a product (emphasis supplied)."

Furthermore, in *Wasik v. Borg*, 423 F.2d 44 (CA-2 (VT) 1970), a U.S. Court of Appeals held that a driver of a car which was struck from behind by a new automobile that allegedly "took off" spontaneously could recover against the manufacturer of the other car in anticipation that Vermont would adopt strict liability in tort — it did (*Zaleskie* case) — and extend its application to innocent bystanders.

Therefore, it is reasonable to assume that bystanders can recover in strict liability in Vermont.

V. SUMMARY AND CONCLUSION

The law of product liability in the nine Northeast Region Member States has been examined to ascertain the potential exposure of solar equipment manufacturers, designers, and installers for personal injury and death resulting from use of their products.

Their liability is similar to that of their counterparts in the industrial world, i.e. they must use reasonable care in the design, manufacture, testing, and distribution of their products, incorporate available safety devices, and furnish adequate warnings and instructions for installation and use. Although their products need not incorporate the ultimate in safety, they must be free of defects throughout their useful life and be reasonably safe for their intended purpose.

It is appropriate to note at this juncture that a thorough search of the reported cases did not reveal a single case involving personal injury or death associated with solar conversion.

In conclusion, a reasonable assessment of the regional legal barriers presented by product liability exposure is that no manufacturer of properly designed and built solar conversion equipment should be deterred from entering the marketplace or be unduly alarmed by fear of litigation resulting from personal injury associated with his products.

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DIGEST OF PRODUCT LIABILITY LAWS OF NORTHEAST REGION STATES

Point of Law	Connecticut	Maine	Massachusetts
1. Privity	Not Required	Not Required	Not Required
2. Warning Labels	Required for "inherently dangerous" product	Not specified, but general principles on labels and instructions probably apply	Required. Labeling must warn of dangers and provide for instructions. If manufacturer provides warnings and they are ignored, the manufacturer is absolved
3. Statute of Limitations for Tort Claims	2 years from date of injury 8 years from date of sale	6 years from date of accident	2 years from date of injury
4. Adoption of Strict Liability in Tort	Yes	Yes, from October 3, 1973. Before then, plaintiff must prove mfr. was negligent	Not yet adopted or rejected, but "may very well be on its way to adopting strict liability in tort"
5. If yes to #4, Must defect render the product unreasonably dangerous"?	Yes	Yes	N/A because of #4
6. What defenses to strict liability does the state recognize?	1. Contributory negligence not 2 bar 2. State-of-the-Art 3. Other defenses	Assume all general negligence defenses would apply	N/A because of #4
7. Bystander recovery in strict liability permitted?	Yes	Not decided	Yes, in negligence but not in strict liability

New Hampshire	New Jersey	New York	Pennsylvania	Rhode Island	Vermont
Not Required	Not Required	Not Required	Not Required	Not Required	Not Required
Not specified, but general principles on warning labels and instructions for negligence liability probably apply	Duty of manufacturer to warn of inherent dangers even if plaintiff is contributorily negligent	Required. Also if manufacturer suggests his product be used in a certain way, he must warn of danger inherent in that way.	Required	Not specified but general principles of product liability will apply	Not specified. General principles of product liability will apply
3 years after injury is, or should have been discovered. 12 years after sale of product	2 years from date of injury	3 years from date of injury	2 years from date of injury	10 years from date product was first purchased	3 years from date of injury
Yes	Yes	Yes	Yes	Yes	Yes
Yes	No, but where there is a defective design, the defect may have to render the product "unreasonably dangerous"	Not settled yet, but it is reasonable to assume NY does not require that the defect render the product "unreasonably dangerous"	Yes	Yes	Yes
1. Intervening conduct 2. Contributory and comparative negligence 3. Product alteration 4. State-of-the-Art	Contributory negligence not a defense if there is economic necessity or where the defect is not known to the user, otherwise contributory negligence or assumption of risk is a bar to recovery	1. Contributory negligence 2. User does not use product as is intended or fails to exercise reasonable care 3. Other defenses to negligence liability	1. Assumption of risk 2. Doing what is obviously dangerous 3. Product is altered	1. Alteration of product 2. Abnormal use 3. Other defenses to negligence liability would be applicable	All defenses to negligence would probably apply
Not decided	Yes	Yes	Yes	Supreme court has not yet ruled on the issue. Reasonable to assume RI will adopt bystander protection if proper case is presented	No law yet, but two decisions make reasonable to assume bystander can recover in strict liability