A STUDY OF OKLAHOMA'S "MANUFACTURERS' PRODUCTS LIABILITY DOCTRINE"

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PREFACE

This study attempts to determine the effects of the Oklahoma Supreme Court's decision in Kirkland v. General Motors and to explicate post Kirkland products liability case decisions, primarily of Oklahoma origin. This analysis is of major significance, particularly to businesses who, at the present, have no succinct explanation based on legal analysis of exactly what Kirkland has meant, means today and more particularly will mean in the future as courts have interpreted the Kirkland decision through decisions "handed down" over the past six years.

I wish to express my appreciation to my adviser, Dr. Herbert M. Jelley, Professor of Administrative Services and Business Education, and to the other members of my advisory committee, Dr. Joe W. Fowler, Dr. Jimmy Koeninger, and Dr. Thomas Karman, for their patience, scholarly excellence and for the opportunity to conduct a somewhat unique research effort.

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CHAPTER I

INTRODUCTION

"Manufacturers' Products Liability"

The year 1974 was an important one for business, business educators and consumers in the state of Oklahoma for it was that year that the Oklahoma Supreme Court decided the landmark case of Kirkland v. General Motors.[1] In that case, the court coined the phrase "Manufacturers' Products Liability" to refer to Oklahoma's products liability law. Essentially the products liability law adopted by the court in Kirkland is the Restatement of Torts II, § 402A version of strict liability in tort. The Oklahoma Supreme Court simply gave the law a new name. They also chose to adopt a somewhat more restrictive plaintiff's conduct defense which they called "assumption of the risk of a known defect." It appears that given a particular fact pattern negligence may be pleaded in addition to Manufacturers' Products Liability.[2] But, implied warranty is merged with Manufacturers' Products Liability.[3] Therefore, implied warranty is not available as a separate cause of action in Oklahoma except in situations where the Uniform Commercial Code (UCC) applies.[4] It appears that the UCC will only apply to persons who are specifically named as beneficiaries of Code warranties in UCC § 2-318.[5] In Hardesty v. Andro Corporation-Webster Division, a 1976 Oklahoma Supreme Court Case, Justice Lavender said, "We refuse to ex-

tend the protection of warranties to those without privity other than as statutorially provided."[6]

Black's Law Dictionary (5th Ed.) defines privity of contract as follows:

> That connection or relationship which exists between two or more contracting parties. It was traditionally essential to the maintenance of an action on any contract that there should subsist such privity between the plaintiff and defendent in respect of the matter sued on. However, the absence of privity as a defense in actions for damages in contract and tort actions is generally no longer viable.[7]

Most states, along with Oklahoma have enacted the "Alternative A" version of § 2-318 which reads:

> Sec. 2-318 (A). A seller's warranty whether express or implied extends to any natural person who is in the family or household of this buyer who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by the breach of the warranty. A seller may not exclude or limit the operation of this section.[8]

Also, there are cases appearing after Kirkland which extend the doctrine to bystanders[9] and to commercial lessors.[10]

Manufacturers' Products Liability doctrine applies prospectively to all cases to be tried after the issuance of the Kirkland mandate and may be applied in cases on appeal "where it would not prejudice the rights of the litigants."[11] "Manufacturer" is defined by the Kirkland decision to include "processors, assemblers, and all other persons similarly situated in processing and distribution."[12] Thus, the decision has a tremendous impact not only for consumers who now have a greater potential chance of recovery, but to businesses large and small who now must, more than ever, take precautions against possible products liability actions in this state. This decision and its ramifications should be studied and understood by business and consumer

educators, business students, and particularly personnel presently employed in the fields of marketing, manufacturing, and consumer affairs. To provide for such an understanding is the primary concern of this research effort.

Statement of the Problem

The major problem to which this study addresses itself is the determination of the effects of the Kirkland decision on the existing products liability law of Oklahoma and to make projections for the future by an analysis of post Kirkland decisions in trend setting cases since 1974. The problem of this study is one of major significance to many persons but especially to businesses who, at the present, have no succinct explanation based on legal analysis of exactly what Kirkland has meant, means today and more particularly will mean in the future as courts have interpreted the Kirkland decision through decisions handed down over the past six years. As business and consumer educators prepare students to serve in small and large business alike, they have a responsibility and a duty to inform them of the tremendous effect of products liability and where the firm now stands given the present and projected future of the law in this state. As part of solving the problem of this study, case analysis was used to determine the definition of the following terms and concepts as presently employed by the courts in products liability actions in Oklahoma: (1) "manufacturer," (2) "unreasonably dangerous," (3) the elements of a products liability cause of action, (4) defenses, (5) proof of defect, (6) validity of disclaimers, (7) the role of "foreseeable misuse," (8) comparative negligence and its potential role in products liability actions, and

(9) duty to warn (particularly in drug cases).

Objectives

Three major objectives can be identified within the framework of the general purpose of the study. They are:

1. To analyze existing products liability law as it exists on a national level and generally.
2. To analyze existing (and project therefrom) Manufacturers' Products Liability law as it exists in Oklahoma.
3. To present in one document a rationale for the significant appellate court opinions which have decided issues relating to the status of Manufacturers' Products Liability in this state.

Procedure

Since the major protion of this study required the analysis of cases of Oklahoma origin, extensive use was made of law reviews published by Oklahoma law schools, the Oklahoma Bar Journal, and the Oklahoma Reporter System. Also, the Federal Reporters 2d, Pacific Reporter 2d, CCH Product Liability Reporter, the Uniform Commerical Code and the American Digest System were heavily utilized.

Each relevant case appearing in the above listed journals and reporters was analyzed to determine the role of expressed judicial intent and the protection afforded the user, bystander and consumer, as well as the duty established therein for business and industry. These analyses were then grouped into divisions of Manufacturers' Products Liability law, e.g., the meaning of defective, the meaning of unrea-

sonably dangerous, etc. Consistencies and inconsistencies were examined in the judicial decisions regarding this emerging specialty of law.

ENDNOTES

[1]521 P.2d 1353 (Okla. 1974).

[2]McNichols, The Kirkland v. General Motors Manufacturers' Products Liability Doctrine - What's In a Name, 27 Okla. L. Rev. 347 (1974).

[3]Id at 374.

[4]See, Moss v. Polyco, Inc., 522 P.2d 622 (Okla. 1974); O'Neal v. Black & Decker Mfg. Co., 523 P.2d 614 (Okla. 1974).

[5]Hardesty v. Andro Corporation-Webster Division, 555 P.2d 1030 (Okla. 1976).

[6]Id at 1034.

[7]Black's Law Dictionary, 1079 (5th ed., 1979).

[8]12A O.S. 1971 §§ 2-101 et seq., § 2-318.

[9]See, Moss v. Polyco, Inc. 522 P.2d 622 (Okla. 1974); O'Neal v. Black & Decker Mfg. Co., 523 P.2d 614 (Okla. 1974).

[10]See, Coleman v. Hertz Corporation, 534 P.2d 940 (Okla. App. 1975); E. Dewberry v. G. La Follette and M. La Follette, d/b/a University Mobile Homes, 1979 CCH PROD. LIAB. REP. ¶ 8492 (Okla. 1979).

[11]Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

[12]Id at 1355.

CHAPTER II

THE LAW OF PRODUCTS LIABILITY GENERALLY

The term generally used to describe the law governing the tort liability of sellers and manufacturers of chattels to persons with whom they are not in privity of contract is products liability. The three possible theories of recovery for damage caused by products are negligence, strict liability and warranty (implied or expressed).[1] The first two theories of recovery are causes of action in tort, whereas the third is considered to be a contract cause of action. The seller's warranty had an historical basis in the tort law, but "gradually came to be regarded as a term of the contract of sale, express or implied, for which the normal remedy is a contract action."[2] Further, Prosser states "whether it be tort or contract, a breach of warranty gives rise to strict liability, which does not depend upon any knowledge of defects on the part of the seller, or any negligence."[3] The statutory sales law found first in the Uniform Sales Act and later in the Uniform Commerical Code, defines warranty as contract-oriented but the developing case law has tended to suggest a tort cause of action.

The Background of Products Liability

Originally, caveat emptor applied which means that the buyer assumed all risks of any defects existing in the purchased product. Later the manufacturer and seller were required to use due care (i.e., that of a reasonable, prudent man) to see to it that harm did not reach the

buyer. Later still, the Uniform Sales Act provided for a contract theory of recovery based on breach of an implied or expressed warranty. Today in all states except Louisana, the Uniform Sales Act has been superseded by the Uniform Commercial Code.

Next, the Uniform Commercial Code placed strict liability for the condition of the purchased chattel on the seller and manufacturer due to the implied warranties of merchantability (UCC§2-314) and fitness (UCC§2-315). The UCC provides that where consideration is extended to a supplier of goods he/she may be liable where they fail to make the goods safe for the purpose for which intended. Also, the liability may possibly extend to injured third persons in the area foreseen for the product's use and to third persons who use or buy the products.

As mentioned in Chapter I, UCC§2-318 provides specifically for recovery by certain "Third Party Beneficiaries of Warranties Expressed or Implied."

