

BILL TEXT:

STATE OF NEW YORK

1316

2005-2006 Regular Sessions

IN ASSEMBLY

January 19, 2005

Introduced by M. of A. MORELLE, SCHIMMINGER -- Multi-Sponsored by -- M. of A. MAGEE -- read once and referred to the Committee on Codes

AN ACT to amend the civil practice law and rules, in relation to product liability actions, compliance with governmental standards, limited liability of persons jointly liable, assumption of the risk, and breach of express warranty; and to repeal certain provisions of the civil practice law and rules relating to limited liability of persons jointly liable

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. The civil practice law and rules is amended by adding a new
2 article 14-B to read as follows:

3 ARTICLE 14-B

4 PRODUCT LIABILITY ACTIONS

5 1414. Definitions.

6 1415. Standards of responsibility.

7 1416. Postmanufacture changes.

8 1417. Defense of modification or alteration.

9 1418. Defenses available to seller.

10 1419. Defenses available in certain product liability actions.

11 1420. Actions based on failure to instruct.

12 1421. Actions based on defective design.

13 1422. Actions based on breach of express warranty.

14 1423. Presumption regarding products in compliance with govern-
15 mental standards.

16 1424. Drugs regulated or approved by the food and drug adminis-
17 tration.

18 § 1414. Definitions. In this chapter:

19 (a) "Product liability action" means an action brought for or on
20 account of personal injury or injury to property caused or resulting
21 from the manufacture, sale, use, construction, design, formula, develop-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets
[-] is old law to be omitted.

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1 ment of standards, preparation, processing, assembly, testing, listing,
2 certifying, warning, instructing, marketing, advertising, packaging or
3 labeling of any product; whether such action is based on: (1) strict or
4 absolute liability in tort; (2) negligence or gross negligence; (3)
5 breach of express or implied warranty; (4) failure to discharge a duty
6 to warn or instruct; or (5) any other theory that is the basis for an
7 award for damages for personal injury or injury to property caused by a
8 product.

9 (b) "Product" means any object possessing intrinsic value which is
10 capable of delivery either as an assembled whole or as a component part
11 and is produced for introduction into trade or commerce; but such term
12 does not include human tissue, blood and blood products, or organs.

13 (c) "Drug" and "medical device" shall have the meanings defined in the
14 federal Food, Drug and Cosmetic Act, 21 U.S.C. § 301 et seq.

15 (d) "Labeling" means the written, printed, or graphic matter upon the
16 immediate product or any of its containers or wrappers, or other writ-
17 ten, printed, or graphic matter accompanying such product, including any
18 warnings or instructions.

19 (e) "Manufacturer" means any person who is engaged in a business to
20 design, produce, make, fabricate, construct, or remanufacture any prod-
21 uct (or component part of a product). Any product seller who acts prima-
22 rially as a wholesaler, distributor, or retailer of products may be a
23 manufacturer with respect to a given product to the extent that such
24 seller designs, produces, makes, fabricates, constructs, or remanufac-
25 tures the product before its sale.

26 (f) "Feasible alternative design" means a design for which the techni-
27 cal and scientific knowledge relating to its implementation and safety
28 was, at the time the product left the control of the manufacturer,
29 developed, available and capable of use in the manufacture of the prod-
30 uct and economically practicable for use by a manufacturer.

31 (g) "Alteration or modification" means a material change in a product,
32 which may include a change in the product design or formulation, or a
33 change in or removal of warnings, instructions or safety devices that
34 accompanied the product.

35 (h) "Express warranty" means a specific representation of material
36 fact about the safety of a product, but does not mean a general opinion
37 about, or general praise of, a product. "Breach of express warranty"
38 means the failure of a product to conform to an express warranty.

39 (i) "Unreasonably dangerous" means dangerous to an extent beyond that
40 which would be contemplated by the ordinary user or consumer of the
41 product with the ordinary knowledge common to the community as to the
42 product's characteristics.

