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Products Liability--Oklahoma's Emergence from Antiquity, Acceptance of the Doctrine of Strict Liability in Tort

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TORT—Products Liability—Oklahoma's Emergence from Antiquity, Acceptance of The Doctrine of Strict Liability in Tort

In the case of *Barnhart v. Freeman Equipment Company*,[1] plaintiff was an employee of Consumers Co-operative in Enid, Oklahoma. Consumers Coop. purchased a number of truck-tractors from defendant, all of which had defective tierods. International Harvester, the assembler of the tractors, notified Rockwell Standard Corporation, manufacturer of the tierod and co-defendant. Rockwell designed a replacement part and forwarded it to Freeman, defendant, for immediate installation. Following installation of the new part on approximately one-half of Consumers' trucks, it was discovered that the new tierod was unsatisfactory. Freeman remodified some of the trucks which had already undergone modification, but failed to correct plaintiff's Unit 465. Because of the defect, plaintiff was involved in an accident and was severely injured. The District Court dismissed the action against defendants. The Oklahoma Supreme Court reversed, holding Rockwell, manufacturer of the defective product, strictly liable in tort and Freeman liable in negligence. A separate action was brought against the assembler, International Harvester.

The law has markedly progressed since *Winterbottom v. Wright*,[2] in 1842, where the Court affirmed the requirement of privity of contract even in a negligence or tort case. Since 1916,[3] the assault upon the citadel of privity has most assuredly proceeded space. The renunciation of the doctrine of privity where a product due to its negligent construction is dangerous to life and limb[4] opened a door to recovery which

[1] Barnhart v. Freeman Equip. Co., 411 P.2d 993 (Okla. 1968).
[2] Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).
[3] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).
[4] *Id.* at 389, 111 N.E. at 1055.

has yet to be fully developed. The theory of negligence superseding that of privity gradually became recognized as the law in Oklahoma.[5] However, due to social pressures demanding greater protection of the public from personal injury there also evolved a doctrine based entirely on public policy. Thus, the concept of strict liability in tort was conceived. This doctrine was initiated in Oklahoma in the food cases,[6] and then cautiously extended to include those articles for intimate bodily use.[7] However, until 1965[8], the law governing products liability, other than goods for consumption or bodily use, was in somewhat of a state of limbo. It suffered the unsuspecting plaintiff to satisfy certain warranty requirements, e.g., privity and notice, or prove negligent conduct if he was to recover.[9]

In 1965, the Oklahoma Supreme Court following the ra-

[5] Pryor v. Lee C. Moore Corp., 262 F..2d 673 (10th Cir.), *cert. dnied* 360 U.S. 900 (1959); Bower v. Corbell, 408 P.2d 307 (Okla. 1965); Gosnell v Zink, 325 P2d 965 (Okla. 1958); Crane Co. v. Sears, 168 Okla. 603, 35 P.2d 916 (1934).
Lee C. Moore Corp., 262 F.2d 673 (10th Cir.), *cert. denied,* 360 U.S. 900 (1959);
1958); Crane Co. v. Sears, 168 Okla. 603, 35 P.2d 916 (1934).

[6] Cook v. Safeway Stores, Inc., 330 P.2d 375, 376 (Okla. 1958) held that, "[W]here a dealer sells food for immediate human consumption, purchaser may rely on implied warranty that such food is wholesome and not deleterious, and in the event he sustains injury from the consumption thereof he may maintain his cause of action upon such implied warranty." Oklahoma Coca-Cola Bottling Co. v. Newton, 205 Okla. 360, 237 P.2d 627 (1951) (beverage); Southwest Ice & Dairy Prods. Co. v. Fawlkenberry, 203 Okla. 279, 220 P.2d 257 (1950) (milk); Griffin v. Asbury, 196 Okla. 484, 165 P.2d 822 (1945) (beverage).

[7] Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841 (5th Cir. 1968); John A. Brown Co. v. Shelton, 391 P.2d 259 (Okla. 1963) (hair spray).

[8] Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965).

