

## PRODUCTS LIABILITY CLAIMS

### Breach of Implied Warranty of Merchantability

In this case, PLF contends s/he was injured by the [product] that [s/he bought/leased from DFT, DFT distributed/manufactured, etc.]. PLF has brought a claim for “breach of an implied warranty” against DFT. The fact that PLF has filed this lawsuit is not evidence that DFT breached an implied warranty or caused PLF’s injuries.

*< If defendant is a seller, retailer, distributor, lessor of product manufactured by a third party (TP), replace prior paragraph with this paragraph>* In this case, PLF alleges a defect in the [design of, manufacture of, warnings about] the [product] by TP [insert name of manufacturer] caused her/his harm. In Massachusetts, a seller [retailer, distributor, lessor] of a product is legally responsible to a person injured by a product for a breach of the implied warranty committed by the manufacturer of the product. For this claim, you do not need to consider the fact that a third party actually [manufactured, designed, etc.] the [product] because the law makes DFT responsible for breach of the implied warranty.

In Massachusetts, the law automatically imposes a promise on a seller [supplier, distributor, lessor, manufacturer] of products, such as the [product], that the product is fit for the ordinary purposes for which such products are used. This promise is called an “implied warranty.” An implied warranty means that the seller [supplier, distributor, lessor, manufacturer] automatically promises that its product will work as intended and is not defective and unreasonably dangerous. When a seller [supplier, distributor, manufacturer] breaks this promise, it “breached (or violated) the implied warranty.”

To prove DFT breached (or violated) the implied warranty, PLF must prove the following five things are more likely true than not true:<sup>1</sup>

1. DFT sold [leased, manufactured, distributed] the [product].
2. PLF [used, came into contract with] the [product] in a way that was reasonably foreseeable to DFT.
3. The [product] was defective in a way that made it unreasonably dangerous when it left DFT's hands.
4. The unreasonably dangerous condition of the [product] was a cause of PLF's injury or harm.
5. The extent that PLF suffered injury or harm, which we call "damages."

I will now explain each of these things in more detail.

#### **(a) Sold the Product**

The first thing PLF must prove is more likely true than not true is that DFT sold [*leased, manufactured, distributed*] the [*product*].<sup>2</sup>

#### **(b) Foreseeable Use**

The second thing PLF must prove is more likely true than not true is that, at the time s/he was harmed, s/he [*used, came in contact with*] the [*product*] in a way that DFT could have reasonably foreseen. A seller [*supplier, distributor, manufacturer*] of a product is required to anticipate the

---

<sup>1</sup> Massachusetts law recognizes a sixth element that is seldom a live issue at trial: that the defendant was a "merchant" regarding products of the kind at issue. *Ferragamo v. Massachusetts Bay Transp. Auth.*, 395 Mass. 581, 585 (1985); G.L. c. 106, § 2-314(1). "[W]hether a person is a merchant is to be determined according to the circumstances of each case," and whether it "'regularly deals in goods of the kind involved or otherwise has a professional status with regard to the goods involved such that [it] could be expected to have specialized knowledge or skill peculiar to those goods.'" *Id.* (citation omitted); see also G.L. c. 106, § 2-104(1), for the definition of "merchant."

<sup>2</sup> The Appeals Court has found that a person outside the distribution chain (i.e. a nonseller) may be liable under the "apparent manufacturer doctrine" when a nonseller trademark licensor participates substantially in the design, manufacture, or distribution of the licensee's products. *Lou v. Otis Elevator Co.*, 77 Mass. App. Ct. 571, 581 (2010). If the plaintiff proceeds on this theory of liability, the jury should be instructed on it.

conditions and settings in which its product may be used, and [manufacture, design, warn about] the product to prevent risk of harms that are reasonably foreseeable.<sup>3</sup> The seller [supplier, distributor, manufacturer] is not required to [manufacture, design, warn about] the product to prevent unusual, unlikely, and random accidents.

< **Misuse of product – if relevant** > Also, a seller [supplier, distributor, manufacturer] of a product is responsible for any reasonably foreseeable or predictable misuse of the product by a user.<sup>4</sup> If DFT could have reasonably foreseen that PLF would misuse the [product] in the way s/he did when s/he was injured, PLF's misuse of the [product] does not prevent her/him from recovering on the breach of implied warranty claim.

### (c) Defective Product

The third thing PLF must prove is that the [product] was defective and unreasonably dangerous when it left DFT's possession or control. A product may be defective due to a defect in its manufacture or design, or in the warnings [instructions] that come with the product.<sup>5</sup> Here, PLF claims that the [product] had a [manufacturing, design, warning] defect when it left DFT's possession or control.

#### (1) Manufacturing Defect

In this case, PLF claims that the [product] was unreasonably dangerous when it left DFT's hands due to a defect in the way the product was manufactured [assembled, inspected].

A manufacturing defect exists when the product is different than its intended design, and that difference made the product unreasonably dangerous.<sup>6</sup> The focus is on the safety of the product and not on the

---

<sup>3</sup> *Back v. Wickes Corp.*, 375 Mass. 633, 640–641 (1978) (citations omitted).