Recovery Under the Warranty Theory

As mentioned above, express warranty is a means of recovery in products liability law. Such warranties include any description of the product , any model or sample, or any promise or affirmation of fact made to the buyer by the seller.[5] The landmark case of Henningsen v. Bloomfield Motors, Inc.,[6] made generally possible recovery by a person using a product after receiving the buyer's consent, without the need to show privity of contract with the manufacturer. This case was an action to recover damages for personal injuries based on a theory of implied warranty of merchantability. Mrs. Henningsen, the plaintiff, was severely injured when the Chrysler her husband had purchased crash-

ed into a wall due to the malfunction of the steering gear. She sued Chrysler and the dealer, Bloomfield Motors. Despite contractual disclaimers of all other warranties expressed or implied, except for replacement of defective parts, the court held for the plaintiff. The holding and rule of law provided by this case is essentially that when a manufacturer and a dealer put a car into the stream of commerce and promote it as reasonably suitable for use, an implied warranty that it is reasonably suitable for use follows despite contractual disclaimers to the contrary.

Before this case, early common law concepts limited lawsuits of this kind to parties to the bargain. This court recognized that persons often buy products for the use of others and also that consumers are limited in their bargaining power with commercial concerns. Thus, the resulting implied warranty for consumer protection. Although this case was extremely important in that it did away with the privity requirement, strict liability in tort which developed later in the products area has reduced the importance of implied warranties of merchantability as a cause of action. Modernly, a cause of action may generally be pleaded either in contract for breach of implied or expressed warranty or in tort, either in negligence or strict liability, where applicable.

The Privity Concept and Negligence

Under the common law, privity of contract was required before negligence liability could be imposed on the manufacturer. Today, almost all jurisdictions do not view the lack of privity between the purchaser and the manufacturer as a defense to negligence liability. One justification of this application of the "MacPherson Doctrine" is the

shifting of the risk onto those who are in a better financial position to bear the loss.

Not only does the manufacturer have the foregoing duties, but the manufacturer also has the duty to warn of latent defects in his/her product even if not negligently manufactured.[8] Further, failure to warn adequately of improper design or failure to inspect or test adequately may lead to negligence liability.[9]

Strict Liability

Beyond causes of action in warranty and negligence the damaged consumer/user has another and more recent theory of recovery promulgated through judicial decision in the landmark California case of Greenman v. Yuba Power Prods., Inc.[10] In this case, the plaintiff Greenman sought to recover for personal injuries sustained when a power tool his wife had bought for him malfunctioned. Notice of breach of the express warranties made in the manufacturer's brochures was not made until ten and a half months after the injury. At trial, Yuba contended that Greenman did not give prompt notification of breach warranty as required by State law. Greenman introduced substantial evidence that his injuries were caused by the tool's defective design and construction. At the trial level Greenman won and Yuba appealed.

Justice Traynor of the California Supreme Court affirmed the lower court's decision and held that anytime an article is placed on the market by a manufacturer who knows the product will be used without inspection for defects, such manufacturer will be strictly liable in tort for any injury caused by the defect. Further, Traynor reasoned that the liability of the manufacturer is governed not by the law of contract warrant-

ies, but by the law of strict liability in tort. Thus, regardless of proof of negligence, contractual relatioship, or express or implied warranties manufacturers are strictly liable for injuries sustained when they place products on the market knowing they would be used without inspection. To make sure that the "cost of plaintiff's injury or loss will be borne by the manufacturer rather than the injured party who is virtually powerless to protect himself"[11] was a major policy reason behind Judge Traynor's landmark decision.

The concept of strict liability in tort appears in the Restatement of Torts II §402A which has been adopted by a majority of the American courts. (The restaters are a group of leading professors, lawyers, judges, etc. who make up the American Law Institute and issue a series of volumes "that tell what the law in a general area is, how it is changing, and what direction the authors think the change should take. . . "[12] The Restatement II §402 A reads

> (1) One who sells any product in a defective condition unreasonably dangerous to the user, or to his property, is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) The rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[13]

Application of Restatement II § 402A has led to strict liability in tort for any and all commercial interests who place a product or part of a product into the chain of commerce. This includes the component part maker, the manufacturer, wholesaler, broker, bailor, lessor, and so on. Such liability extends only to commercial "sellers " so, there-

fore, would not apply where a friend loans another a cup of sugar or a car but would apply where a demonstrator is loaned by a new car dealer or where an airplane is leased to a pilot. Prosser states that there is no reason to distinguish between those who sell products and those that rent them and implies that this will eventually become the prevailing view.[14]

Although many courts have failed to allow innocent bystanders to recover for injuries suffered due to breach of warranty, absent negligence, the trend of recent cases allows the innocent bystander to recover through the theory of strict liability in tort. The general view today is that §402A extends to bystanders and property damage even where no personal injury occurs. Economic loss is generally not recoverable in strict tort and is still treated as a warranty issue. But most courts allow recovery under strict tort for property damage to the product itself.

Courts have not extended strict liability for services but there is some confusion about the definition of a "service". For example, are the artichitect's plans a product or a service? Generally, the courts have been very reluctant to impose strict liability on professionals such as doctors, dentists or architects, arguing that the primary reason consumers deal with them is for their services and that accompanying products are ancillary. However, where "non-professionals" are concerned there may be a trend towards a wide use of strict liability recoveries. For example, liability was found in the 1969 case of Newmark v. Gimbel's, Inc. where a defective lotion was applied to the injured plaintiff's hair in a beauty parlor. In this case the court found no legal distinction between the sale of a product for use and the use of that product

on the person as a service at the store.[15]

Misrepresentation of the Product

Misrepresentation as a basis for imposing liability on the seller or manufacturer of chattels whether innocent, negligent, or intentional is another, although much less important, basis for recovery for injuries from defective products. The landmark case for this theory of recovery is Baxter v. Ford Motor Co.[16]

Baxter, the plaintiff was driving a car he had purchased when a pebble struck the windshield causing small pieces of glass to injure his eyes. Ford Motor Company, through its advertising had represented the windshield as being made of non-shatterable glass. Ford claimed that there can be no implied or express warranties without privity of contract and that warranties as to personal property do not attach themselves to and run with the article sold. Ford won at the trial level but Baxter appealed and the appellate court held that a manufacturer or retailer of a product is responsible in tort for all representations upon which the consumer must rely, given no effective means of testing the product, regardless of a contractual relationship between plaintiff and defendent. Thus, on appeal, Baxter received a judgment against Ford, the manufacturer, although he was only in privity with the retailer. The cause of action in this case was based on breach of an express warranty, but because of this leading decision and its effects, manufacturers and retailers are now held, almost without exception, to strict liability for their misrepresentations. The Restatement of Torts II §402 B holds that the manufacturer is liable for physical harm to a consumer when that harm is caused by the consumer's

justifiable reliance upon the manufacturer's misrepresentations, regardless of contractual relationship, fraud, or negligence. But the representation must be made with the expectation that it will reach the plaintiff and the plaintiff must actually rely on the representation in his use of the product if strict liability is to apply.[17]

In esssence, Restatement of Torts II 402 B extends protection formally reserv ed for very dangerous products, like drugs or explosives, to all products where the user depends on the manufacturer's or retailer's representations. The reason the effect is strict liability is because liability will occur regardless of privity of contract, negligence or fraud.

Section 402 B of the Restatement II of Torts says:

> One engaged in the business of selling chattels, who, by advertising, labels or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation even though (a) it is not made fraudulently or negligently, and (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.[18]

According to this rule of law, where adopted, strict liability will be applied to the seller even though the misrepresentation is innocently done.[19]

Products Liability Defenses

Regardless of whether the cause of action is based on warranty, negligence or strict liability, where the plaintiff shows he/she was injured by the product because it was defective and that it was defective when it left the defendent's possession,[20] then plaintiff will recover unless appropriate defenses are pleaded by the defendent. Defenses

to a products liability case may include misuse, intervening cause, disclaimers, contributory negligence, assumption of the risk and exclusions and limitations under the Uniform Commercial Code The appropriate defense depends on which cause of action the plaintiff is pursuing. That is, warranty actions have their own defenses, e.g., disclaimers and exclusions, just as negligence or strict liablity actions do. Generally assumption of the risk is not a good defense when treated as a form of contributory negligence but is perfectly good when used to mean a voluntary exposure to a known risk.[21]

Of course, the Uniform Commercial Code may protect the manufacturer where appropriate disclaimers, exclusions and limitations are used.[22] And, appropriate warnings, even where an unavoidably unsafe product is sold, will insulate the seller/manufacturer from liability. Regardless of the type of defect; manufacturing, design, or failure to warn, the appropriate defense properly pleaded can reduce or eliminate liability where the facts of the case make such a defense possible. Of course, most plaintiff's lawyers will plead as many of the three causes of action as possible, particularly negligence, since this may lead to greater damages. Likewise, the defense will generally plead every possible defense as an attempt to prevent or minimize liability. Whereas the above represents only a sketchy view of products liability law generally, we now will examine in more detail this emerging field of law as it has been interpreted and applied in Oklahoma.