43 § 1415. Standards of responsibility. A manufacturer or seller shall be
44 liable in a product liability action only if:

45 (a) the product (1) was defective because it deviated in a material
46 way from the manufacturers specifications, formulae, or performance
47 standards, or from otherwise identical units manufactured to the same
48 manufacturing specification or formulae, (2) was defective because it
49 failed to contain adequate warnings or instructions, (3) was designed in
50 a defective manner, (4) was fraudulently misrepresented by the manufac-
51 turer or seller, and the purchaser of the product, or the person whose
52 use of the product caused the injury, reasonably relied on the misrepre-
53 sentation, or (5) breached an express warranty upon which the purchaser
54 of the product, or the person whose use of the product caused the inju-
55 ry, reasonably relied;

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1 (b) the defect, fraud or breach of express warranty described in
2 subdivision (a) of this section proximately caused the harm; and

3 (c) the plaintiff must prove the elements of a cause of action set
4 forth in subdivisions (a) and (b) of this section by a preponderance of
5 the evidence.

6 § 1416. Postmanufacture changes. In a product liability action,
7 evidence of measures taken by the manufacturer or seller after an event,
8 which if taken previously would have made the event less likely to
9 occur, is not admissible to prove negligence or culpable conduct or to
10 prove a defect in the product. Evidence of subsequent measures may,
11 however, be admissible when offered to impeach or as proof of ownership,
12 control, or feasibility of precautionary measures, if such issues are
13 controverted.

14 § 1417. Defense of modification or alteration. In any product liabil-
15 ity action, the damages for which a manufacturer or seller is otherwise
16 liable shall be reduced by the percentage of responsibility for the
17 plaintiff's injury attributable to modification or alteration of a prod-
18 uct if the manufacturer or seller establishes by a preponderance of the
19 evidence that such percentage of the plaintiff's injury was proximately
20 caused by (a) a modification or alteration of a product in violation of,
21 or contrary to, the manufacturer's or seller's express specifications,
22 warnings or instructions if the specifications, warnings or instructions
23 were adequate, or (b) a modification or alteration of a product involv-
24 ing a risk of harm which was known or should have been known by the
25 ordinary person who uses or consumes the product with the knowledge
26 common to the class of persons who used or would be reasonably antic-
27 ipated to use the product.

28 § 1418. Defenses available to seller. In any product liability action
29 a party may assert as a defense in such action that he or she is not the
30 manufacturer of the product in question and that such product was
31 acquired and sold by him or her in a sealed container or that the prod-
32 uct was acquired and sold by him or her under circumstances in which he
33 or she was afforded no reasonable opportunity to inspect the product in
34 such a manner which would have or should have, in the exercise of
35 reasonable care, revealed the existence of the defective condition;
36 provided, however, that the defense set forth herein will not be avail-
37 able if (a) the manufacturer is not subject to service of process under
38 the laws of the state in which the plaintiff brings the action, or (b)
39 the manufacturer has been judicially declared insolvent and is unable to
40 pay its debts as they become due in the ordinary course of business, or
41 (c) the court determines that the plaintiff would be unable to enforce a
42 judgment against the manufacturer. The provisions of this section shall
43 not apply to actions based upon breach of express warranty, negligence
44 or fraudulent misrepresentation of the seller.

45 § 1419. Defenses available in certain product liability actions.
46 Except for product liability actions commenced pursuant to subdivision
47 two of section two hundred fourteen-c of this chapter, a party may
48 assert as a defense in a product liability action that he or she is the
49 manufacturer or seller of the product in question but that ten years or
50 more have elapsed since he or she had possession or control of such
51 product. If a product has been modified or altered by, or with the
52 express or implied consent of, or according to instructions or specifi-
53 cations provided by a party against whom the action is commenced, and
54 where the injury is caused by such modification or alteration, the time
55 periods referred to herein shall commence as to such party from the date
56 the modification or alteration was completed.