<sup>4</sup> *Allen v. Chance Mfg. Co.*, 398 Mass. 32, 34, 36 n.2 (1986) (citations omitted).

<sup>5</sup> *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 422 (2013) (citation omitted).

<sup>6</sup> *Niedner v. Ortho-McNeil Pharm., Inc.*, 90 Mass. App. Ct. 306, 313 (2016).

conduct of manufacturer. PLF proves a manufacturing defect by showing the [*product*] was different than its intended design and was unreasonably dangerous, even if the manufacturer [*and seller, retailer, distributor, lesser*] took all possible care in making and selling [*leasing*] the product.<sup>7</sup>

## (2) Design Defect

In this case, PLF claims that the [*product*] was unreasonably dangerous when it left DFT's hands due to a defect in the way the product was designed.

A design defect is a feature or condition in the product's design that makes it unreasonably dangerous to [*users, persons that come in contact with it*] during ordinary use. A manufacturer [*and the seller, lessor, retailer, distributor*] of a product is responsible for breach of the implied warranty if its conscious design choices made the product unreasonably dangerous to a person [*using, coming in contact with*] it in a reasonably foreseeable or predictable way.<sup>8</sup>

Remember what I explained a few moments ago when discussing the "foreseeable use" of the product. The design must take into account, or consider, the conditions and settings in which the product will be used, and guard against reasonably foreseeable or predictable risks that may result in those conditions and settings.

PLF proves a design defect by showing that foreseeable or predictable dangers from the [*product*] could have been reduced or avoided by the manufacturer if it used a reasonably feasible alternative design, and that the manufacturer's failure to use the alternative design made the product unsafe. In order to prove a design defect, PLF must show that a change in

---

<sup>7</sup> *Restatement (Third) of Torts: Products Liability*, § 2(a) (1998).

<sup>8</sup> *Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 747–748 (2006).

the design would have reduced the risk of harm without costing too much or interfering with the performance of the product.<sup>9</sup>

When deciding if PLF proved a design defect, you must focus on the product at the time it left DFT's hands. You must also understand that designing a product often involves the balancing of safety, cost, and functionality. In deciding whether the design was reasonably safe at the time it left DFT's hands, you must consider the risks and benefits of the allegedly defective design as well as of the alternative design(s). In any product liability case, when you decide whether there was a safer alternative design available and whether DFT should have adopted that alternative design, you may consider the following questions:<sup>10</sup>

---

<sup>9</sup> *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 428 (2013); *Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 747–748 (2006).

<sup>10</sup> See *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 425 (2013) ("A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe.") (quoting Restatement (Third) of Torts: Products Liability § 2, comment f, at 23 (1998)); *Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 748 (2006) ("To determine the adequacy of a product's design, the jury must weigh multiple factors, including the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design."); *Everett v. Bucky Warren, Inc.*, 376 Mass. 280, 290–291 (1978) ("Factors that should be weighed in determining whether a particular product is reasonably safe include the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the . . . cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.") (quotation and citation omitted); *Main v. R. J. Reynolds Tobacco Co.*, 100 Mass. App. Ct. 827, 836 (2022) ("In deciding whether a reasonable alternative design existed at the time of sale or distribution, the jury may consider whether the proffered design unduly interfered with the performance of the product from the perspective of a rational, informed consumer, whose freedom of choice is not substantially impaired by addiction.") (quotation and citation omitted); *Fahey v. Rockwell Graphic Systems, Inc.*, 20 Mass. App. Ct. 642, 651 (1985) ("In deciding the issue of warranty liability the jury must weigh competing factors much as they would in determining the fault of the defendant in a negligence case. . . . In evaluating the adequacy of a product's design, the jury should consider among other factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design,

- How severe was the possible harm from the design?
- What was the likelihood that the harm may occur?
- What did the instructions and warnings say that came with the product?
- Was it technically feasible to make a safer design?
- What was the potential cost of manufacturing the product using a safer design?
- What were the potential negative effects on the product's performance, lifespan, maintenance, repair, or appearance that may result from a safer design?
- And, what were consumer expectations about the safety of the design?<sup>11</sup>

When deciding whether PLF showed a design defect, you may also consider whether the product came with adequate warnings or instructions to avoid the risk of harm. But, if a slight change in design would prevent serious harm, the manufacturer may not avoid liability by simply warning of the possible injury.<sup>12</sup> And, even if the product performed as intended and came with adequate warnings and instructions, PLF may still prove a design defect if s/he shows an available design change would have reduced the risk of harm without costing too much or interfering too much with the performance of the product.

< ***Consumer expectations – if applicable*** > As I mentioned, one factor you may consider in deciding whether PLF has shown a design defect is whether the product met reasonable safety expectations of consumers. But a design

---

and the adverse consequences to the product and to the consumer that would result from an alternative design.”) (quotation and citation omitted).

<sup>11</sup> *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 425 (2013).