ENDNOTES

[1]Prosser, Torts § 74, 641 (4th ed. 1971).

[2]Id at 635.

[3]Id at 637.

[4]See Noel and Phillips, Products Liability in a Nutshell, 13-14, 1974.

[5]Id at 2-213.

[6]32 N.J. 358, 161 A.2d 69(1960).

[7]Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791(1966).

[8]Haberly v. Reardon Co., 319 S.W. 2d 859 (Mo. 1958).

[9]Larsen v. General Motors Corp., 391 F 2d 495 (8th Cir. 1968).

[10]59 Cal.2d 57, 27 Cal Rptr. 697 377 P.2d 897(1963).

[11]Greenman v. Yuba Power Prods. Inc., 377 P.2d 897(1963).

[12]Black's Law Dictionary, 1180 (5th ed., 1979).

[13]See Restatement (Second) of Torts § 402A.

[14]W. Prosser, Torts § 74,679 (4th ed. 1971).

[15]54 N.J. 585, 258 A.2d 697 (1969).

[16]168 Wash. 456, 12 P.2d 409 (1932), 179 Wash. 123,35 P.2d 1090 (1934).

[17]See Restatement (Second) of Torts § 402B.

[18]Id.

[19]Ford Motor Company v. Lonon, 217 Tenn. 400, 398 S.W. 2d 240(1966).

[20]Kerr v. Corning Glass Works, 284 Minn. 115, 169 N.W. 2d 587 (1969)

[21]Pritchard v. Liggett and Myers Tobacco Co., 350 F2d 479 (3rd Cir. 1965).

[22]See UCC § 2-316.

CHAPTER III

KIRKLAND V. GENERAL MOTORS CORP.

The Supreme Court of Oklahoma adopted strict liability in tort for products liability in the most important case of Kirkland v. General Motors Corp.[1] But, they chose to call it Manufacturers' Products Liability which appears to be somewhat of a misnomer since certainly the manufacturer is not the only potential defendent, just as in other states. Justice Doolin wrote:

> It was Justice Traynor, who . . . gave this doctrine a label "Strict Liability in Tort," Greenman v. Yuba, supra; this theory or remedy we would adopt for Oklahoma, but would prefer to call it "Manufacturers' Products Liability".....[2]

Essentially, the version of strict liability in tort adopted by Oklahoma is the Restatement of Torts II, § 402 A with minor variations. This chapter is an attempt to point out the key points of the Kirkland decision. Later chapters represent an attempt to explicate later cases that have impacted on and affected Oklahoma's law of products liability.

Benita Kirkland who had been drinking at the time of the wreck claimed whe had been injured when the frontseat of her roommate's new car (a 1969 Opal) which she had borrowed, suddenly gave way. She claimed that this caused her to fall backward, lose control of the wheel and collide head-on with an oncoming vehicle after crossing the median of Interstate 44.[3] At trial Ms. Kirkland testified:

> After I accelerated, I was driving casually along, very slowly, down the Skelly By-pass and suddenly the Opal went out of con-

> trol on me. It seemed that I had no support behind me and I fell backward and I was looking at the ceiling and I did not know where I was going. I could not control the car.[4]

Ms. Kirkland brought suit against the manufacturer for breach of an implied warranty of fitness. She made no attempt to assert a strict tort liability theory, nor did she plead allegations of negligence. General Motors entered the seat into evidence and used expert testimony to show why the seat was not defective. Also, as an affirmative defense, General Motors alleged assumption of the risk due to misuse of the product and contributory negligence, based on driving and drinking and excessive speed.[5]

At the trial level, even though the case was tried only on an implied warranty cause of action, instructions were given to the jury upon both assumption of the risk and contributory negligence. The jury awarded the defendent the verdict. Ms. Kirkland appealed and the Supreme Court of Oklahoma affirmed the trial court but chose to rely upon the doctrine of Manufacturers' Products Liability. The court held that the new doctrine would apply to all cases tried subsequent to the Kirkland holding and also to cases on appeal where the rights of the litigants would not be prejudiced.[6] The Supreme Court found that the jury instructions of contributory negligence and assumption of the risk were harmless error, although incorrect, since a properly instructed jury could reasonably have found that the plaintiff's drinking either constituted misuse of the product or was the sole cause of the accident and either of these would be good defenses under Manufacturers' Products Liability.[7] According to Justice Doolin, in the holding of the Kirkland case,

> Among other things, we find (1) that Oklahoma's Manufacturers'

> Products Liability substantially tracks the language of Restatement (Second) of Torts, § 402 A; (2) that recent case law rejecting the requirement that a product be "unreasonably" dangerous will not be followed; (3) that a two-year statute of limitations measured from the date of injury applies; (4) that the doctrine extends to any user, consumer, or third party injured as a result of the product's defect; (5) that a plaintiff may prove a defect by circumstantial evidence but that a defendent may rebut the inferences so raised by evidence of his due care and quality control; (6) that a plaintiff may join two or more defendents but must prove particular individual responsibility for the defect unless he can show joint responsibility; (7) that neither the defenses of assumption of risk or contributory negligence nor the new comparative negligence statute apply to Manufacturers' Products Liability; and (8) that the "defenses" of abnormal or misuse of the product and what the court calls "voluntary assumption of a known defect" do apply.[8]

Syllabus 1 of Kirkland states that "One who sells any product in a defective condition unreasonably dangerous to the user or consumer is strictly liable for the physical harm to his person or his property caused thereby."[9] Although the new doctrine is called Manufacturers' Products Liability, the Supreme Court explicitly stated in the decision where the name was "coined" that "Manufacturer" was to include "processors, assemblers and all other persons similarly situated in processing and distribution."[10]

Syllabus 4 of Kirkland defined "unreasonably dangerous" as requiring that "the article sold must be 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."[11] This position is essentially that of comment (i) of the Restatement of Torts II § 402 A which asserts that the reasonable consumer's expectation is the key to determining whether a product is unreasonably dangerous/defective. Comment (i) reads "dangerous to an extent beyond that which would be contemplated by the ordinary consumer

who purchases it."[12]

Syllabus 3 of Kirkland describes the elements of the cause of action under the new doctrine. The plaintiff must prove that

> the product was the cause of the injury. . .the defect existed in the product at the time it left the control of the manufacturer, assembler or supplier. . .and the defect made the product unreasonably dangerous to the user or his property.[13]

The Kirkland opinion explicitly refused to adopt recent case law that rejected the element of unreasonably dangerous, e.g., Cronin v. J.B.E. Olson Corp. . .[14]

Further, the Kirkland opinion holds that

> The theory of implied warranty for injuries to persona heretofore existing in this jurisdiction is merged into the theory and doctrine of manufacturers' products liability, and accept for Uniform Commercial Code application, is no longer viable.[15]

Also, the court did not discuss disclaimers but quotes Restatement of Torts II § 402 A, comment (m), which does not allow disclaimers of strict tort.[16] The court in Kirkland did not discuss misuse but two years later adopted a liberal view of the misuse doctrine in Fields v. Volkswagen of America, Inc.[17] Whereas the court in Kirkland did not treat the issues of drinking and speeding as foreseeable misuse they did so regarding drinking in Fields and held that because drinking was foreseeable misuse it was no defense where a defect in the vehicle was also a cause of plaintiff driver's injuries.

As mentioned earlier, the Oklahoma comparative negligence doctrine[18] was held not applicable to manufacturers' products liability. The reason given by the Kirkland court was that the new doctrine is not to be treated like negligence and the statute is limited in its terms to negligence actions. But, it seems likely that comparative negligence may easily be applied in future Oklahoma cases as it seems the present

trend of cases nationally is to apply it, e.g., Dippel v. Sciano,[19] Hagenbuch v. Snap-On Tools Corp.,[20] Butaud v. Suburban Marine,[21] and Hopkins v. General Motors,[22] all of which apply comparative negligence to strict tort. Also, see Daly v. General Motors, Inc.[23] Further, California recently held that "pure" comparative negligence principles apply to a strict tort products liability case.

The discussion above has primarily been an attempt to discuss the major points of the landmark Kirkland decision. The following chapters contain analysis of trend setting post Kirkland decisions and projections for the future of Oklahoma's Manufacturers' Products Liability law. The reader will find the various cases and discussions grouped into major problem areas chapter by chapter such as Chapter IV "Proof of Defect."

ENDNOTES

[1]Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

[2]Id at 1361.

[3]Id at 1356.

[4]Id at 1356.

[5]Id at 1353, 1356, 1357.

[6]Id at 1368.

[7]Id at 1367.

[8]Id at 1356.

[9]Id at 1353.

[10]Id at 1353.

[11]Id at 1354.

[12]See Restatement (Second) of Torts § 402 A, at 347 (1965).

[13]521 P.2d 1353, 1355 (Okla. 1974).

[14]501 P.2d 1153 (Cal. 1972).

[15]521 P.2d 1353, 1357 (Okla. 1974).

[16]Restatement (Second) of Torts § 402 A, at 347 (1965).

[17]555 P.2d 48 (Okla. 1976).

[18]23 O.S. §§11 & 12.

[19]155 N.W. 2d 55 (Wisc. 1967).