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1 § 1420. Actions based on failure to instruct. (a) In any product
2 liability action based upon a claimed failure to provide adequate spec-
3 ifications, instructions or warnings, the manufacturer or seller shall
4 be liable for failure to specify, instruct or warn, only upon the basis
5 of negligence; provided, however, that in no way shall the manufacturer
6 or seller be liable for failure to warn of a hazard which was either (1)
7 unidentifiable by such defendant, unless the plaintiff proves by a
8 preponderance of the evidence, in addition to other requirements under
9 state or federal law, that after the time such hazard became known or
10 reasonably should have become known, either to the defendant or general-
11 ly to similar situated manufacturers or sellers of similar products, the
12 defendant failed to make a reasonable effort to provide adequate warn-
13 ings of such hazards under circumstances where such failure constituted
14 a breach of a legal duty of care owed to the plaintiff; or (2) clear
15 under all of the circumstances to users of ordinary skill and judgment
16 who reasonably might have been expected to use, come into contact with
17 or to be affected by the product or in the case of prescription
18 products, practitioners of appropriate medical skill and judgment; or
19 (3) a result of actions by the user of the product that would not be
20 expected of a reasonably prudent person who is likely to use the product
21 in the same or similar circumstances.

22 (b) For purposes of paragraphs one and two of subdivision (a) of this
23 section, evidence that a nonmanufacturing seller provided all pamphlets,
24 booklets, labels, inserts or other written instructions or warnings
25 received by such seller from the manufacturer shall give rise to a
26 rebuttable presumption that at the time of sale, lease or delivery of
27 the product, the nonmanufacturing seller did not know of any inadequacy
28 in such written instructions or warnings, or was not aware of facts from
29 which a reasonable person would infer such inadequacies.

30 (c) In any product liability action based upon a claimed failure to
31 provide adequate specifications, instructions or warnings, a manufactur-
32 er or seller of an ethical drug or device shall not be liable for fail-
33 ure to specify, instruct or warn of hazards associated with the product
34 if the manufacturer or seller provides an otherwise adequate warning or
35 instruction to the physician or other legally authorized person who
36 prescribes or dispenses that ethical drug or device for the plaintiff,
37 provided the federal food and drug administration has not required that
38 the warning or instruction be given directly to the ultimate user of the
39 product.

40 (d) In any product liability action based upon a claimed failure to
41 provide adequate specifications, instructions or warnings a manufacturer
42 or seller shall not be liable for failure to instruct or to warn of
43 hazards associated with a product, unless the plaintiff also proves by a
44 preponderance of the evidence, in addition to other facts required to be
45 proved under the laws of the state or the United States, including the
46 provisions of this chapter, that the product was the immediate, physical
47 and producing cause of the injury or damage of which the plaintiff
48 complains and that, if adequate specifications, instructions and warn-
49 ings had been supplied by the defendant, the user of the product, or any
50 nonuser shown to have been in a position to respond to such information,
51 would have responded by altering his or her conduct and thereby would
52 have avoided or reduced the injury or damage of which the plaintiff
53 complains.

54 § 1421. Actions based on defective design. (a) In any product liabil-
55 ity action based upon defective design, a manufacturer or seller shall
56 not be liable unless the plaintiff proves by a preponderance of the

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1 evidence that, at the time the product left the control of the manufac-
2 turer, there existed a feasible alternative design that would have
3 prevented the harm without substantially impairing the usefulness or
4 desirability of the product to users.

5 (b) In any product liability action based upon defective design, a
6 manufacturer or seller shall not be liable unless the plaintiff proves
7 by a preponderance of the evidence that the product design was the imme-
8 diante, physical and producing cause of the injury or damage of which the
9 plaintiff complains, and that, if a feasible alternative design as
10 provided in subdivision (a) of this section was marketed by the defend-
11 ant, the user of the product would have responded by altering his or her
12 conduct and thereby would have avoided or reduced the injury or damage
13 of which the plaintiff complains.