<sup>12</sup> *Uloth v. City Tank Corp.*, 376 Mass. 874, 880 (1978).

may be defective even if a product design's risk was obvious or generally known by consumers, and still satisfied consumer expectations.<sup>13</sup>

< *Evidence of industry standards, etc. – if applicable* > When considering whether a safer alternative design was practical, you may consider evidence of whether a particular safety feature or design was actually used or a common practice in the industry that manufactured the [product].<sup>14</sup> But, even in the case of an industry-wide design standard, whether or not the product's design met that standard does not, by itself, mean that the design of the product was or was not defective because there may be evidence that the industry-wide standard should have been more or less strict.<sup>15</sup>

### (3) Warnings / Instructions Defect

In this case, PLF claims that the [product] was unreasonably dangerous when it left DFT's hands because DFT failed to provide adequate warnings [instructions] about a foreseeable or predictable risk of harm from the product.

A seller [supplier, distributor, manufacturer] of a product is required to provide warnings [instructions] about a product's use to reduce or prevent foreseeable or predictable risk of harm that may make the product

---

<sup>13</sup> *Laramie v. Philip Morris USA Inc.*, 488 Mass. 399, 413 n.12 (2021) ("In determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe, a jury may consider a broad range of factors, including the nature and strength of consumer expectations regarding the product.") (quoting Restatement (Third) of Torts: Products Liability § 2 comment f (1998)); *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 428 (2013) ("[T]he judge did not err in instructing the jury that they 'may,' rather than that they 'must,' consider whether Newport cigarettes met consumers' reasonable expectations as to safety.").

<sup>14</sup> "In determining whether a reasonable alternative design was practicable, a trier of fact may consider whether the alternative design is in actual use and whether it is common practice in the industry, but if expert testimony establishes that 'a reasonable alternative design could practically have been adopted, a trier of fact may conclude that the product was defective notwithstanding that such a design was not adopted by any manufacturer, or even considered for commercial use, at the time of sale.' " *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 424–425 (2013) (quoting Third Restatement, *supra* at § 2, comment d, at 20).

<sup>15</sup> *Back v. Wickes Corp.*, 375 Mass. 633, 642–643 (1978).

unreasonably dangerous to [*users, persons that come in contact with it*]. These warnings [*instructions*] may be necessary to prevent foreseeable or predictable risk of harm even if the product was properly designed and manufactured. But, the risk of harm must have been reasonably foreseeable or predictable at the time the product was sold, or must have been discoverable by reasonable testing before the product was marketed for sale.<sup>16</sup>

A seller [*supplier, distributor, manufacturer*] does not have to warn about risks of harm that are obvious or that PLF already knew about<sup>17</sup> because in that situation, a warning likely would not have reduced the risk of harm.

< ***Claim of insufficient warning – if applicable*** > In this case, PLF claims that the warning [*instruction*] actually given by DFT was not adequate to prevent the foreseeable or predictable risk of harm to her/him. The adequacy of the warning [*instruction*] is measured against the warning [*instruction*] that would have been given by a reasonably careful seller [*supplier, distributor, manufacturer*] at the time of sale of the product. When considering the adequacy of the warning [*instruction*], you should look at what was stated and the way in which it was stated.<sup>18</sup> In any product liability case, you may consider the following questions:<sup>19</sup>

- Was the warning [*instruction*] understandable to the average user of the product?<sup>20</sup>
- Did the warning [*instruction*] fairly and reasonably put into words the nature and extent of the potential harm?

---

<sup>16</sup> *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 22–23 (1998). “The judge’s instruction that the jury could consider product testing in evaluating the design defect claim was not in error.” *Id.* at 19.

<sup>17</sup> *Colter v. Barber-Greene Co.*, 403 Mass. 50, 59 (1988).

<sup>18</sup> *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 141 (1985) (citation omitted).

<sup>19</sup> See *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 141 (1985).

<sup>20</sup> See *Rafferty v. Merck & Co.*, 479 Mass. 141, 151 (2018) (citations omitted).



- To what extent did the warning [*instruction*] call attention to the possible dangers?
- What was the tone of the warning [*instruction*]?
- Was the warning [*instruction*] sufficiently forceful or did it sufficiently express a sense of urgency?

#### (4) Continuing Duty to Warn

In this case, PLF claims that the [*product*] was defective and unreasonably dangerous because DFT failed to provide adequate warnings about a risk of harm from the product [after the sale of the product.]

A seller [*retailer, distributor, lessor, manufacturer*] has a continuing duty to warn buyers and anticipated users of the product of the risk of harm that make the product unreasonably dangerous that it discovers or reasonably should have discovered after the sale.<sup>21</sup>

In order to prove DFT had a continuing duty to warn PLF, PLF must prove the following five things are more likely true than not true:<sup>22</sup>

- **First**, DFT knew or reasonably should have known that the product posed a significant risk of harm.
- **Second**, a reasonably careful seller [*retailer, distributor, lessor, manufacturer*] in DFT's position would have provided a warning [*instruction*].
- **Third**, DFT could have reasonably identified persons it should have assumed were not aware of the risk of harm.
- **Fourth**, the warning [*instruction*] could have been effectively communicated to and acted upon by the persons identified.
- **Fifth**, the risk of harm was great enough to justify placing the burden of providing a warning [*instruction*] on DFT.

I will now provide you with more information about some of these things.

---

<sup>21</sup> *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 23 (1998).