[20]339 F. Supp. 676 (D.N.H. 1972).

[21]555 P. 2d 42 (Alas. 1976).

[22]548 S.W. 2d 344 (Tex. 1977).

[23]575 P. 2d 1168 (Cal. 1978).

CHAPTER IV

THE MEANING OF "DEFECTIVE"

As mentioned earlier in Chapter III, the Kirkland court defined "defective" as unreasonably dangerous in Restatement (Second) of Torts § 402 A Comment (i) language:

> The article sold must be 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.[1]

By choosing such a definition of defective, the Kirkland court refused to follow the 1972 decision of the California Supreme Court in Cronin v. J.B.E. Olson Corp.[2] which rejected the § 402 A "unreasonably dangerous" element and opted for a jury instruction to be phrased in terms of Judge Traynor's orignial Greenman terminology.[3] In Cronin, a "safety hasp" made of very porous metal, used to hold bread trays in place gave way when the bread truck was involved in an accident allowing the trays to hit the driver in the back and force him through the windshield.[4] The California Supreme Court's rejection of "unreasonably dangerous" in Cronin has been followed by an appellate court in New Jersey in the case of Glass v. Ford Mtr. Co.[5]

In a scathing criticism of California's rejection of the "unreasonably dangerous" element Dean Keeton claimed that without this element there would be confusion and administrative difficulties. Keeton also expressed concern that the ordinary consumer's expectations might become too important and could be the exclusive factor to be

considered even in a situation where the plaintiff knew of the danger and even in cases where the defect was not one of manufacturing, but one of design.[6] In fact, in two of the earliest product liability cases in Oklahoma, both decided in the same year and on the same day as Kirkland, 1974, it seems the Oklahoma court did just as Keeton feared. That is, they may have been led to overemphasize the Comment (i) "standard of proof" of defectiveness. Each of these cases, first Atkins v. Arlan's Dept. Store, Inc. and then Seay v. General Elevator Co. will be discussed below.

Atkins v. Arlan's Dept. Store (1974)

In Atkins v. Arlan's Dept. Store,[7] an action was brought against the manufacturer and the retailer of a lawn dart game, when a minor sustained accidental injuries when he was struck in the eye by a dart thrown by another minor. The plaintiff was the minor's father who sued individually and as next friend of his son.[8]

Plaintiff proceeded on three legal theories: (1) strict liability in tort; (2) breach of warranty; and (3) negligence. The plaintiffs alleged that the injured minor was struck in the eye by a lawn dart, which is a thirteen inch metal shaft with a sharp protrusion, when another boy threw the dart into a vertical arc approximately ten feet high and it fell behind the thrower. The injured youth was hit when he looked up in response to a warning.[9]

It was alleged, by the plaintiff, that the lawn dart possessed the inherently dangerous capability of penetration of the human body and the game was therefore unsafe for its intended use.[10] Thus, the plaintiffs argued the defendent manufacturer manufactured and designed

an inherently dangerous product while at the same time expressly and impliedly warranting the Lawndart game could be played with safety.[11] Also, the defendents either faled to test and discover the dangerous properties of the lawn dart or already knew of its danger and failed to label the Lawndart game with a warning of such danger. Also, the plaintiffs alleged the defendents were negligent in selling the game in toy departments as a children's game.[12]

The trial court sustained the defendents demurrers and dismissed the cause of action. On appeal, the Court of Appeals, Division No. 2, reversed and remanded which led to acceptance of the case before the Oklahoma Supreme Court. The latter held that the plaintiff-appellants pleadings failed to state a cause of action against the defendents since they failed, inter alia, to show that a defect in the design or manufacture of the dart was the proximate cause of the dart striking the injured minor.[13]

In rendering such a holding the court said:

> There are many toys and playthings, perfectly harmless and inoffensive in themselves, but whose common use can be perverted into a dangerous use or design, and there are very few of the most harmless toys which cannot be used to injure another. The dart's propensities to cause unjury is demonstrated by the injury sustained but the fact that an injury was sustained does not necessarily mean that the manufacturer or retailer are liable for those injuries.[14]

Thus, in this design defect application of Manufacturers' Products Liability the lawn darts were not determined to be defectively designed because they were not dangerous beyond the extent contemplated by the ordinary consumer. This type holding could be also expected where a knife, designed to be sharp, cuts a consumer or where a baseball bat, designed to be heavy and swung hard, accidentally causes

a concussion in a baseball player.

Seay v. General Elevator Co. (1974)

In Seay v. General Elevator Co., [15] a design defect case, the plaintiff was a 63 year old arthritic lady who was personally injured when as an elevator passenger the elevator's outer hallway doors closed in an unduly fast manner on her right heel. Plaintiff said she was injured when she fell after following the other passenger out of the elevator. The evidence did not show she made any attempt to stop the elevator from closing on her even though she had ridden the same elevator before and had suffered a previous encounter with the doors or similar ones in the same building with no injury in the past. Further, a stop button on the elevator that, when pushed, would stop the doors from closing was not used by the plaintiff. She also had not attempted to hold the doors apart by pushing upon the rubber leading edge of either of the center-closing elevator doors (as distinguished from the elevator's outer hallway doors) which contained a safety device which would open the doors when the leading edge was pushed. The evidence showed others had done this for her in the past but that she had not known that it was the rubber edge on the inside door that was used to hold the doors open. There was no such safety device on the outer elevator hallway doors as is typical with United States manufactured elevator doors.

The plaintiff alleged a cause of action in Manufacturers' Products Liability against the defendent for failing to design, manufacture and install the elevator in a manner whereby it would be reasonably fit for the purposes for which it was to be used. (Plaintiff's

cause of action against another defendent was based on alleged negligence). Defendent denied fault in installation, manufacture and design of the elevator. In defense they alleged the negligence of the plaintiff and called such negligence the proximate or contributing cause of the accident and injury. That is, defendent claimed plaintiff was negligent in failing to stop the door with her hand by pressing the safety edge of the door and argued she caught her heel between the floor of the elevator and floor of the building which caused her to fall when she attempted to free the heel and shoe.

Citing Kirkland, the Oklahoma Supreme Court held that the plaintiff's evidence failed to establish a cause of action in products liability against defendent because the absence of the extra safety device on the outer door was not an unreasonably dangerous design to the plaintiff if she had used the door in the way it was intended to be used.[16]

In each of the above design defect cases, the Oklahoma Supreme Court stressed the ordinary consumer's expectations regarding the danger even when it appears obvious the particular plaintiff actually had knowledge of the danger. Professor McNichols, in his comments on the two cases above writes

> One hopes that in future cases the court will not be led to overemphasize its Comment (i) standard of proof of defectiveness, especially in defective design cases. Narrowly or exclusively applied, the test reduces to this: a product which is perhaps still on the market because it has not yet been regulated off the shelves or into a different configuration is not defective simply because everyone knows it is dangerous. At least some further questions ought to be asked in determining whether a product like Lawndarts was unreasonably dangerous as marketed.[17]

McNichols then cites a Texas intermediate appellate court case,[18] Metal Window Products Co. v. Magnusen,[19] in which the plaintiff had

walked through a patio closed sliding glass door at a cookout. The plaintiff had been through the door several times and the same type door was used as a rear door, as it was in this fact pattern, in all other apartments of the building. At the trial level the plaintiff had won on charges of strict liability and negligence theories through his claims that the door was defectively designed and marketed due to the lack of warnings or decals so people could tell when it was closed. The appellate court reversed, holding that the door was not unreasonably dangerous as a matter of law.

McNichols cited and quoted from the above case in introducing Dean Keeton's illustration of the type of questions which should be asked by the courts and juries in determining the issue as seen in cases such as Atkins v. Arlan's Dept. Store and Seay v. General Elevator Co. In commenting on the decision on appeal of Metal Window Products Co., Keeton says:

> Three factors were stressed - the utility of transparency, the obviousness of the danger, and the ease with which users could supply decals to guard against the obvious risk involved. The desire for a view, the gracious and spacious concept and the feeling that transparency gives to being outdoors and yet indoors are aesthetic considerations that cause people to want glass doors, even with the risk that is inherent in them. I would hope that decisions of this nature will produce instructions to the jury asking the jury to make this kind of evaluation of products, and that trials are simplified (thereby). . . (Citation omitted.)[20]

Such common sense approach seems to have become somewhat more the norm in later Oklahoma cases.