[9] McAlester Coca-Cola Bottling Co. v. Lynch, 280 P.2d 466 (Okla. 1955).

tionale of a line of California Cases,[10] held that where a consumer is injured by a defective battery: "The manufacturer's liability was established when it was shown that the plaintiff was injured while using the battery for the purpose intended by reason of defect as to which he was not aware, and could not have ascertained by examination."[11] The impact of *Marathon* on Oklahoma law was somewhat dubious. The occurence of the accident in *Marathon* was prior to the adoption of the Commercial Code.[12] Therefore, certain seemingly common areas, such as effect of disclaimers,[13] and what parties may benefit,[14] remained uncertain. However, as noted in *Speed Fasteners, Inc. v. Newson,*[15] the rule set forth in *Marathon* was not changed by the Commercial Code. Rather, the Court recognized the *Marathon* rule to be in accord with the Code's concept of implied warranty and merchantability.[16] Thus, the law in Oklahoma which may be extracted from the Commercial Code and judicial decisions is that which is expounded in the Restatement.[17] While as yet in its infant stage, it promises room for growth and expansion as evidenced in *Barnhart.*[18]

The importance of the *Barnhart* case is twofold. It reaf-

[10] Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); Greenman v. Yuba Power Prod., 59 Cal. 2d 57, 377 P.2d 897, 914, 27 Cal. Rptr. 697, 700 (1962) held that, "A manufacturer is strictly liable in tort when an article he places on the market knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."

[11] Marathon Battery Co. v. Kilpatrick, at 915.

[12] OKLA. STAT. tit. 12A, § 1-101 (1961).

[13] *Id.* § 2-316.

[14] *Id.* § 2-318.

[15] Speed Fasteners, Inc. v. Newson, 382 F.2d 395 (10th Cir. 1967).

[16] OKLA. STAT. tit. 12A, § 2-314 (1961).

[17] RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[18] Barnhart v. Freeman Equip. Co., 441 P.2d 993 (Okla. 1968).

firms the Supreme Court's position as set forth in *Marathon,* and extends the class of those liable to a manufacturer of component parts.[19] In addition, it may be suggested that the Court, while addressing itself to the negligence of the retailer-repairman and adopting the Restatement view,[20] is nonetheless equating this negligence to a defect and in effect applying a strict liability. This liability, both Rockwell's and Freeman's, affirmed in *Barnhart* and noted by Justice Traynor,[23] is not one based on negligence or privity but on the concept of strict liability in tort;[24] liability whose effect is to shoulder the manufacturer with the burden of placing a non-defective product on the market.

Now that Oklahoma has embraced the dictates of public policy and recognized strict liability in tort, what may be gleaned from the *Marathon* case? Looking again to the supreme court's explanation in *Marathon,* [25] it bcomes apparent that the manufacturer's liability while strict is not absolute. The plaintiff must show that he was using the product for the purpose for which it was intended, i.e., that contemplated by reasonable parties, and that his injury was the result of defect. What might constitute a defect is a subject capable of unlimited hypothesis. However, it appears to be at least the breach of a warranty of fitness and merchantability,[26] or a condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him.[27] As a further limita-

[19] *Id.* at 1000.
[20] *Id.* at 998; RESTATEMENT (SECOND) OF TORTS § 404 (1965).
[21] Greenman v. Yuba Power Prod., 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962).
[22] RESTATEMENT OF TORTS, Explanatory Notes § 402A, comment *m* at 355 (1965).
[25] 418 P.2d at 900.
[24] Schenfeld v. Norton Co., 391 F.2d 420 (10th Cir. 1968).
[25] Marathon Battery Co. v. Kilpatrick, 418 P.2d 900 (Okla. 1965).
[26] 3 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 3-16A(4), at 3-202 (1967).
[27] RESTATEMENT OF TORTS, Explanatory Notes § 402A, comment *g* at 351 (1965).

tion or requirement, the Court suggests that to maintain his action, plaintiff must not have been aware of the defect nor have been able to discover it by a reasonable inspection. The former requirement infers that if plaintiff was aware of the defect then he proceeded unreasonably, and will be denied recovery because he assumed the risk. While Oklahoma has yet to address itself to this problem, the view above is consistent with the Restatement.[28] The heretofore mentioned requirement of examination pertains primarily to patent defects, requiring only a reasonable examination. It is suggested that the Court did not intend to make the purchaser accountable for defects which are of a remote or latent nature, for this would seem to defeat the public policy dictates which form the roots of strict liability in tort. In essence, the question faced by courts in applying the products liability doctrine is what doctrine will replace the requirement of fault or contract as a means of delimiting liability. The chief limitation heretofore accepted by the Oklahoma Supreme Court is the requirement that the product be defective for the use intended.