<sup>22</sup> *Lewis v. Ariens Co.*, 434 Mass. 643, 647 - 649 (2001).

To show that there was a continuing duty to warn after the sale of the product, PLF must prove the risk of harm was significant. Normally, it is inevitable that a manufacturer learns about a risk of harm as time passes after the initial sale of a product. A seller [*retailer, distributor, lessor, manufacturer*] has no obligation after the time of sale to issue warnings about product-related accidents that occur infrequently and are not likely to cause significant harm. But a seller [*retailer, distributor, lessor, manufacturer*] may have an after-sale obligation to warn about a risk of harm that is likely to cause significant harm, even if it happens infrequently.

Also, PLF must prove DFT could have reasonably been able to identify her/him as someone who should have been warned. For example, sometimes when a product is sold, the seller [*retailer, distributor, lessor, manufacturer*] asks the buyer [*lessee*] to register their name and other information so that it may keep track of potential users of the product. In other instances, it may be difficult to identify users of the product if a long time has passed. In addition, a warning after the sale is not necessary if users [*consumers*] were generally aware of the risk of harm. Nevertheless, a seller [*retailer, distributor, lessor, manufacturer*] must act reasonably under the circumstances to try to identify persons who should be warned.

#### (d) Causation<sup>23</sup>

The fourth thing that PLF must prove for her/his breach of implied warranty claim is that DFT's breach (or violation) of the implied warranty caused her/him harm. Even if PLF proved more likely than not that the [*product*] was defective and unreasonably unsafe, DFT is not responsible for the harm to PLF unless the defect was a cause of PLF's harm.

---

<sup>23</sup> In *Doull v. Foster*, 487 Mass. 1, 3 (2021), the SJC "conclude[d] that the traditional but-for factual causation standard is the appropriate standard to be employed in most cases, including those involving multiple alleged causes . . . [and] that the substantial factor test is unnecessarily confusing and discontinue its use, even in multiple sufficient cause cases." Thus, an instruction for "but for" causation is set forth here.

To determine if PLF proved DFT's breach of the implied warranty caused her/his harm, you should ask: Did the product defect make a difference? In other words, would the harm have happened anyway, even if the [*product*] had not been defective and dangerous?

PLF does not have to prove that DFT was the only cause of the harm because there may be many causes of a harm.<sup>24</sup> But, DFT did not cause the harm and is not responsible if the harm would have happened anyway. PLF has proved causation if the dangerous defect made a difference in producing the harm to PLF.

**< If Foreseeability Is Contested >** In addition, PLF must also prove, more likely than not, that the kind of harm s/he suffered was reasonably foreseeable to DFT.<sup>25</sup> By "reasonably foreseeable," or reasonably predictable, harm I mean that it was a predictable result of the product's dangerous defect. You consider foreseeability or predictability from the point of view of someone in DFT's position. PLF does not have to prove that DFT foresaw or should have foreseen the precise way in which the harm occurred; but PLF must show that her/his harm was a natural result of the dangerous defect in the product.

#### **(e) Compensation for Damages**

*See separate model instruction "Civ – Personal Injury Damages" for a damages instruction that may be adapted.*

---

<sup>24</sup> *Doull v. Foster*, 487 Mass. 1, 19-20 (2021).

<sup>25</sup> *Fishman v. Brooks*, 396 Mass. 643, 646 (1986); *Shimerv. Foley, Hoag & Eliot LLP*, 59 Mass. App. Ct. 302, 305 (2003).

## (f) Defenses

### (1) The *Correia* Defense (Unreasonable Use Defense)

As part of its defense, DFT claims that PLF acted unreasonably in using a product s/he knew was defective and dangerous.<sup>26</sup> This defense is often referred to as the “Unreasonable Use Defense” or the “Misuse Defense.”

You will only consider this defense if PLF proved that the [*product*] was defective and that the defect was a cause of PLF’s injuries.

For this defense, DFT, not PLF, has the burden of proving, more likely than not, the following three things:

1. PLF actually knew and appreciated that the [*product*] was defective and dangerous.
2. Despite PLF’s knowledge and understanding of the danger, her/his use of the [*product*] was unreasonable.
3. PLF’s use of the [*product*] with the known dangerous defect was a cause of her/his harm.

If DFT proves all three of these things, PLF is not entitled to recover anything from DFT. Now, I’ll tell you more about the “Unreasonable Use Defense.”

DFT must prove that, before the accident, PLF knew of and understood the dangerous defect in the product and s/he nevertheless used it anyway.

Evidence of PLF’s knowledge and understanding of the dangerous defect could come from something s/he said, her/his familiarity with the [*product*] or products like it, instructions or warnings that came with the product, or other sources.

---

<sup>26</sup> *Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 748 – 749 (2006) (citations omitted), citing *Correia v. Firestone Tire and Rubber Co.*, 388 Mass. 342, 356 (1983).

PLF's knowledge of the dangerous defect does not need to be technically specific.<sup>27</sup> In other words, DFT need not show that PLF knew the technicalities about the defect. Instead, it is enough that DFT shows PLF knew the product was dangerously defective in some way, used it nonetheless, and was injured or harmed as a result.