Davis v. Fox River Tractor Co. (1975)

In Davis v. Fox River Tractor Co.,[21] a design defect case, the plaintiff sued for injuries under Oklahoma's Manufacturers' Products

Liability doctrine when he sustained injuries after slipping off the tailgate of a dump truck while trying to descend from it. He fell into an open hopper on a forage blower into which grain from the tilted truck was being placed so it could be fed into a fan and blower.[22] Although the plaintiff's shoes were slippery, he was exhausted when the accident happened, and the danger was obvious. The Oklahoma District Court and on appeal the United States Court of Appeals (10th Circuit) ruled against the defendent.[23]

The defendent was the manufacturer of the forage blower and argued on appeal that the trial court had erred in failing and refusing to rule that the evidence did not substantiate the tests for Restatement (Second) of Torts § 402 A.[24] Citing Kirkland and the Oklahoma Supreme Court's emphasis on Comment (i) of § 402 A the court said:

> We are not, of course, saying that a manufacturer is an insurer. . .(3) Is the fact that these defects were obvious a factor which diminishes its legal dangerousness as the defendent-appellant contends? If a device is dangerous to life and limb to the degree that no amount of care on the part of the user can overcome the defect so as to prevent injury, the obviousness does not alleviate the danger. We have difficulty seeing how the knowledge of the dangerousness can alleviate the dangerous condition inasmuch as the performance by plaintiff of his assigned tasks subjected him to injury regardless of the care exercised.
>
> We are of the opinion that the manufacturer cannot escape liability by contending that the defect was obvious where, as here, knowledge of the highly hazardous condition cannot serve to prevent the injury since the plaintiff-appellee must work.[25]

The appellate court also held it was not error for the trial court to admit evidence that the plaintiff's employer, after the accident, borrowed a similar machine to finish the plaintiff's job. The employer welded a grid onto it to make it safer and the result was not a defective machine, which the defendent-appellant implied, but one

which allowed the employer to load more than a million pounds of grain into a silo, despite the inexpensive addition of the safety device. This court allowed such evidence and held it refuted the defendent-appellant's contention that the machine could not perform if a protective device of such a type with small enough grids to prevent injury were used. In fact, the entire case turned on the fact that the hopper did not have a screen on it to prevent persons from coming into contact with the augers, within, and incurring injury such as the plaintiff sustained.[26] The appellate court, after examining evidence of plaintiff's mechanical engineer expert witness presented at the trial level, said:

> (2) In determining whether a machine is defective in design, the jury is entitled to weigh the ease of construction of a safety device against the magnitude of threatened harm in not constructing it. If the latter is of great magnitude and the former is relatively inconsequential, the trier may determine that the machine was defectively designed. The jury so found.[27]

Thus, the 10th Circuit Court affirmed the liability of the forage machine manufacturer and held that adequate evidence was presented showing that a protective shield on the machine was necessary for safety and could be designed and installed without reducing the machine's efficiency. The result was a finding of a design defect. Further, the design was still found to be defective even though the danger would be obvious to the ordinary consumer in a situation where the user is subjected to injury from the dangerous condition in performing his/her assigned tasks even where utmost care is used.

Berry v. Eckhardt Porsche Audi, Inc. (1978)

In Berry v. Eckhardt Porsche Audi, Inc., [28] the cause of action was brought by the acting administrator of the estate of the deceased driver of a used car purchased by the deceased one week prior to the accident from the defendent-appellee automobile dealer. The plaintiff contended that if the seat belt warning buzzer had not been disconnected when the car was purchased at the time of the accident, the deceased, who ultimately took his own life, would have fastened the belt and consequently sustained much less serious injuries.[29]

The trial court sustained the defendent's demurrer to the plaintiff's petition on the grounds it did not state a cause of action. The suit was dismissed after the plaintiff chose to stand on his demurrer. After the plaintiff appealed the Supreme Court of Oklahoma affirmed the District Court.

The plaintiff's cause of action was primarily one of negligence arguing that the defendent failed to properly inspect the auto before it was sold. On appeal the plaintiff-appellant argued his petition also stated a cause of action in Manufacturers' Products Liability. Citing Kirkland, the court pointed out that the decision

> stated that to make the product "unreasonably" dangerous, the defect must have made the product dangerous to an extent beyond that which would be contemplated by the purchaser with ordinary knowledge as to its characteristics. We do not believe this element was adequately pleaded and without such allegation the petition did not state a cause of action.[30]

Next, the Supreme Court of Oklahoma cited and agreed with Marshall v. Ford Motor Company, 446 F.2d 712 (10th Cir. 1971), where it was argued that Ford should have warned of the consequences of nonuse of seat belts. Applying Oklahoma law, the circuit court held

that no duty to warn of the consequences of nonuse of seat belts could be placed on an automobile manufactuer in a day and age when the function of seat belts is general knowledge.[31]

Then, they cited Nicholson v. Tocher 512 P.2d 156 (Okla. 1973) where the court held a defendent is under no duty to warn of obvious dangers. Thus, Judge Doolin held that the plaintiff's allegation that the auto was sold with an inoperative seat belt buzzer did not state a cause of action in Manufacturers' Products Liability or negligence and no warning was needed since the ordinary consumer knows the danger of not wearing seat belts and since the product was not determined to be unreasonably dangerous.

Stucky v. Young Exploration Co. (1978)

In Stucky v. Young Exploration Co.,[32] Larry Mack Stucky, by and through his guardian, Janet Stucky, brought a cause of action in Manufacturers' Products Liability for personal injuries resulting from an accident caused by failure of a steering mechanism. There were multiple defendents but the defendent of concern for our purposes was International Harvester Company. The plaintiff appealed to the Oklahoma Supreme Court from an order of the trial court which sustained a motion for summary judgment in favor of defendent International Harvester Company, manufacturer of the truck involved in the accident in which injuries occurred.

The Supreme Court of Oklahoma held that the motion for summary judgment by International was properly sustained. Citing Kirkland the court said:

> To maintain a cause of action under manufacturers' product liability, the plaintiff must prove the product was the cause

> of the injury, a defect in design or otherwise existed in the product at the time it left control of the manufacturer, and that the defect made the product unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it. Ordinarily under Kirkland a showing the product was subject to abnormal use precludes recovery under Restatement of Torts 2d § 402 A which requires before liability may attach, a product must reach the user or consumer without substantial change in the condition in which it is sold.[33]

According to the evidence, the truck was eleven years old and had 186,000 miles on it at the time of the accident. It had been modified twice and routine maintenance and adjustments had been made during the past eleven years. The plaintiff admitted the truck was regularly overloaded and that such overloading caused wear on the drag link at the spot where separation ultimately occurred. Testimony also showed that the truck was not dangerous when it left International's control, which is necessary under Oklahoma's application of § 402 A of Restatement (Second) of Torts. The modifications and wear and tear from 186,000 miles of use caused the danger.[34] Accordingly the court said:

> Nearly all automotive parts subject to friction wear out sometime. The fact a part wears out after 186,000 miles does not evidence that a defect existed when the truck left the manufacturer. Plaintiff submitted no evidence as to how long a suspension system should last with overloading present. A manufacturer does not undertake to provide a product that will never wear out, particularly if used in a continually abnormal manner. The doctrine of manufacturers' products liability cannot be said to require a manufacturer to build a failsafe product.
>
> The cab and chassis of the truck underwent substantial change after leaving International's control and admittedly. . .this weakened the evidence from which an inference could be drawn that a defect in the suspension system or its design existed, such as would support a finding by a jury the truck was defective when it left International's control.[35]

Thus, Manufacturers' Products Liability did not apply since the elements of such a cause of action were not met.

One result of the cases applying Manufacturers' Products Liability in Oklahoma is the stress upon the ordinary consumer's expectations as to the danger of the product. It seems the trend of the cases over the past six years has been one of "common sense" in that the courts have attempted to deal with the tension which exists between the inherent danger of certain products and the utility of such products in the marketplace.

Smith v. United States Gypsum Co. (1980)

In Smith v. United States Gypsum Co.,[36] the plaintiff in this Manufacturers' Products Liability case was injured in a fire and explosion from vapors emitting from the adhesive he was using while paneling his bathroom. Defendents, appellents before the Oklahoma Supreme Court, are the manufacturers and distributors of Wal-lite, the adhesive product which exploded. The court, in its opinion first quoted Kirkland's elements of the prima facie case for Manufacturers' Products Liability[37] stressing that "unreasonably dangerous is defined 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.'"[38] The Smith court said:

> There is no question the Wal-lite exploded, probably due to ignition of the vapors by the electric fan. But was the proximate cause an unreasonably dangerous product due to defective design and inadequate warnings, or was it plaintiff's ignoring the warnings on the can?
>
> If a product is potentially dangerous to consumers, a manufacturer is required to give directions or warnings on the container as to its use. If these warnings cover all foreseeable use and if the product is not unreasonably dangerous if the warnings and directions are followed, the product may not be defective in this respect. If warnings are unclear or inadequate to apprise the consumer of the

> inherent or latent danger, the product may be defective; particularly where a manufacturer has reason to anticipate danger may result from the use of his product and the product fails to contain adequate warning of such danger, the product is sold in a defective condition.
>
> Foreseeability as applied to manufacturers' products liability is a narrow issue. A manufacturer must anticipate all foreseeable uses of his product. In order to escape being unreasonably dangerous, a potentially dangerous product must contain or reflect warnings covering all foreseeable uses. These warnings must be readily understandable and make the product safe. Foreseeability as used here is not to be confused with foreseeability involved in the concept of proximate cause under a negligence theory.[40]

The Oklahoma Supreme Court affirmed the lower court's decision because they found there was sufficient evidence that the warnings on the Wal-lite did not prevent the product from being unreasonably dangerous and because the use of the product by the plaintiff was one that the defendent could reasonably foresee and therefore does not qualify as the defense of "misuse for an unforeseeable purpose" which is a defense under Manufacturers' Products Liability.

