An Overview Of
Oklahoma Product Liability Law

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Any discussion of Oklahoma product liability law must start with the Oklahoma Supreme Court's 1974 opinion in *Kirkland v. General Motors Corp.*[1] As Justice Doolin predicted in *Kirkland*, that case "set the pattern" in Oklahoma for product liability litigation. Virtually every Oklahoma federal and state court opinion in a product liability case cites *Kirkland* at least once, and it remains the leading case on various product liability issues. This article discusses the developments in Oklahoma product liability law since the issuance of that opinion.

1. Who May Be a Plaintiff?

In *Moss v. Polyco, Inc.*,[2] an opinion rendered on the same day as *Kirkland*, the court discussed the reach of the product liability cause of action. In *Moss*, the plaintiff, a customer in a restaurant, was injured when a plastic container of drain cleaner fell from a bathroom shelf, causing the contents to come in contact with the plaintiff's body.[3] The court noted there was no adequate rationale or theoretical explanation why non-users and non-consumers should be denied recovery against the manufacturer of a defective product, and thus expressly included bystanders in the class of potential plaintiffs.[4] In so doing, the court agreed that the manufacturer who places into commerce a product rendered dangerous to life or limb by reason of some defect is strictly liable in tort to one who sustains injury because of the defective condition.[5] More than two decades later, Oklahoma extended the right of recovery to bystanders who: (1) are directly, physically involved in an incident; (2) are injured from viewing the injury to another as opposed to learning of it later; and (3) had a familial relationship to the injured party.[6]

In a product liability cause of action involving death, the determination as to who may be a plaintiff is governed by statute.[7]

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

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

[3] *Id.* at 624.

[4] *Id.* at 626.

[5] *Id.*

[6] *Kraszewski v. Baptist Medical Center of Oklahoma, Inc.*, 916 P.2d 241 (Okla. 1996).

[7] *See* 12 O.S. §§1053-55.

A significant restriction on the ability of an injured party to pursue a product liability cause of action arises in "failure to warn" cases.[8] The duty to warn extends to an ordinary consumer or user, which has been defined as "one who would foreseeably be expected to purchase the product involved."[9] In *Rohrbaugh v. Owens-Corning Fiberglass, Inc.,*[10] the court found that the wife of an insulator, whose only exposure to the asbestos insulation was her exposure to her husband's clothes, was not a foreseeable purchaser or user of the product. Thus, the court reasoned, the manufacturer had no duty to warn the wife of the danger of exposure to its products.[11]

2. Who May Be A Defendant?

Expanding on its use of the term "manufacturers' product liability," the *Kirkland* court included, within the meaning of "manufacturers," all "processors, assemblers, and all other persons who are similarly situated in processing and distribution."[12] Later opinions have recognized that product liability causes of action may be brought against a product retailer[13] as well as a commercial lessor,[14] and, in the proper situation, a product liability action may be available against the supplier of a component part.[15] In short, Oklahoma courts have recognized that a product liability cause of action may properly be stated against those engaged in the business of buying and selling products who inject a defective product

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[8] *See McKee v. Moore,* 648 P.2d 21, 23 (Okla. 1982).

[9] *Woods v. Fruehauf Trailer Corp.,* 765 P.2d 770, 774 (Okla. 1988).

[10] 965 F.2d 844 (10th Cir. 1992), *aff'd following remand,* 53 F.3d 1181 (10th Cir. 1995).

[11] *Id.* at 846.

[12] *Kirkland,* 521 P.2d at 1361. The same test was later restated by the court in *Fields v. Volkswagen of America, Inc.,* 555 P.2d 48, 53 (Okla. 1976).

[13] *Robinson v. Volkswagen of America, Inc.,* 803 F.2d 572, 574-75 (10th Cir. 1986); *Braden v. Hendricks,* 695 P.2d 1343, 1350 (Okla. 1985); *Moss v. Polyco, Inc.,* 522 P.2d 622, 626 (Okla. 1974). The liability of the manufacturer and distributor/retailer is co-extensive, even though the latter is not responsible for the presence of the defect. *Braden,* 695 P.2d at 1350. Where the defect is attributable solely to the manufacturing process, the distributor/realtor may seek indemnification from the manufacturer. *Shuman v. Lavern Farmers Cooperative,* 809 P.2d 76, 77-78 (Okla.Ct.App. 1991); *Friend v. Eaton Corp.,* 787 P.2d 474, 476-77 (Okla.Ct.App. 1989); *Braden,* 695 P.2d at 1349. Conversely, a verdict for the manufacturer in such a case absolves the distributor/retailer from liability on a product liability theory.