One last thing about this defense: It applies even if PLF's unreasonable use of the product was foreseeable or predictable by DFT.<sup>28</sup>

## **(2) Bulk Supplier Defense<sup>29</sup>**

*See "Bulk Supplier Defense" in section (e)(2) of the "Products Liability – Negligence" instruction, below, for an instruction that may be adapted.*

## **(3) Sophisticated User Defense<sup>30</sup>**

*See "Sophisticated User Defense" in section (e)(3) of the "Products Liability – Negligence" instruction, below, for an instruction that may be adapted.*

## **Breach of Implied Warranty of Merchantability – Food or Drink**

***< For merchantability claims involving food or drinks, use the following introductory paragraphs and adapt the paragraphs explaining each element above.>***

In this case, PLF claims s/he was injured by [*foreign object, harmful ingredient*] in a [*food/drink*] that s/he bought from DFT. PLF has brought a claim for "breach of an implied warranty" against DFT based on this claim.

---

<sup>27</sup> *Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 749 (2006).

<sup>28</sup> *Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 749 (2006).

<sup>29</sup> "[A]n instruction on the bulk supplier doctrine may apply to both a claim of negligent failure to warn and a claim of breach of warranty failure to warn in products liability actions." *Hoffman v. Houghton Chem. Corp.*, 434 Mass. 624, 637–638 (2001).

<sup>30</sup> "The sophisticated user doctrine applies where a warning will have little deterrent effect." *Hoffman v. Houghton Chem. Corp.*, 434 Mass. 624, 630 (2001) (citations omitted). It was adopted by the SJC as a defense in products liability cases in *Carrel v. Nat'l Cord & Braid Corp.*, 447 Mass. 431, 433 & 441 (2006).

The fact that PLF began this lawsuit is not evidence that DFT breached an implied warranty or caused PLF's injuries.

In Massachusetts, the law automatically imposes a promise on a seller [*supplier, distributor, manufacturer*] of food and drinks, such as the [*product*], that the [*product*] is fit to be eaten [*or drank*]. The law calls this promise an "implied warranty." This means that the seller [*supplier, distributor, manufacturer*] automatically promises that its food and drinks are not unreasonably dangerous to consume. When a seller [*supplier, distributor, manufacturer*] breaks this promise, it "breached (or violated) the implied warranty."

To prove DFT breached (or violated) the implied warranty, PLF must prove the following six things are more likely true than not true:<sup>31</sup>

1. DFT sold the [*food/drink*] to her/him.
2. The [*food/drink*] contained a dangerous object [*or ingredient or substance or bacteria*].
3. DFT was the source of the dangerous object [*or ingredient or substance or bacteria*].
4. The object [*or ingredient or substance or bacteria*] was one that an average consumer would not reasonably expect to find in the [*food/drink*].
5. The object [*or ingredient or substance or bacteria*] was a cause of PLF's harm.
6. The extent that PLF suffered injury or harm, which we call "damages."

---

<sup>31</sup> *Burns v. McDonald's Corp.*, 81 Mass. App. Ct. 908, 909 (2012) (citations omitted); Restatement (Third) of Torts: Products Liability § 7 (1998).

## Products Liability – Negligence<sup>32</sup>

In this case, PLF contends s/he was injured by the *[product]*, which DFT *[sold, distributed, manufactured]*. PLF claims DFT was negligent in *[selling, manufacturing, designing, warning about]* the *[product]*. The fact that PLF began this lawsuit is not evidence that DFT was negligent or caused PLF's injuries.

To prove negligence, PLF must show that the following four things are more likely true than not true.<sup>33</sup>

1. DFT owed PLF a duty of care when *[selling, leasing, manufacturing, designing, warning about]* the *[product]*.
2. DFT failed to use reasonable care under all the circumstances when *[selling, leasing, manufacturing, designing, warning about]* the *[product]*.
3. DFT's failure to use reasonable care was a cause of PLF's harm.
4. The extent that PLF suffered injury or harm, which we call "damages."

I will now describe these things in more detail.

### (a) Duty of Care

The first thing PLF must prove is more likely true than not true is that DFT owed her/him a duty of care. When manufacturing *[selling, leasing]* its product, a manufacturer *[retailer, seller, lessor]* owes a duty of care to prevent harm to people it reasonably should know may come in contact with the product. PLF proves duty of care if s/he shows it was reasonably

---

<sup>32</sup> Where a plaintiff brings claims for both negligence and breach of the implied warranty, "[a] defendant in a products liability case in this Commonwealth may be found to have breached its warranty of merchantability without having been negligent, but the reverse is not true. A defendant cannot be found to have been negligent without having breached the warranty of merchantability." *Colter v. Barber-Greene Co.*, 403 Mass. 50, 62 (1988) (citation omitted).

<sup>33</sup> A manufacturer of a product has a duty to use reasonable care when designing, manufacturing, and warning about its products. See e.g. *Uloth v. City Tank Corp.*, 376 Mass. 874, 878 (1978) (negligent design case). This element is rarely contested at trial.

foreseeable or predictable by DFT when it [*sold, leased, manufactured*] the [*product*] that PLF would come in contact with the product.

