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Products Liability--Dealer-Seller of Used Car Held Strictly Liable in Tort under Section 402A, Peterson v. Lou Backrodt Chevrolet Co.

Lance Hillpert

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PRODUCTS LIABILITY — DEALER-SELLER OF USED CAR HELD STRICTLY LIABLE IN TORT UNDER SECTION 402A, *Peterson v. Lou Backrodt Chevrolet Co.*, 17 Ill. App. 3d 690, 307 N.E.2d 729 (1974).

The Appellate Court of Illinois, Second District held in *Peterson v. Lou Backrodt Chevrolet Co.*[1] that the doctrine of strict liability in tort could be applied to a dealer-seller of *used* cars, and that an injured bystander could enjoy the protection of the doctrine.

The litigation originated when *X* purchased from defendant a used 1965 Chevrolet. While the vehicle was being driven by *Y*, the brakes failed; the car swerved from the road and struck the two bystander-plaintiffs. In the amended complaint the plaintiffs sought recovery under strict liability, alleging essentially the facts above and also that the car was not reasonably safe due to defects in the braking system, and that as a proximate cause of those defects the injuries resulted. The lower court struck the counts in the amended complaint for failure to state a cause of action, and the plaintiffs' appeal was initiated.

In holding that the complaint did state a cause of action in strict liability, the appellate court noted that the doctrine of strict liability as expressed in section 402A of the *Restatement (Second) of Torts* had been adopted in Illinois in *Suvada v. White Motor Co.*[2] The court also indicated that the doctrine had been extended to retailers of defective products, even though it was not alleged that a defect existed at the time the product left the manufacturer's control, and the manufacturer was not named as a defendant.[3] The court then stated that section 402A and its comments impose strict liability on the seller of *any* defective product, and that application of the doctrine is not limited to defects occurring in the manufacturing process.[4] In support of this it cited comment *g* to section 402A, which reads in part:

> *Defective condition.* The rule stated in this Section applies only where the product is, at the time it leaves the *seller's* hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him. . . .

1. 17 Ill. App. 3d 690, 307 N.E.2d 729 (1974).
2. 32 Ill. 2d 612, 210 N.E.2d 182 (1965).
3. 307 N.E.2d at 731.
4. *Id.*

> The burden of proof that the product was in a defective condition at the time that it left the hands of the *particular seller* is upon the injured plaintiff . . . .[5] (Emphasis added by the court).

Having concluded that section 402A does not preclude application of strict liability to sellers of used cars, the court reasoned that the fundamental policy considerations underlying the doctrine are as compelling in the case of sellers of used cars as they are in the case of manufacturers and retailers of new products. The manufacturer is held strictly liable for injuries resulting from defective products so that hazards to health and safety will be reduced. The doctrine is imposed on the retailer because of his integral role in the overall producing enterprise and as an additional incentive to safety. The court concluded that

> [a]lthough the seller of used motor vehicles is not an immediate participant in the overall producing process as is the manufacturer or retailer, the fundamental safety, or deterrence purpose behind strict liability mandates the rule's application in this case. . . . This factor of deterrence as justification for the imposition of strict products liability is well established.[6]

The court remanded the case for further proceedings, pointing out that the plaintiffs still had to meet their burden of proof as to the elements of the cause of action, and that the issue of whether the vehicle was unreasonably dangerous when it left the seller's hands, taking into account the age and condition of the used car, was a matter for the jury. The appellate court saw the effects of its decision as twofold: used car dealers would make every effort to insure that vehicles put on the market would be safe and that the cost of this inspection and repair would be distributed among the seller, the dealer, and the consumer.[7]

Since its formal adoption of Manufacturers' Products Liability in *Kirkland v. General Motors Corp.*,[8] the Oklahoma Supreme Court has not confronted the issue of whether the doctrine would be applicable to a seller of used cars; but it seems that Oklahoma would be in a position to follow essentially the same reasoning as the Illinois court in so extending the doctrine.

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5. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *g*; quoted in *Peterson* at 307 N.E.2d 731.

6. 307 N.E.2d at 732.

7. *Id.* at 734.

8. 521 P.2d 1353 (Okla. 1974).