[14] *Dewberry v. La Follette,* 598 P.2d 241, 242 (Okla. 1979) (action available against commercial lessors of a mobile home that supplied allegedly defective steps); *Coleman v. Hertz Corp.,* 534 P.2d 940, 945 (Okla.Ct.App. 1975) (action available against company that leased truck to plaintiff).

[15] This is implicit in the decision of *Mayberry v. Akron Rubber Mach. Corp.,* 483 F.Supp. 407 (N.D. Okla. 1979); *c.f., Scott v. Thunderbird Indus., Inc.,* 651 P.2d 1346, 1349 (Okla.Ct.App. 1982).

into the stream of commerce, whether through sale or other means.[16] A bailor may not, however, be held liable under a product liability theory where the bailor maintains control of the product, and thus does not inject it into the stream of commerce.[17]

Notwithstanding the breadth of *Kirkland* and its progeny, it is incumbent upon the plaintiff, even in a strict liability case, to establish a causal link between the defendant's acts and/or omissions and the plaintiff's injuries and damages. As the Oklahoma Supreme Court noted in *Case v. Fiberboard Corp.,*[18] the public policy favoring recovery by an innocent plaintiff does not justify the abrogation of the defendant's right to have "a causative link proven between the defendant's specific tortious acts and the plaintiff's injuries where there is a lack of circumstances which would insure that there was a significant probability that those acts were related to the injury."[19] In *Case,* the court refused to apply the market share liability, alternative liability, concert of action, and enterprise liability theories that allow a plaintiff to circumvent the "significant probability" standard.[20]

It is clear that a product liability cause of action may not be brought against an ultimate consumer of the product in question. In *Potter v. Paccar Co.*[21] the court stated that the product liability theory was not "so expansive that it permits an injured party to require everyone to defend his or her relationship to the defective product."[22] The court thus granted a motion to dismiss filed by the owner of a battery that exploded and caused the plaintiff to lose sight in his right eye. In *Allenberg v. Bentley Hedges Travel Serv., Inc.,*[23] the court held that product liability theory does not apply to the commercial seller of a used product if the alleged defect was not created by the seller, and if the product was sold in essentially the

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[16]*Kating v. ONEOK, Inc.,* 953 P.2d 66, 68 (Okla.Ct.App. 1997); *Dewberry v. La Follette,* 598 P.2d 241, 242 (Okla. 1979).

[17]*Gosner v. Decker,* 814 P.2d 1056, 1057-58 (Okla.Ct.App. 1991). In *Gosner,* the defendant was neither a seller nor lessor, but merely used and allowed the use of its own equipment in providing a service.

[18]743 P.2d 1062 (Okla. 1987).

[19]*Case,* 743 P.2d at 1067; *see also, Blair v. Eagle-Picher Industries, Inc.,* 962 F2d 1492, 1496 (10th Cir. 1992); *Dillon v. Fiberboard Corp.,* 919 F.2d 1488, 1491 (10th Cir. 1990).

[20]*Case,* 743 P.2d at 1067. The court's opinion was in response to certified questions regarding an "asbestos related injury" case where the plaintiff is unable to identify specific tortfeasors. *Id.* A similar conclusion was reached by the court in *Wood v. Eli Lilly & Co.,* 38 F.3d 510 (10th Cir. 1994), a case involving diethylslilbestrobol (DES).

[21]519 F.Supp. 487 (W.D. Okla. 1981).

[22]*Id.* at 488. "The defendant neither manufactured the battery, nor did it process the battery.... Rather, [the defendant] stands in the shoes of an ultimate consumer...." *Id.* at 489.