14 (c) In any product liability action based upon defective design, a
15 manufacturer or seller shall not be liable unless the plaintiff proves
16 by a preponderance of the evidence that, at the time the product left
17 the control of the manufacturer, the manufacturer knew or, in light of
18 then existing scientific and technological knowledge, reasonably should
19 have known of the danger that caused the plaintiff's harm.

20 (d) In any product liability action based on defective design, a prod-
21 uct shall not be found to contain a defect or be unreasonably dangerous
22 for its intended use if the personal injury, property damage, or death
23 for which recovery of damages is sought was caused by an inherent aspect
24 of the product about which adequate specifications, instructions, or
25 warnings are provided or which would be recognized as capable of causing
26 harm by the ordinary person who uses or consumes the product with the
27 ordinary knowledge common to the class of persons for whom the product
28 is intended.

29 (e) In any product liability action based on defective design, a prod-
30 uct shall not be found to contain a defect or be unreasonably dangerous
31 for its intended use if the personal injury, property damage, or death
32 for which recovery of damages is sought was caused by an unavoidably
33 unsafe product, as defined in comment K to Section 402A of the Restate-
34 ment (2d) of Torts, and specifications, warnings or instructions are
35 provided to the extent required by this article.

36 § 1422. Actions based on breach of express warranty. In any product
37 liability action based on breach of express warranty, a manufacturer or
38 seller shall not be liable unless the plaintiff proves by a preponder-
39 ance of the evidence that the purchaser of the product, or the person
40 whose use of the product caused the injury, relied upon the warranty
41 and that such reliance was reasonable under all of the circumstances.

42 § 1423. Presumption regarding products in compliance with governmental
43 standards. In a suit against a manufacturer alleging that a product
44 caused the plaintiff harm, if the product alleged to have caused the
45 harm was manufactured and labeled in relevant and material respects in
46 accordance with standards, conditions, or specifications established,
47 adopted or approved by a federal or state statute or by agency of the
48 federal or state government responsible for the design, formulation,
49 manufacturing, labeling, packaging, performance, or approval of the
50 product, there shall be a rebuttable presumption that the product was
51 reasonably safe in design, formulation, manufacturing, labeling, packag-
52 ing, or performance unless that plaintiff proves by clear and convincing
53 evidence that the government standards relevant to the harm alleged to
54 have been suffered were inadequate to protect the class of persons of
55 which plaintiff is a member from unreasonable risk of harm.

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1 § 1424. Drugs regulated or approved by the food and drug adminis-
2 tration. (a) In any product liability action, a manufacturer or seller
3 of a drug or medical device shall not be subject to punitive damages if
4 the drug or medical device that caused the plaintiff's harm was subject
5 to pre-market approval or licensure by the federal food and drug admin-
6 istration under the federal food, drug, and cosmetic act and was
7 approved or licensed, or is generally recognized as safe and effective
8 pursuant to conditions and applicable regulations, including packaging
9 and labeling regulations, established by the food and drug adminis-
10 tration.

11 (b) The prohibition on the award of punitive damages provided in
12 subdivision (a) of this section shall not apply where the manufacturer
13 or seller knowingly withheld or misrepresented information required to
14 be submitted to the food and drug administration and such information
15 was material and relevant to the harm in question.

16 § 2. Sections 1600, 1602 and 1603 of the civil practice law and rules
17 are REPEALED.