ENDNOTES

[1]521 P.2d 1353, 1362, 1363 (Okla. 1974).

[2]8 Cal. 3d 206, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

[3]McNichols, "The Kirkland v. General Motors Manufacturers' Liability Doctrine - What's in a Name," 27 Okla. L. Rev. 347, 356 (1974).

[4]Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 206, 501 P. 2d 1153, 104 Cal. Rptr. 433 (1972).

[5]123 N.J. Supre. 599, 304 A. 2d 562 (N.J. App. 1973).

[6]Keeton, "Product Liability and the Meaning of Defect," 5 St. Mary's L.J. 30 (1973).

[7]522 P.2d 1020 (1974).

[8]Id at 1020.

[9]Id at 1021.

[10]Id at 1021.

[11]Id at 1021.

[12]Id at 1021.

[13]Id at 1022.

[14]Id at 1022.

[15]522 P. 2d 1022 (Okla. 1974).

[16]The court affirmed a jedgment against the other defendent charged with negligent maintenance of the elevator. The Supreme Court reversed the Court of Appeals Division No. 2 which had overruled the trial court's approval of the defendents demurrer to the evidence of the plaintiff. Id at 1023.

[17]McNichols, "The Kirkland v. General Motors Manufacturers' Products Liability Doctrine - What's in a Name," supra note 3 at 360.

[18]Id at 360.

[19]485 S.W. 2d 355 (Tex. Cir. App. 1972).

[20]Keeton, "Product Liability and the Meaning of Defect," supra note 6, at 38.

[21]518 F. 2d 481 (1975).

[22]Id at 482.

[23]Id at 486.

[24]Id at 483.

[25]Id at 485.

[26]Id at 482.

[27]Id at 484.

[28]578 P.2d 1195.

[29]Id at 1196.

[30]Id at 1196

[31]Id at 1196.

[32]586 P.2d 726 (1978).

[33]Id at 727.

[34]Id at 731.

[35]Id at 731.

[36]Okla. Bar J.: p. 53 q. Vol. 51.

[37]Id, p. 532.

[38]Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974).

[39]Smith, supra at 532.

[40]Smith, supra at 532-533.

CHAPTER V

PROOF OF DEFECT

Brown v. Ford Motor Co. (1974)

Brown v. Ford Motor Co.[1] was an action for wrongful death brought against a pickup manufacturer originally in state court, but removed to federal court. The court of Appeals held that no liability could be imposed on the manufacturer based on a claim that a defective mechanism caused the deceased to fall to the ground and sustain a fatal head injury. The plaintiff was Geneva Brown, wife of the deceased. The complaint alleges the deceased was attempting to step up on the tailgate of a pickup and the tailgate came unlatched and the deceased was thrown to the ground. The result was that the deceased sustained injuries to his head causing his eventual death.[2] Plaintiff's claim was that the tailgate's locking device was defectively manufactured and installed, constituting a breach of implied warranty of fitness. In holding for the defendent manufacturer on appeal before the United States Court of Appeals (10th Circuit), the court held,

> To recover, appellant must present evidence that the tailgate was defective when manufactured, that such defect rendered the tailgate unsafe for its intended use, and that the defective tailgate proximately caused the deceased's injuries. The record before us, however, discloses that no genuine issue exists on any of the material facts. We believe summary judgement is proper here.[3]

Gates v. Ford Motor Co. (1974)

In Gates v. Ford Motor Co.,[4] before the United States Court of Appeals (10th Circuit) the plaintiff-appellant Patricia Gates brought suit against appellee Ford Motor Company for personal injury and wrongful death of of her husband. The plaintiff's claim was that the tractor was defectively designed, constituting negligence, strict liability and a breach of implied warranty of fitness and resulting in personal injury and wrongful death and personal injury of her husband.[5]

After considering the facts, such as the age of the tractor, at least 23 years of age, the changing ownership and any modifactions, the court held that no defect was proved as a matter of law just because the tractor overturned and killed the operator. Thus, the rule of law from this case is that proof of injury is not proof of defect. The court said

> To recover, appellant necessarily must establish that the tractor was defective when manufactured, that such defect rendered the tractor unsafe for its intended use, and that the defective tractor proximately caused the deceased's injuries.[6]

The court came to no such conclusion.

Northrip v. Montgomery Ward & Co. (1974)

In Northrip v. Montgomery Ward & Co.,[7] the plaintiff brought an action against the seller and manufacturer for damages allegedly resulting from the explosion of a battery which destroyed and damaged the purchaser's equipment. The plaintiff alleged that as he tapped lightly on the cables, the battery exploded, causing a fire that destroyed and damaged his equipment. The District Court, Atoka County, entered summary judgment for the defendent and the buyer appealed. Justice Doolin, for

the Oklahoma Supreme Court, reversed and remanded holding that material issues of fact existed as to negligent or defective construction of the battery. A key point of this appeal was that strict liability, adopted in Oklahoma in 1974, was not available to the buyer in his action against the manufacturer and seller of a battery which allegedly exploded, caused a fire, and destroyed and damaged the buyer's equipment in 1969.[8]

Green v. Safeway Stores, Inc. (1975)

In Green v. Safeway Stores, Inc.,[9] the plaintiff brought an action against the owner of a store to recover for injuries suffered when a soft drink she had purchased at the store exploded. After the District Court rendered jugment for the plaintiff, the store owner appealed to the Court of Appeals, Division No. 2 which affirmed. The store owner brought certiorari and Justice Irwin of the Oklahoma Supreme Court reversed both the trial court and the court of appeals.

Although the trial occurred before Kirkland, Kirkland was prospective and referred to by the Supreme Court in this case in response to appellee's brief where she claimed that in view of the pleadings and evidence the rules set forth in Kirkland were applicable. The Supreme Court found no reason why Kirkland should not be dispositive of the appeal.[10] In a somewhat confusing dissent, Vice Chief Justice Hodges said

> . . .the carton was not introduced, and that the record is barren of any evidence that the bottle fell out of the carton because of any defective condition. Although the opinion cites Kirkland . . .it declined to apply Kirkland as authority for proof of a defect by circumstantial evidence. . . .Under the strict liability theory, plaintiff need only show that the defect existed at the time of sale and delivery and that

> no substantial change occurred thereafter. The object of the proof is the same as in "res ipsa loquitur" and the methods of proof are similar. There is no indication that the questions of circumstantial evidence and inferences from the facts are to be dealt with in any matter different from negligence. However, the inferences from circumstantial evidence which are the core of the doctrine of res ipsa loquitur are no less applicable to strict liability.[11]

Again referring to Kirkland later in the dissent, Justice Hodges said "The court specifically decreed that the adoption of such remedy does not infer that proof of the injury is proof of the defect or raise any presumption of a defective article or shift the burden to the defendent."[12]

Kimbrell v. Zenith Radio Corp. (1976)

In Kimbrell v. Zenith Radio Corp.,[13] a Manufacturers' Products Liability action was brought by a home owner and her insurer against the manufacturer of a television set which was allegedly defective in design, material and workmanship and allegedly was the cause of extensive fire damage to the plaintiff's home. At the conclusion of the plaintiff's case, the trial court sustained the defendent-appellee's demurrer to the evidence. On appeal the Supreme Court of Oklahoma affirmed the trial court ruling that the evidence failed to trace the alleged defect to the manufacturer[14] which is of course a necessary element for the prima facie case of Manufacturers' Products Liability.

The fire in question occurred on February 8, 1973, and other evidence at trial showed the television was purchased sometime between 1960 and 1965. Also, it was shown that certain repair work had been done, some professionally and some by the plaintiff's father, during the years since the television was bought.[15]

Referring to the elements of the prima facie case for

Manufacturers' Products Liability as set forth in Kirkland: "Plaintiff must prove that the defect existed in the product if the action is against the manufacturer, at the time the product left the manufacturer's possession and control"[16] the court said

> The evidence at the trial was sufficient to enable the jury to find that a defect in the television was the cause of the fire, in that the television set with its defect was dangerous to an extent beyond which an ordinary consumer with common knowledge could contemplate.
>
> The evidence did not, however, so clearly establish that the defective, crimped wire existed in the television set at the time the television left the manufacturer.[17]

Quoting from Kirkland once more

> Although the manufacturers' products liability for injuries caused by defective products described in this opinion is neither grounded in negligence or breach of implied warranty, responsibility for the defect must still be traced to the proper Defendent.[18]

Thus the Oklahoma Supreme Court held that the trial court's action sustaining the demurrer to the evidence was proper since the defect was not traced to the defendent-manufacturer - a necessity in Oklahoma's application of Restatement (Second) of Torts § 402A.

Moor v. Babbit Prod. Inc. (1978)

In Moor v. Babbit Prod. Inc.[19] the plaintiff sued for personal injuries to her face and eyes which she received resulting from the explosion of a can of Acme Chlorinated Lime, a cleaning compound. Plaintiff alleged negligence, implied warranty and strict liability in tort. The defendents moved for the plaintiff to produce the can she claimed had exploded or in the alternative for dismissal. It was beyond the capability of the plaintiff to produce the can because the testing company she had delivered the can to had inadvertently misplaced, destroyed or lost it.[20] Nevertheless, the trial court

dismissed the action.