[23]22 P.3d 223 (Okla. 2001).

same condition as when it was obtained for resale.[24] The court defined a "commercial seller" as a seller who is in the business of selling used goods.[25]

Like courts in numerous other jurisdictions, the Oklahoma Supreme Court has held that a successor corporation may be liable on a product liability theory for injuries caused by the products manufactured or distributed by the acquired entity. In *Pullis v. United States Electrical Tool Co.*,[26] the court stated that as a general rule, where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts and liabilities of the transferor. However, exceptions to the rule exist where there is an agreement to assume such debts or liabilities, where the circumstances surrounding the transaction warrant a finding that there was a consolidation or merger of the corporations, and where the purchasing corporation was a mere continuation of the selling company.[27]

Similarly, the Oklahoma Supreme Court has held that a claimant injured by a defective product after the dissolution of the manufacturing corporation may, under the proper facts, seek recovery against the former shareholders of the corporation to the extent of the assets received by them.[28]

3. What Are The Basic Elements In A Product Liability Action?

In *Kirkland*, the court noted that the plaintiff must prove three elements to prevail in a product liability action:

> First, Plaintiff must prove that the product was the cause of the injury; the mere possibility that it might have caused the injury is not enough.
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> Secondly, 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. [Citation omitted.] If the action is against the retailer or supplier of the article, the Plaintiff must prove that the article was defective at the time of sale for public use or consumption or at the time it left the retailer's possession and control.

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[24] *Id.* at 224-25.

[25] *Id.* at 224.

[26] 561 P.2d 68 (Okla. 1977).

[27] *Id.* at 69.

[28] *Green v. Oilwell*, 767 P.2d 1348 (Okla. 1989). This is known as the "equitable trust fund doctrine."

> Thirdly, Plaintiff must prove that the defect made the article unreasonably dangerous to him or his property as the term "unreasonably dangerous is ... defined."[29]

Early post-*Kirkland* cases have, in reviewing the elements that the plaintiff must establish to prevail in a product liability case, either restated or rephrased the above quoted passage from the *Kirkland* decision.[30] However, more recent decisions have essentially added a "fourth element" requiring the plaintiff to establish personal injury or damage to property other than the allegedly defective product.[31]

a. Causation. The causation requirement, the same requirement that has existed in traditional negligence actions, has frequently been cited as a necessary element in the product liability plaintiff's case.[32] Though the doctrine of *res ipsa loquitur* has never been applied in an Oklahoma product liability case, the plaintiff need not exclude all other possible conclusions.[33]

The abnormal use or misuse of a product may serve as a complete defense to the product liability action to the extent that the abnormal use or misuse defeats the causation requirement.[34] Where it is established that a subsequent modification of the product, rather

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[29]*Kirkland*, 521 P.2d at 1363.

[30]*See, e.g., Wheeler v. HO Sports, Inc.*, 232 F.3d 754, 756 (10th Cir. 2000); *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998); *Holt v. Deere & Co.*, 24 F.3d 1289, 1292 (10th Cir. 1994); *McMurray v. Deere & Co.*, 858 F.2d 1436, 1439 (10th Cir. 1988); *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 499 (10th Cir. 1984); *Sterner Aero AB v. Page Airmotive, Inc.*, 449 F.2d 709, 713 (10th Cir. 1974); *Woulfe v. Eli Lilly & Co.*, 965 F. Supp. 178, 1482 (E.D. Okla. 1997); *Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 190 (Okla. 1992); *Lamke v. Futorian Corp.*, 709 P.2d 684, 688 (Okla. 1985) (Doolin, J. dissenting); *Lee v. Volkswagen of America, Inc.*, 688 P.2d 1283, 1285 (Okla. 1984); *Stuckey v. Young Exploration Co.*, 586 P.2d 726, 730 (Okla. 1978); *Bohnstedt v. Robscon Leasing L.L.C.*, 993 P.2d 135, 136 (Okla. App. 1999) ; *Attocknie v. Carpenter Mfg.*, 901 P.2d 221, 227 (Okla.Ct.App. 1995); *Tigert v. Admiral Corp.*, 612 P.2d 1381, 1383 (Okla.Ct.App. 1980).

[31]*Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187 (Okla. 1992); *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649 (Okla. 1990).