## **(b) Failure To Use Reasonable Care**

### **(1) Negligent Manufacturing – Failure to Use Reasonable Care**

*< use these paragraphs for negligent manufacturing claims >*

The second thing PLF must prove is that DFT failed to use reasonable care in manufacturing or inspecting the [*product*]. This failure is called “negligent manufacturing.”

A manufacturer of a product must use the care which the ordinary, reasonably careful manufacturer would use under the circumstances. Negligent manufacturing occurs when the product is different from its intended design and the difference made the product unsafe to people who the manufacturer reasonably should know would come in contact with the product.

### **(2) Negligent Design – Failure to Use Reasonable Care**

*< use these paragraphs for negligent design claims >*

The second thing PLF must prove is that DFT failed to use reasonable care in designing the [*product*]. This failure is called “negligent design.”

A negligent design is a feature or condition in the product’s design that makes it dangerous. A manufacturer must take reasonable care to design its product to eliminate avoidable dangers.<sup>34</sup>

When designing a product, a manufacturer must take into account, or consider, the situations and conditions in which the product will be used and guard against the reasonably foreseeable or predictable risk that may result in those settings and conditions.<sup>35</sup> But a manufacturer is not required

---

<sup>34</sup> *Simmons v. Monarch Mach. Tool Co.*, 413 Mass. 205, 211 (1993).

<sup>35</sup> *Simmons v. Monarch Mach. Tool Co.*, 413 Mass. 205, 211 (1993).



to design a product to be risk free. It has no obligation to design a product to protect against dangers that are only slightly possible.

PLF proves a negligent design by showing that foreseeable or predictable dangers from the [*product*] could have been reduced by the manufacturer if it used a reasonably feasible alternative design, and that the manufacturer's failure to use the alternative design made the product unsafe. In order to prove a design defect, PLF must show that a change in the design would reduce the risk of danger without costing too much or interfering too much with the performance of the product.<sup>36</sup> The plaintiff must show that a safer alternative design was feasible, not that any manufacturer in the industry used it or even considered it.<sup>37</sup>

When deciding if PLF proved a negligent design, you must focus on the product at the time it left DFT's hands. You should also understand that designing a product often involves the balancing of safety, cost, and functionality. In deciding whether the product was designed with reasonable care at the time it left DFT's hands, you should consider the following questions:<sup>38</sup>

---

<sup>36</sup> *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 444 (2013).

<sup>37</sup> *Id.* See also *Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 748 (2006).

<sup>38</sup> See *Simmons v. Monarch Mach. Tool Co.*, 413 Mass. 205, 211 (1993); *Colter v. Barber-Greene Co.*, 403 Mass. 50, 57 (1988) ("In evaluating the adequacy of a product's design, the jury should consider, among other factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.") (quotation and citation omitted); *Uloth v. City Tank Corp.*, 376 Mass. 874, 881 (1978) ("We decline to hold that there can be no negligence in design if the product performs as intended, or if there are warnings found to be adequate, or if the dangers are obvious. We hold that these factors should be considered by a jury in evaluating a claim of design negligence."); *Back v. Wickes Corp.*, 375 Mass. 633, 642 (1978) ("In evaluating the adequacy of a product's design, the jury should consider, among other factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.") (quotation and citation omitted); *Caron v. General Motors Corp.*, 37 Mass. App. Ct. 744, 753 (1994) ("In

- How severe was the possible harm from the design?
- What was the likelihood that the harm may occur?
- What did the instructions and warnings say that came with the product?
- Was it technically feasible to make a safer design?
- What was the potential cost of manufacturing the product using a safer design?
- What were the potential effects on the product's performance that may result from a safer design?
- What were the potential effects on the product's lifespan, maintenance, repair, and appearance that may result from a safer design?
- And what was the range of choice consumers had among similar products?

When looking at the adequacy of the product's warning or instructions, you should keep in mind that the manufacturer may not avoid liability by simply warning of the possible injury if a slight change in design would prevent serious harm.<sup>39</sup> And, even if the product performed as intended and came with adequate warnings and instructions, PLF may still prove negligent design if s/he shows an available design change would have reduced the risk of harm without an unreasonable cost and without unreasonably interfering with the intended performance of the product.

---

evaluating the adequacy of a product's design, the jury should consider, among other factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.") (quotation and citation omitted); *Torre v. Harris-Seybold Co.*, 9 Mass App. Ct. 660, 678 (1980) (judge correctly instructed jury that "in evaluating the adequacy of the design they could consider a variety of factors, including the seriousness or gravity of the dangers to the user posed by the machine as it was designed, the mechanical feasibility and financial cost of an improved design, and whether there was an available design modification which would have reduced the risk without undue cost or interference with the performance of the machine") (quotation and citation omitted).

<sup>39</sup> *Uloth v. City Tank Corp.*, 376 Mass. 874, 880 (1978).

### (3) Negligent Warnings – Failure to Use Reasonable Care<sup>40</sup>

The second thing PLF must prove is that DFT failed to use reasonable care in providing warnings [*instructions*] with the [*product*]. This failure is called “negligent warnings [*instructions*].”