The plaintiff then appealed to the Supreme Court of Oklahoma arguing that she should be permitted to prove her case without production of the can citing Kirkland for the proposition that a defect in a product may be proved by circumstantial evidence.[21] The court cites the United States Supreme Court case of Societe Internationale, Etc. v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 1255 (1958) where, as in this case, the Court issued a pretrial production order to present the evidence and through no fault, willfullness or bad faith of the plaintiff there was an inability to comply. The Oklahoma Supreme Court in Moor adopted the test of Rule 37 of the Federal Rules of Procedure 28 U.S.C.A. as interpreted in Societe. According to the Oklahoma Supreme Court "Our discovery statutes 12 O.S. 1971 §§ 548, 549 are similar to Rule 37 of Federal Rules of Civil Procedure 28 U.S.C.A." The test referred to above, and as it applied to this topic, essentially is that circumstantial evidence may be enough for a Manufacturers' Products Liability cause of action when it has been shown that failure to produce the actual evidence of the defective product has been due to inability, and not to willfullness, any fault of the plaintiff or bad faith.

Randolph v. Collectramatic, Inc. (1979)

In Randolph v. Collectramatic, Inc.[23] the plaintiff filed an action in state court seeking damages from Collectramatic for injuries he allegedly sustained while cooking with a pressure cooker which exploded and which was manufactured by defendent. Randolph, the plaintiff, argued the cooker was defectively designed and unreasonably dangerous

since it lacked proper warning devices and safety characteristics. The complaint also stated causes of action in negligence, warranty, and res ipsa loquitur.[24] However, the defendents succeeded in changing the trial to the United States District Court for the Eastern District of Oklahoma. There, Randolph abandoned his negligence claims and chose to proceed to trial on the theory of Manufacturers' Products Liability.[25] After a directed verdict for Collectramatic, Randolph appealed to the U.S. Court of Appeals (10th Circuit).

The directed verdict was affirmed by the U.S. Court of Appeals (10th Circuit) on the basis that plaintiff's testimony as to the defective design of the product should have properly been excluded by the trial court and that opinion testimony was not satisfactory to prove a defect. Randolph argued that, despite his excluded testimony and his lack of expert witnesses, the introduction of the pressure cooker along with the explosion, provided sufficient evidence of a dangerous and defective product. The court cited Kirkland which reads: "the mere happening of an accident raises no presumption of negligence on the part of the defendent. Nor does it raise any presumption of defectiveness in the article involved in the accident."[26]

Thus, Oklahoma's Manufacturers' Products Liability law essentially follows the Restatement (Second) of Torts § 402A with regard to "proof of defect." Circumstantial evidence will be allowed to show "proof of defect" when through no willful misconduct of the plaintiff but through simple inability, the "defective" product cannot be produced at trial.

ENDNOTES

[1]494 F.2d 418 (1974).

[2]Id. at 420.

[3]Id. at 420.

[4]494 F.2d 458 (1974).

[5]Id. at 459.

[6]Id. at 460.

[7]529 P.2d 489 (1974).

[8]Id. at 491.

[9]541 P.2d 202.

[10]Id. at 202.

[11]Id. at 206.

[12]Id. at 207.

[13]555 P.2d 590.

[14]Id. at 590.

[15]Id. at 590 and 591.

[16]Kirkland v. General Motors Corporation, Okl., 521 P.2d 1353, 1363, (1974).

[17]Kimbrell v. Zenith Radio Corporation, Okl., 555 P.2d 591.

[18]Kirkland, supra at 1365.

[19]575 P.2d 969 (1978).

[20]Id. at 970.

[21]Kirkland, supra at 1353.

[22]Moor, supra at 971.

[23]CCH Prod. Liab. Rptr, 118348 (Okla. 1979).

[24]Id. at 71 8349.

[25]Id. at 71 8349.

[26]Kirkland, supra at 1363.

CHAPTER VI

THE UNAVOIDABLY UNSAFE PRODUCT AND DUTY TO WARN

Cunningham v. Charles Pfizer & Co. (1975)

The plaintiff in Cunningham v. Charles Prizer & Co.[1] was 15 years old whe he contracted polio after ingesting an oral polio vaccine. He subsequently brought suit against the manufacturer and the District Court, Tulsa County, entered judgment on a jury verdict for $340,000. The manufacturer appealed and the Oklahoma Supreme Court reversed and remanded with instructions.[2]

The plaintiff's theory in the trial court was that the defendent had failed to warn him or his parents of the risk of contracting polio from the vaccine. He argued that the failure to warn rendered the defendent liable for all resulting damages from the vaccine.[3] The defendent's theory in the trial court was, among several, that there was not duty to warn ultimate consumers of risks involved in taking the vaccine, but only a duty to warn members of the medical society sponsoring the program.[4]

The Oklahoma Supreme Court concluded the principles enunciated in Kirkland were applicable to this appeal[5] and then referred to Comment (k) of the Restatement (Second) of Torts § 402 A:[6]

> k. Unavoidably unsafe products
> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for

> their intended and ordinary use. These are especially common in the field of drugs. . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective nor is it unreasonably dangerous. The same is true of many other durgs, vaccines, and the like, many of which for this very reason cannot legally be sold except to physicians, or under the prescription of physician. . . The seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

The court cites several cases, e.g., Davis v. Wyeth Laboratories, Inc., 9 Cir., 399 F.2d 121, where §402 A Comment (k) has been construed to mean a drug manufacturer, in certain circumstances, has a duty to ensure consumers are warned of known risks involved in taking a drug. When this duty is not fulfilled the drug is rendered defective.[7] Then the court said: ". . . if a duty to warn existed in the present case, we conclude plaintiff was not required to establish the vaccine was otherwise defective."[8]

Thus, even if "unavoidably unsafe" as a product, Sabine Polio vaccine could be "defective" if the manufacturer failed in its duty to warn of the danger. The duty extended beyond warning the medical society which sponsored the 1963 Tulsa mass immunization program. The duty to warn extended to the plaintiff user. But, a new trial was ordered by the Oklahoma Supreme Court because Oklahoma was a state where polio had reached epidemic proportions in years prior to 1963 and there had been 12 cases in Tulsa, alone, in 1962.[9] Based on these facts the court held there was sufficient evidence to overcome a rebuttable presumption that the plaintiff and his parents would have heeded any warning which might have been given.[10]

The rule of law which emanated from this case as presented by the court was

> the test applied should be an objective test, i.e., in light of all circumstances existing on the date plaintiff took the vaccine, would a reasonably prudent person in plaintiff's position have refused the vaccine if adequate warning of risks had been given.[11]

ENDNOTES

[1]532 P.2d 1377 (1975).

[2]Id at 1377.

[3]Id at 1379.

[4]Id at 1379.

[5]Id at 1380.

[6]Id at 1380.

[7]Id at 1380.

[8]Id at 1380.

[9]Id at 1382.

[10]Id at 1382.

[11]Id at 1382.

CHAPTER VII

EXTENSIONS OF MANUFACTURERS' PRODUCTS LIABILITY

Since the Kirkland decision, the court has extended the Manufacturers' Products Liability doctrine to allow a cause of action by the "bystander" plaintiff and the lessee who sues a commercial lessor. Three landmark cases are discussed below.

Moss v. Polyco, Inc. (1974)

In Moss v. Polyco[1] an action based on warranty, the plaintiff wife sued to recover for personal injuries sustained when a plastic container of VIP Super Drain spilled its contents on her body while in the bathroom of a steak house where she was a customer. Her husband sued for lack of consortium.[2] According to the facts of the case, the container was on a shelf in the bathroom and somehow became dislodged. The plaintiffs argued that the container and its cap were defectively constructed by the defendent manufacturer and supplier of the article. The plaintiffs also contended that the defendents had warranted and represented to the plaintiffs that the cap and container were proper for the use intended for them.[3]

Because the plaintiffs did not file their suit until 28 months after the injury occurred, each court level, including the Oklahoma Supreme Court, dealt in some detail with the issue of statute of limitations.[4]

In barring the cause of action due to the "running" of the two year statute of limitations, Justice Lavender of the Oklahoma Supreme Court said,

> We are of the view that the trial court's apparent conclusion that this action is not one arising upon contract but is one based upon an alleged tortious wrong committed by the defendents is correct, and that the two year statute of limitations bars the action.
>
> We are aware, of course, that when the Court of Appeals opinion was written that court did not have before it our opinion in Kirkland v. General Motors, Corp. . . . We there stated that allegations similar to those made by the plaintiff appellants of "breach of implied warranty of fitness" alleged a cause of action in Manufacturers' Products Liability . . .[5]

Justice Lavender then proceeded to write

> We now point out that the plaintiff, Mrs. Moss, was neither a user nor consumer of the allegedly defective product so as to come within the special liability of seller provision in § 402A of the Restatement of Torts, 2d. Instead she was in the general category of a bystander. In Kirkland v. General Motors Corp., supra, we recognized that the doctrine of Manufacturers' Products Liability should extend to any third party injured as a result of the defect in the product. See Syllabi 10 thereof. However, the plaintiff there was a user, and we now make it clear that the doctrine also applies to bystanders.[6]

Thus, the supreme court reversed the court of appeals and reinstated the trial court's judgement.[7] Therefore, for these particular plaintiffs there was no recovery because they waited too long to sue. However, the bystander has been afforded the same protection as the consumer or user under Manufacturers' Products Liability ever since.