[32]*See e.g., Blair v. Eagle-Picher Industries, Inc.*, 962 F.2d 1492, 1495 (10th Cir. 1992), *cert denied*, 506 U.S. 974, 113 S. Ct. 464, 121 L.Ed.2d 372 (1992)("The mere possibility that the product caused the injury is not enough."); *Dillon v. Fiberboard Corp.*, 919 F.2d 1488, 1491 (10th Cir. 1990); *McMurray v. Deere & Co.*, 858 F.2d 1436, 1439 (10th Cir. 1988); *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 499 (10th Cir. 1984); *Cunningham v. Charles Pfizer & Co.*, 532 P.2d 1377, 1379 (Okla. 1974); *Messler v. Simmons Gun Specialities, Inc.*, 687 P.2d 121, 125 (Okla. 1984); *Kaye v. Ronson Consumer Products Corp.*, 921 P.2d 1300, 1302 (Okla.Ct.App. 1996).

[33]*Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 191 (Okla. 1992).

[34]*Kirkland*, 521 P.2d at 1367 (plaintiff's intoxication as misuse if the intoxication caused the injury);*see also, Black v. M&W Gear Co.*, 269 F.3d 1220, 1236 (10th Cir. 2001)("in a products liability case in which contributory negligence is not a defense and misuse is not an issue, the only relevant causation issue is whether a defect in the

than a manufacturing or design defect in the product, is the intervening and superseding cause of the injury (as opposed to the concurrent cause), no cause of action exists against the manufacturer.[35] Similarly, the plaintiff's recovery may be barred by a finding that the injuries and damages were caused solely by someone other than the named defendant.[36]

The current Oklahoma causation standard in a product liability case requires a "significant probability" that a causative link exists between the defendant's tortious acts and the plaintiff's injuries.[37] Citing this requirement, the theories of "alternative liability,"[38] "market share liability"[39] and other "nonidentification theories,"[40] have been rejected.

The causation requirement does, however, become somewhat distorted in a situation where a distributor of a defective product is named as a defendant in a product liability action. In such a case, as the court noted in *Braden v. Hendricks*,[41] "it is immaterial to the plaintiff's case that the defect in the product was not caused by the distributor."[42] As noted previously, the liability of the manufacturer and distributor is coextensive even though the distributor was in no way responsible for the presence of the defect.[43]

b. Existence of a Defect. Central to the plaintiff's case in a product liability action is proof that a defect existed in the product either at the time the product left the

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defendant's product was the cause of the injury."); *Saupitty v. Yazoo Mfg.*, 726 F.2d 657, 659 (10th Cir. 1984); *Stuckey v. Young Exploration, Inc.*, 586 P.2d 726, 730 (Okla. 1978); *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48, 56 (Okla. 1974); *Stewart v. Scott-Kitz Miller Co.*, 626 P.2d 329, 331 (Okla.Ct.App. 1981).

[35] *Messler v. Simmons Gun Specialties, Inc.*, 687 P.2d 121, 125 (Okla. 1984).

[36] *See Hinds v. General Motors Corp.*, 988 F.2d 1039, 1049 (10th Cir. 1993).

[37] *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512-13 (10th Cir. 1994); *Case v. Fiberboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987).

[38] *Wood*, 38 F.3d at 512-13.

[39] *Id.* at 513-14.

[40] *Id.* at 512-13; *Case*, 743 P.2d at 1067.

[41] 695 P.2d 1343 (Okla. 1985).

[42] *Id.* at 1350.

[43] *Id.; see Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572, 574-75 (10th Cir. 1986) (verdict in favor of manufacturer absolves distributor where alleged defect is attributable solely to manufacturing process). *See* note 13, *supra.*

manufacturer's control[44] (where the defendant is the manufacturer) or at the time the product was sold for use to the general public.[45] As the court noted in *Mayberry v. Akron Rubber Mach. Co.,*[46] a product may be defective because of: (1) manufacturing defects;[47] (2) supplier flaws;[48] (3) design defects;[49] or (4) a failure to supply proper warnings to the product's dangers.[50] The court noted in *Smith v. FMC Corp.,* 754 F.2d 873, 877 (10th Cir. 1985), "a manufacturer has a responsibility to warn of a defective product at any time after it is manufactured and sold if the manufacturer becomes aware of the defect." The duty to warn arises only when the manufacturer "knows or should know that the use of the product is hazardous ...." *Rohrbaugh v. Owens-Corning Fiberglass Corp.,* 965 F.2d 844, 847 (10th Cir. 1992). However, plaintiff has the burden of proving that the lack of adequate warnings caused his or her injuries. *Black v. M&W Gear Co.,* 269 F.3d 1220, 1231 (10th Cir. 23001). A rebuttable presumption exists that an adequate warning would have been heeded. For a discussion of the inference and its rebuttal, *see Eck v. Parke, Davis & Co.,* 256 F.3d 1013 (10th Cir. 2001); *Daniel v. Ben E. Keith Co.,* 97 F.3d 1329, 1332-33 (10th Cir. 1996); *Woulfe v. Eli Lilly & Co.,* 965 F. Supp. 1478, 1483-86 (E.D. Okla. 1997).