18 § 3. Section 1601 of the civil practice law and rules, as added by
19 chapter 682 of the laws of 1986, subdivision 1 as amended by chapter 635
20 of the laws of 1996, is amended to read as follows:

21 § 1601. Limited liability of persons jointly liable. 1. Notwithstand-
22 ing any other provision of law, when a verdict or decision in an action
23 or claim for personal injury is determined in favor of a claimant in an
24 action involving two or more tortfeasors jointly liable or in a claim
25 against the state and the liability of a defendant is found to be fifty
26 percent or less of the total liability assigned to all persons liable,
27 the liability of such defendant to the claimant [~~for non-economic loss~~]
28 shall not exceed that defendant's equitable share determined in accord-
29 ance with the relative culpability of each person causing or contribut-
30 ing to the total liability [~~for non-economic loss~~]; provided, however
31 that the culpable conduct of any person not a party to the action shall
32 not be considered in determining any equitable share herein if the
33 claimant proves that with due diligence he or she was unable to obtain
34 jurisdiction over such person in said action [~~(or in a claim against the~~
35 ~~state, in a court of this state)~~]; and further provided that the culpa-
36 ble conduct of any person shall not be considered in determining any
37 equitable share herein to the extent that action against such person is
38 barred because the claimant has not sustained a "grave injury" as
39 defined in section eleven of the workers' compensation law.

40 2. Nothing in this section shall be construed to affect or impair any
41 right of a tortfeasor under section 15-108 of the general obligations
42 law.

43 § 4. The civil practice law and rules is amended by adding a new arti-
44 cle 17 to read as follows:

45 ARTICLE 17

46 ASSUMPTION OF THE RISK

47 1700. Short title.

48 1701. Definitions.

49 1702. Bar to liability.

50 1703. Limitation of liability.

51 1704. Knowledge of warning.

52 1705. Severability clause.

53 § 1700. Short title. This article shall be known and may be cited as
54 "the assumption of the risk act".

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1 § 1701. Definitions. The following words, as used in this article,
2 shall have the meanings set forth below, unless the context clearly
3 requires otherwise:

4 (a) "Fault" means any theory under which tort liability may be recog-
5 nized, including, but not limited to, negligence, malpractice, strict
6 liability, absolute liability, and failure to provide adequate warning.

7 (b) "Person" means any individual, corporation, company, association,
8 firm, partnership, society, joint stock company, or any other entity,
9 including any governmental entity or unincorporated association of
10 persons.

11 § 1702. Bar to liability. Assumption of the risk shall operate as a
12 complete bar to an action when the injured person:

13 (a) expressly, in writing or orally, voluntarily assumed the risk of
14 injury; or

15 (b) has knowledge of the risk, as proven by actions, statements, or
16 direct testimony, yet voluntarily undertook or continued the activity
17 that constituted exposure to the risk.

18 § 1703. Limitation of liability. In cases not governed by section
19 seventeen hundred two of this article, but where reasonably prudent
20 persons should have realized the risk before exposing themselves to it,
21 assumption of the risk shall be considered as a factor in apportioning
22 fault.

23 § 1704. Knowledge of warning. In all cases involving products, struc-
24 tures, or services, where a warning has been provided to the plaintiff,
25 directly or indirectly, concerning the product, structure, or service,
26 including any warning required or approved by a federal or state govern-
27 ment body or regulatory agency, proof of such provision of the warning
28 will create a rebuttable presumption that the plaintiff knew of the
29 warning's content.

30 § 1705. Severability clause. If any clause, sentence, paragraph,
31 subdivision, section, rule or part of this article shall be adjudged by
32 any court of competent jurisdiction to be invalid, such judgment shall
33 not affect, impair or invalidate the remainder thereof, but shall be
34 confined in its operation to the clause, sentence, paragraph, subdivi-
35 sion, section, rule or part thereof directly involved in the controversy
36 in which such judgment shall have been rendered.

37 § 5. This act shall take effect immediately and shall apply to all
38 claims filed on or after such effective date.

SPONSORS MEMO:

**NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Sec 1(e)**

BILL NUMBER: A1316

SPONSOR: Morelle (MS)

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to product liability actions, compliance with governmental standards, limited liability of persons jointly liable, assumption of the risk, and breach of express warranty; and to repeal certain provisions of the civil practice law and rules relating to limited liability of persons jointly liable

PURPOSE OR GENERAL IDEA OF BILL: To establish rules governing product liability actions, to statutorily define the doctrine of assumption of

risk, to modify existing provisions regarding joint and several liability making them applicable to all losses and eliminating the exceptions contained in that statute, and to establish certain standards of responsibility for manufacturers and sellers in New York State.