Coleman v. Hertz Corp., (Okla. App. Div. 2 1975)

In Coleman v. Hertz Corp.,[8] Manufacturers' Products Liability was extended and applied against the commercial lessor of a milk truck where wheels fell off causing an accident in which the employee driver of the

lessee was injured. The plaintiff driver brought a cause of action for breach of implied warranty and in accord with a jury verdict, judgement was entered for the plaintiff. The truck rental agency appealed and the Court of Appeals affirmed the trial court's decision. In the written opinion Justice Brightmire said

> Notwithstanding the restrictive nomenclature adopted, Kirkland projects a philosophy and spirit broad enough to be consistent with the extension of the strict liability doctrine to all commercial suppliers--such as the truck leasing company here--where no sale is involved. We hold that it does and here is why.
>
> Throughout Kirkland are various references to the public policy underlying it--a policy which applies with equal reason to the truck leasing operation of Hertz here . . .[9]

The public policy referred to is that the responsibility for losses caused by defective articles should be borne by those who are most able to control the danger or make an equitable distribution of losses of and when they occur.[10]

Justice Brightmire then stated, "While Kirkland delivered the newborn strict liability principle from its common law womb in this state it did not sever the offspring's umbilical cord from its maternal attachment--the law of sales. This bit of legal surgery we perform in this case consonant with the humane aspects of Kirkland."[11]

E. Dewberry v. G. Lafollette and M. Lafollette, d/b/a/ University Mobile Homes (1979)[12]

In Dewberry the plaintiff was seriously injured when the stairs which accompanied a leased mobile home collapsed. The plaintiff brought a cause of action in Manufacturers' Products Liability.[13] The trial court sustained the defendents' demurrer to the plaintiff's petition for failure to state a cause of action. On appeal the Oklahoma Supreme

Court reversed and remanded.[14] Citing Kirkland Justice Doolin said, "The policy of strict liability in tort defined in Manufacturers' Products Liability . . . extends its protection to any person using the defective product for its intended purpose. This would include the present plaintiff."[15]

Quoting from Francioni v. Gibsonia Truck Corp.,[16] a 1977 Pennsylvania Supreme Court case, Justice Doolin said

> All (foregoing decisions) have premised their holdings on these pertinent factors: (1) In some instances the lessor, like the seller, may be the only member of the marketing chain available to the injured plaintiff for redress, (2) As in the case of the seller, imposition of strict liability upon the lessor serves as an incentive to safety; (3) The lessor will be in a better position than the consumer to prevent the circulation of defective products; and (4) The lessor can distribute the cost of compensating for injuries resulting from defects by charging for it in his business, i.e., by adjustment of the rental terms. We find the reasoning of these opinions to be highly persuasive and hold that all suppliers of products engaged in the business of supplying products for use or consumption by the public are subject to strict liability for injuries caused by "defective condition unreasonably dangerous to the user or consumer or his property."
>
> We adopt this reasoning, finding it to be in line with the public policy of this state as espoused in Kirkland. We perceive no substantial difference between sellers of personal property and non-sellers of personal property such as lessors. In each instance the seller or lessor places an article in the stream of commerce; it makes no difference that lessor has retained title.[17]

Thus, Manufacturers' Products Liability has been extended to both bystanders and lessors of products. Each of these extensions make recovery easier for injured plaintiffs and increase the likelihood of expensive lawsuits and settlements for business and industry.

ENDNOTES

[1]522 P.2d 622 (Okla. 1974).

[2]Id. at 623.

[3]Id. at 624.

[4]Id. at 624.

[5]Id. at 625-625.

[6]Id. at 626.

[7]Id. at 624.

[8]534 P.2d 940 (Okla. App. Div. 2 1975).

[9]Id.

[10]Henningsen v. Bloomfield Motors, 32 N.J. 358, 161 A. 2d 69, 75, A.L.R.2d 1 (1960).

[11]Coleman v. Hertz Corp, 534 P.2d 940, (Okla. Appl. Div. 2 1975).

[12]1979 CCH Prod. Liab. Rep. ¶ 8492 (Okla. 1979).

[13]Id. at ¶ 8492.

[14]Id. at ¶ 8495.

[15]Id.

[16]372 A.2d 736 (Pa. 1977).

CHAPTER VIII

SUMMARY AND CONCLUSIONS

The year 1974 was an important one for business, business educators and consumers in the state of Oklahoma. It was that year the Oklahoma Supreme Court decided the landmark case of Kirkland v. General Motors. In Kirkland, the court chose to name Oklahoma's products liability law "Manufacturers' Products Liability."

Essentially, the Oklahoma law on this subject is the Restatement (Second) of Torts, §402 A version of strict liability in tort with perhaps a more restrictive plaintiff's conduct defense (i.e., "assumption of the risk of known defect"). Given a certain fact pattern both negligence and Manufacturers' Products Liability may be pleaded as separate causes of action. But, implied warranty as a cause of action is no longer available except to the extent the UCC applies, due to its merger with Manufacturers' Products Liability.

Cases appearing after the Kirkland decision extend the doctrine to bystanders but restrict the application of the UCC to persons specifically named as beneficiaries of Code warranties in UCC § 2-318. Manufacturers' Products Liability doctrine was held to apply prospectively to all cases to be tried after the Kirkland mandate issued and may be applied in cases on appeal "where it would not prejudice the rights of the litigants." As shown in the preceeding chapters, a fairly large number of Oklahoma cases have been affected by this landmark case

which has had a tremendous impact not only for consumers who now have a greater potential chance for recovery, but to businesses large and small who now must, more than ever, take precautions against possible products liability actions in this state. To provide an understanding of this decision and its ramifications has been the primary concern of this research effort. The findings and conclusions should be studied and understood by business and consumer educators, business and law students, and particularly personnel presently employed in the fields of marketing, manufacturing and consumer affairs.

Whereas strict liability in Oklahoma had earlier applied in cases of wild animals, abnormally dangerous activities and so on, Kirkland extended such treatment to the "manufacturers" of unreasonably dangerous products. "Manufacturer" was defined to include "processors, assemblers and all other persons similarly situated in processing and distribution." The Kirkland court explicitly refused to adopt the California position of Cronin v. J.B.E. Olson Corp. which rejected the element of "unreasonably dangerous." The plaintiff must prove the article sold was dangerous to an extent beyond that contemplated by the ordinary consumer who buys it. The ordinary knowledge common to the community as to its characteristics is the key to understanding what Kirkland meant by "unreasonably dangerous." In addition, the defect had to have made the product unreasonably dangerous to the user or his property. Also, the plaintiff must prove that the product was a cause of the injury, not "the cause" as the Court originally wrote, and that the defect existed in the product at the time it left the control of the manufacturer, supplier or assembler.

The plaintiff must prove a defect existed, but may do so by

circumstantial evidence. The defendent may rebut inferences by evidence of his care and quality control.

Further, the Kirkland opinion held that the two year tort statute of limitations measured from the date of injury applies to Manufacturers' Products Liability. Although the Kirkland opinion did not discuss disclaimers it quotes Comment (m) of Restatement (Second) of Torts § 402 A which does not allow disclaimers of strict tort.

The "defense" of abnormal or misuse of the product and what the Kirkland court called "voluntary assumption of the risk of a known defect" are applicable. But, the defenses of contributory negligence and assumption of the risk used in the common law sense in negligence actions do not apply to Manufacturers' Products Liability, nor does the defense of lack of privity.

Although the Kirkland court did not discuss misuse, they adopted a liberal view of misuse in Fields v. Volkswagen of America, Inc., 555 P.2d 48 (Okla. 1976). And, the comparative negligence doctrine as seen in 23 O.S. §§ 11 & 12 does not apply to Manufacturers' Products Liability because the Kirkland court held that the new doctrine is not to be treated like negligence and 23 O.S. §§ 11 & 12 is limited only to negligence causes of action.

Post Kirkland Manufacturers' Products Liability decisions have consistently cited and affirmed the above stated rules set forth in Kirkland. And, in Coleman v. Hertz Corp. 534 P.2d 940 (Okla. App. Div. 2 1975) the Manufacturers' Products Liability doctrine was extended to commercial lessors. The decision in Moss v. Polyco. Inc., 522 P.2d 622 (1974) stated that Manufacturers' Products Liability applies to bystanders.

To conclude, Manufacturers' Products Liability in Oklahoma is essentially an adoption of strict liability in tort as seen in the Restatement (Second) of Torts § 402 A. This adoption first occurred in the landmark case of Kirkland v. General Motors (1974). Later cases have affirmed Kirkland and made certain extensions, e.g., to commercial lessors.

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UCC § 2-318.

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