While the *Kirkland* decision did not expressly adopt section 402 in its entirety, it is evident that "[d]espite the new name, Manufacturers' Products Liability appears substantially to be the *Restatement (Second) of Torts*, Section 402A version of the strict liability in tort doctrine."[9] In addition, the Oklahoma Supreme Court in *Moss v. Polyco, Inc.*[10] stated that Oklahoma's doctrine is synonymous with the term "strict liability in tort" used in other jurisdictions.[11]

In *Kirkland*, the court listed what a plaintiff would have to prove in order to effect a recovery under Manufacturers' Products Liability: first, that the defective product was the cause of the injury; second, if the action is against the manufacturer, that the defect existed at the time the article left the manufacturer's control, or alternatively, if the action is against the retailer or supplier of the article, that the article was defective at the time it left the supplier's control; and third, that the article was unreasonably dangerous to the plaintiff.[12] These elements would not seem to preclude application of the doctrine to a seller of used cars in Oklahoma.

In *Moss*, the Oklahoma court extended the protection of its doctrine to apply to bystanders, and also held that the doctrine could be imposed on the retailer as well as the manufacturer of defective products.[13] In imposing the doctrine on retailers, the court stated the following reasons: first, that retailers have an integral role in the producing and marketing enterprise which should bear the cost of injuries resulting from defective products; second, that the retailer may be the only party available to the plaintiff; and third, that the retailer's liability would serve as an added incentive to safety.[14]

It appears, then, that the Oklahoma Supreme Court would find itself in substantially the same position in confronting the issue as the court in *Peterson*. The doctrine of strict liability has been adopted substantially as stated in section 402A, which does not preclude the application of the doctrine to sellers of used automobiles. Strict liability has

9. MCNICHOLS, *The Kirkland v. General Motors Manufacturers' Products Liability Doctrine—What's In a Name?*, 27 OKLA. L. REV. 347, 354 (1974). This article provides an in depth examination of the Oklahoma doctrine as espoused in *Kirkland*, and a comparison with other jurisdictions.

10. 522 P.2d 622 (Okla. 1974).

11. *Id.* at 627.

12. 521 P.2d at 1363.

13. 522 P.2d at 626-27.

14. *Id.*

been imposed on sellers of products in the interests of consumer safety and to facilitate recovery by an injured plaintiff.

As predicted, the imposition of strict liability on sellers of used cars hinged primarily on the important public policy considerations involved, since section 402A is not conclusive on the issue.[15] The policy considerations for extending the doctrine go to protection of the consumer: the seller of used cars is obliged to make every effort to insure that used automobiles put on the market are free of dangerous defects, and the injured party is afforded a more available defendant. The primary opposition argument is that sellers of used cars "are as little able to protect themselves with respect to risk as is the consumer . . . since the seller of such products cannot pass the risk on to the original manufacturer or processor, who may have been the only one able to prevent the defect."[16] There is some language in *Kirkland* which seems to demonstrate the Oklahoma courts support for this proposition.[17]

Oklahoma's new Manufacturers' Products Liability doctrine appears capable of embracing the used car dealer; whether it is so extended would hinge on which policy argument the court finds more persuasive. However, it seems highly probable that the compelling interest of public safety should prevail, and that sellers of used cars in Oklahoma would find Manufacturers' Products Liability imposed on them should the issue arise.

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15. *See* Annot., 53 A.L.R.3d 337 (1973). Noting that the issue had not been squarely resolved, the annotation discusses the probable issues involved should the problem arise. It points out that case law in the area has dealt with the issue only by implication or dicta, and hence would be of little use in argument.

16. *Id.* at 341.

17. The court said:

> 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 Defendant. Where the product is of sophisticated design and construction, or if the product reaches the consumer in a sealed container, varying degrees of difficulty are encountered in tracing this responsibility. . . . Several courts have held that this practice should be adopted, and that the parties defendant should then determine between themselves where the final responsibility lies . . . . This procedure is entirely compatible with the methods of proof described above for products liability recovery, and which Defendant is responsible for an alleged defect may be determined in the trial court, as it frequently has been in Oklahoma actions.

521 P.2d at 1365.