SUMMARY OF SPECIFIC PROVISIONS: Amends the Civil Practice Law and Rules by adding a new Article 14B, Product 'Liability Actions.

--Section 1414 sets forth definitions for Product Liability Actions.

--Section 1415 creates standards of responsibility for manufacturers and sellers in New York State.

--Section 1416 provides evidence of a post manufacture change by a manufacturer or a products seller is not admissible as evidence.

--Section 1417 provides that a manufacturer or seller is not liable following a modification or alteration of the product after it has left the possession and control of the manufacturer or seller.

--Section 1418 provides that a seller is not liable if the product was acquired and sold by him in a sealed container, or if he otherwise had no opportunity to inspect the product or to detect the defect.

--Section 1419 provides that a manufacturer will not be liable if ten years or more have elapsed since he had possession or control of the product.

--Section 1420 establishes when a manufacturer or seller shall be liable for an alleged failure to instruct.

--Section 1421 includes certain substantive rules in existing New York State case law relating to actions based on defective design.

--Section 1422 establishes standards for actions based on alleged breach of an express warrant.

--Section 1423 establishes a presumption regarding products which are manufactured and labeled in accordance with government standards.

--Section 1424 would bar recovery of punitive damages from a manufacturer or seller of a drug medical device, except in cases of fraud, where the drug or device is regulated or approved by the Food and Drug Administration.

Section 2 Repeals Sections 1600, 1602 and 1603 of the Civil Practice Law and Rules.

Section 3 Adds a new Section 1601 which modifies joint and several liability. If a defendant's liability is found to be 50% or less of the total liability, that defendant is liable for only his or her equitable share.

Section 4 Adds a new Article 17 which revises the doctrine of Assumption of the Risk.

JUSTIFICATION: Although much has been accomplished in recent years, there continues to be the need to take further steps to ensure that the ultimate solution to the liability crisis be long term in nature. The Second Report of the Governor's Advisory Commission on Liability Insurance (Jones 11) issues post 1986 session enumerates many pressing liability issues which still need to be addressed. This bill addresses many of those recommendations as well as additional changes designed to further alleviate a problem which threatens the economic vitality of our State.

Product Liability Reform:

While it is preferable that the tort law establishing the liability of product manufacturers and sellers be national in scope, it is becoming increasingly apparent that Congress is unable to resolve this plaguing problem. The Jones Commission recommends that -- lacking federal agreement -- it is in New York State's best interest to enact a package of product liability reforms for application in New York State.

The basic reforms in product liability law in this bill are necessary to limit the expanded liability which was created in Court decisions over the past two decades.

Applicability of Joint and Several Liability Modifications to Losses: In 1986, legislation was enacted which modified joint and several liability so that, in the case of non-economic damages, if the defendant was found to be 50 percent or less responsible for a tortious act he would pay only his/her share of the award. However, that modification does not apply to economic damages. In order to bring greater predictability and equity into the insurance market place and to further lessen the impact of "deep pocket" litigation, the modification of joint and several liability should be extended to all losses.

Assumption of Risk Doctrine:

An equitable assumption of risk doctrine would play an important role in reducing the spiraling liability costs being experienced by the tourism industry and others. Fairness dictates that one who voluntarily assumes or has knowledge of a risk and is then injured because of that risk should bear the consequence of his or her own behavior. In 1986 important inroads were made into the resolution of a problem which threatened to cripple our State's economy. The reforms in this bill would build on that work and would help to assure that the liability insurance problem is not allowed to once again reach the magnitude that it did in the past.

PRIOR LEGISLATIVE HISTORY:

A.3875/S.30333 of 1999/00.
A.7645 of 2001/02.
A.140 of 2003/04

EFFECTIVE DATE: Immediately