A manufacturer of a product is required to provide warnings [*instructions*] about a product’s use or misuse to reduce or prevent foreseeable or predictable risk of harm from the product.<sup>41</sup> These warnings [*instructions*] may be necessary to prevent foreseeable or predictable risk of harm even if the product was properly designed and manufactured. But the risk of harm must have been reasonably foreseeable or predictable by the manufacturer at the time the product was sold.

A manufacturer does not have to warn about a risk of harm that may arise from an unforeseeable or unpredictable use or misuse of the product. And a manufacturer does not have to warn about risks of harm that are obvious or that PLF already knew about<sup>42</sup> because in that case, a warning likely would not have reduced the risk of harm.

< ***Claim of insufficient warning – if applicable*** > In this case, PLF claims that the warning [*instruction*] actually given by DFT was not adequate to prevent a foreseeable or predictable risk of harm to her/him.

When determining whether the warnings [*instructions*] needed for the product are adequate, a manufacturer should have the average user of the product in mind.

---

<sup>40</sup> This instruction may be modified if the defendant is the seller, rather than the manufacturer, of the product at issue. “A seller of a product manufactured by another is not liable in an action for negligence unless it knew or had reason to know of the dangerous condition that caused the accident.” *Enrich v. Windmere Corp.*, 416 Mass. 83, 86 (1993).

<sup>41</sup> *Barbosa v. Hopper Feeds, Inc.*, 404 Mass. 610, 614 (1989).

<sup>42</sup> *Evans v. Lorillard Tobacco Co.*, 465 Mass. 411, 442 (2013); *Colter v. Barber-Greene Co.*, 403 Mass. 50, 59 (1988).

The adequacy of the warning [*instruction*] is measured against the warning [*instruction*] that would have been given by a reasonably careful manufacturer at the time of sale of the product. When evaluating the adequacy of the warning [*instruction*], you should consider the following questions:<sup>43</sup>

- Was the warning [*instruction*] understandable to the average user of the product?<sup>44</sup>
- Did the warning [*instruction*] fairly and reasonably convey the nature and extent of the potential harm?
- To what extent did the warning [*instruction*] call attention to the possible dangers?
- What was the tone of the warning [*instruction*]?
- Was the warning [*instruction*] sufficiently forceful and did it sufficiently express a sense of urgency?

(c) **Causation**<sup>45</sup>

*Use or adapt causation instruction from the “Civ – Negligence, General” model instruction.*

< *If Foreseeability Is Contested* > In addition, PLF must also prove, more likely than not, that the kind of harm PTF suffered was reasonably foreseeable to DFT.<sup>46</sup> By “reasonably foreseeable” harm, I mean that the PTF’s harm was a predictable result of DFT’s negligent [*manufacturing, design, warning*]. You must consider foreseeability from the point of view of someone in DFT’s position. PLF does not have to prove that DFT foresaw or

---

<sup>43</sup> See *MacDonald v. Ortho Pharmaceutical Corp.*, 394 Mass. 131, 141 (1985).

<sup>44</sup> See *Rafferty v. Merck & Co.*, 479 Mass. 141, 151 (2018) (citations omitted).

<sup>45</sup> In *Doull v. Foster*, 487 Mass. 1 (2021) the SJC “conclude[d] that the traditional but-for factual causation standard is the appropriate standard to be employed in most cases, including those involving multiple alleged causes . . . [and] that the substantial factor test is unnecessarily confusing and discontinue its use, even in multiple sufficient cause cases.” *Id.* at 2. Thus, an instruction for “but for” causation is set forth here.

<sup>46</sup> *Fishman v. Brooks*, 396 Mass. 643, 646 (1986); *Shimerv. Foley, Hoag & Eliot LLP*, 59 Mass. App. Ct. 302, 305 (2003).

should have foreseen the precise way in which the harm occurred; but PLF must show that PLF's harm was a natural result of the negligent [*manufacturing, design, warning*].

**< If Negligent Design Worsened Injury >** Also, a manufacturer is responsible when the negligent design worsens the injuries a person sustains in an otherwise foreseeable or predictable accident.<sup>47</sup>

#### **(d) Compensation for Damages**

*See separate model instruction "Civ – Personal Injury Damages" for a damages instruction that may be adapted.*

#### **(e) Defenses**

##### **(1) Comparative Negligence<sup>48</sup>**

*See separate model instruction "Civ – Negligence, General" for a comparative negligence instruction that may be adapted.*

##### **(2) Bulk Supplier Defense (negligent warning cases)<sup>49</sup>**

As part of its defense, DFT claims that it reasonably relied on an intermediary distributor to warn end users of the dangers associated with the use of the [*product*]. This is called the "Bulk Supplier Defense."

---

<sup>47</sup> *Simmons v. Monarch Mach. Tool Co.*, 413 Mass. 205, 212 (1992).

<sup>48</sup> *Correia v. Firestone Tire & Rubber Co.*, 388 Mass. 342, 353-55 (1983).