The application of strict liability in the field of products liability is still in its infant stage. Oklahoma has recognized that the manufacturer of the whole,[29] the manufacturer of components and a repairman fall into that class of defendants whose duty to the public brings them within the jurisdiction of the doctrine.[30] However, in negligence cases Oklahoma courts have previously held that recovery can be maintained against almost any seller in the commercial chain.[31] While yet undecided as to strict liability with respect to retailer and wholesaler, it seems inevitable that Oklahoma will adopt the same position as announced by Vandermark,[32] Prosser,[33]

[28] *Id.* comment *n* at 356.
[29] Case cited, note 8 *supra.*
[30] Barnhart v. Freeman Equip. Co., 441 P.2d 993 (Okla. 1968).
[31] Cook v. Safeway Stores, Inc., 330 P.2d 375, 376 (Okla. 1958).
[32] Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 259, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964) which held that,

and the Restatement.[34] This position would hold all members of the commercial chain to the duty of a reasonable inspection of the product, except where the products are not conducive to inspection for defects, e.g., come from the manufacturer in sealed containers. In the latter instance, the purchaser always has an action for breach of the implied warranty of fitness.[35]

Another problem exists as to who is protected and for what damages may he seek recovery. Prior decisions in Oklahoma indicate that in addition to the remote purchaser and members of his household, an employee who stands in the shoes of his employer may also recover It seems likely that public policy will extend this concept to include all of those persons whose presence and use of the product could have been foreseen. This is the policy set forth in the Restatement,[36] though it is limited in warranty cases by the Uniform Commercial Code.[37] However, notice that the mere bystander is purposely absent from Restatement consideration and has not been considered as belonging to that class of foreseeable persons. If this step is taken it would mark the final fall of the citadel.

The concept of strict liability is an outgrowth of the public concern for protecting the individual from bodily harm.

"Retailers like manufacturers are engaged in the business of distributing goods to the public. They are an integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products."

[33] Prosser, *Assault upon the Citadel,* 69 YALE L. J. 1099, 1101 (1960).

[34] RESTATEMENT OF TORTS, Explanatory Notes § 402A, comment *f* at 350 (1965).

[35] John A. Brown Co. v. Shelton, 391 P.2d 259, 266 (Okla. 1963).

[36] RESTATEMENT OF TORTS, Explanatory Notes § 402A, comment *l* at 354 (1965).

[37] OKLA. STAT. tit. 12A, § 2-318 (1961).

Thus, as set forth by numerous cases and authorities, personal injury to all exept the mere bystander is always compensable. However, what about damage to one's property? While Oklahoma has yet to extend the principle this far, in the language of Chief Justice Traynor and Prosser, "Physical injury to property is so akin to personal injury that there is no reason for distinguishing them."[38] This proposes an extension of recoverable losses. Although the New Jersey Court[39] has allowed recovery for a purely economic loss, e.g., loss of value of a defective carpet, Chief Justice Traynor strongly rebutts this position,[40] saying such recovery should be limited to a warranty action and is beyond the purpose of the doctrine of strict liability in tort. Therefore, it seems that where one suffers injury due to a defective product he may recover damages which were the result of that defect; but, where his loss is purely economic he must bring his action for breach of warranty.

Products liability in Oklahoma is a ripening field yet to be harvested. Strict liability in tort is not meant to be a replacement or substitute for breach of warranty or negligence. Likewise, it does not seek to impose an absolute liability on those in the commercial chain but provides certain prerequisites, i.e., normal use, use without knowledge of the defect, and reasonable examination. The *Barnhart* case may be said to be the cornerstone of Oklahoma law in the area of products liability. The effect of this law is to provide the public with the ultimate protection possible against defects dangerous to life and limb. The manufacturer has an absolute defense: he can insure himself against liability by placing a non-defective product on the market.

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[38] Seely v. White Motor Co., 63 Cal. 2d 916, 403 P2d 145, 152, 45 Cal. Rptr. 17, 24 (1965); Prosser, *Assault upon the Citadel, supra* note 33, at 1143.

[39] Santor v. A & M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965).

[40] Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 149, 45 Cal. Rptr. 17, 21.