<sup>49</sup> "[A]n instruction on the bulk supplier doctrine may apply to both a claim of negligent failure to warn and a claim of breach of warranty failure to warn in products liability actions." *Hoffman v. Houghton Chem. Corp.*, 434 Mass. 624, 637–638 (2001). "The instruction properly required that the jury consider whether the defendants supplied their products in bulk; whether they gave "adequate and sufficient" warning; whether they had no reason "to anticipate any negligence or other fault" on the part of Gotham; and whether the defendants "had no indication" that Gotham "was inadequately trained, or unfamiliar with the product, or incapable of passing on its knowledge about the product to the ultimate users of the product." *Id.* at 635."

You will only consider this defense if PLF proved that DFT was negligent in warning [*instructing*] about the [product] and its negligence was a cause of PLF's injuries.

For this defense, DFT, not PLF, has the burden of proving, more likely than not, the following four things:

1. DFT delivered the [product] in bulk to a middle distributor/seller.
2. DFT provided adequate and sufficient warnings [*instructions*] about the product's characteristics and dangers to the middle distributor/seller.
3. DFT relied on the middle distributor/seller to convey the warnings [*instructions*] to the end user of the [product].
4. DFT's reliance on the middle distributor/seller to convey the warnings [*instructions*] to the end user was reasonable.

As for this last thing, the reasonableness of DFT's reliance on the middle distributor/seller, you may consider the following questions:<sup>50</sup>

- How dangerous was the product?
- What purpose was the product typically used for?
- Did DFT provide any warnings [*instructions*] and, if so, what was the form of the warnings [*instructions*]?
- Did DFT have any information about the reliability or dependability of the middle distributor/seller as a way to communicate necessary information about the product to the end user and, if so, what information did DFT have?

---

<sup>50</sup> "The reasonableness inquiry is fact intensive; no bright-line rule can 'automatically determine' when reliance on the intermediary is reasonable." *Hoffman v. Houghton Chem. Corp.*, 434 Mass. 624, 632 (2001); *Tilton v. Union Oil Co. of California*, 64 Mass. App. Ct. 115, 116–117 (2005) (on the question of reasonable reliance, judge correctly instructed jury that they may consider as factors whether: defendant had any knowledge of the training policies and/or the manner in which its product was used by plaintiff's employer and its employees; defendant make reasonable inquiries into the practice of employer in regards to warning its employees in safety procedures; and defendant had any reason to believe that employer was incapable of passing along its knowledge about the characteristics and dangers of the product."

- What was the level of the risk to the end user from the lack of warnings [*instructions*]?
- And, how low or high would the burden have been on the middle distributor/seller to directly warn end users?

### **(3) Sophisticated User Defense (negligent warning cases)<sup>51</sup>**

As part of its defense, DFT claims that it had no obligation to warn PLF about [*describe the danger at issue*] because PLF had sufficient knowledge, experience, and expertise about the [product] and a warning would not have prevented harm to PLF. This is called the "Sophisticated User Defense."

You will consider this defense only if PLF proved that DFT was negligent regarding the warnings [*instructions*] and its negligence was a cause of PLF's injuries.

For this defense, DFT, not PLF, has the burden of proving, more likely than not, that PLF's knowledge, experience, and expertise about the risk of harm from the [product] were at least as great as DFT's, and, therefore, warnings [*instructions*] would not have prevented the harm to PLF.

DFT is not required to show that PLF knew what exact characteristics of the [product] made it dangerous.<sup>52</sup> It is enough that DFT shows PLF knew or reasonably should have known of the particular danger to be guarded against, so a warning [*instruction*] would have been unnecessary.<sup>53</sup>

---

<sup>51</sup> "The sophisticated user doctrine applies where a warning will have little deterrent effect." *Hoffman v. Houghton Chem. Corp.*, 434 Mass. 624, 630 (2001) (citations omitted). It was adopted by the SJC as a defense in products liability cases in *Carrel v. Nat'l Cord & Braid Corp.*, 447 Mass. 431 (2006).

<sup>52</sup> *Carrel v. Nat'l Cord & Braid Corp.*, 447 Mass. 431, 445 (2006).

<sup>53</sup> *Carrel v. Nat'l Cord & Braid Corp.*, 447 Mass. 431, 445 (2006).

**(f) Possible Additional Instructions**

**(1) Violation Of Regulation, Statute, etc.**

*See separate model instruction “Civ – Professional Negligence” for an instruction about violation of a regulation, statute, etc. as evidence of negligence, which may be adapted.*

**(2) Prior Similar Incidents**

PLF presented evidence about earlier incidents involving the [product] that s/he claims were similar to the events in this case. You may consider this evidence only for the limited purpose of deciding whether DFT knew or should have known about any dangers or risk that existed regarding the [product].

Before you may consider this evidence, PLF must prove, more likely than not, that the other incident[s] was [were] substantially similar to the incident in this case. The circumstances of the other incidents do not have to be identical to the incident in this case, but they must be substantially similar.<sup>54</sup> If you find that the earlier incident[s] was [were] substantially similar, then you may consider it/them, along with all the other evidence, to determine whether DFT knew or should have known about the risk PLF claims existed in this case.

---

<sup>54</sup> *Dubuque v. Cumberland Farms, Inc.*, 93 Mass. App. Ct. 332, 344–345 (2018).