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[44] *Holt v. Deere & Co.,* 24 F.3d 1289, 1292 (10th Cir. 1994); *McMurray v. Deere & Co.,* 858 F.2d 1436, 1439 (10th Cir. 1988); *Lamke v. Futorian Corp.,* 709 P.2d 684, 688 (Okla 1985) (Doolin, J., dissenting); *Hurd v. American Hoist & Derrick Co.,* 734 F.2d 495, 499 (10th Cir. 1984); *Barber v. General Electric Co.,* 648 F.2d 1272, 1276 (10th Cir. 1981); *Scott v. Thunderbird Indus.,* 651 P.2d 1346, 1348 (Okla. 1982); *Kirkland,* 521 P.2d at 1363; *Bohnstedt v. Robsco Leasing, L.L.C.,* 994 P.2d 135 (Okla.Ct.App. 1999).

[45] *Mayberry v. Akron Rubber Mach. Corp.,* 483 F.Supp. 407, 412 (N.D. Okla. 1979); *Kirkland,* 521 P.2d at 1363; *Hawkins v. Larrance Tank Corp.,* 555 P.2d 91, 94 (Okla.Ct.App. 1976).

[46] 483 F.Supp. 407 (N.D. Okla. 1979).

[47] *Id.* at 412; s*ee, e.g., Wheeler v. HO Sports, Inc.,* 232 F.3d 754, 757 (10th Cir. 2000); *Messler v. Simmons Gun Specialities, Inc.,* 687 P.2d 121 (Okla. 1984).

[48] *Mayberry v. Akron Rubber Mach. Corp.,* 483 F.Supp. 407 (N.D. Okla. 1979).

[49] *Id.* at 412. *See, e.g., Wheeler v. HO Sports, Inc.,* 232 F.3d 754, 757 (10th Cir. 2000); *Rohrbaugh v. Owens-Corning Fiberglass Corp.,* 965 F.2d 844 (10th Cir. 1992); *McMurray v. Deere & Co.,* 858 F.2d 1436 (10th Cir. 1988)*; Saupitty v. Yazoo Mfg.,* 726 F.2d 657 (10th Cir. 1984); *Blood v. R&R Engineering, Inc.,* 769 P.2d 144 (Okla. 1989); *Messler v. Simmons Gun Specialties, Inc.,* 687 P.2d 121 (Okla. 1984). In the automotive context, design defects may be alleged in the context of crashworthiness. *See e.g., Hinds v. General Motors Corp.,* 988 F.2d 1039, 1049 (10th Cir. 1993); *Lee v. Volkswagen of America, Inc.,* 688 P.2d 1283 (Okla. 1984).

[50] *See, e.g., Wheeler v. HO Sports, Inc.,* 232 F.3d at 757 (10th Cir. 2000); *Daniel v. Ben E. Keith* Co., 97 F.3d 1329, 1332 (10th Cir. 1996); *McMurray v. Deere & Co.,* 858 F.2d 1436 (10th Cir. 1988); *Rohrbaugh v. Owens-Corning Fiberglass Corp.,* 965 F.2d 844 (10th Cir. 1992); *Smith v. FMC Corp.,* 754 F.2d 873 (10th Cir. 1985); *Woulfe v. Eli Lilly & Co.,* 965 F. Supp. 1478, 1482 (E.D. Okla. 1997); *Mayberry v. Akron Rubber Mach. Corp.,* 483 F.Supp. 407 (N.D. Okla. 1979); *Barber v. General Electric Co.,* 648 F.2d 1272 (10th Cir. 1981); *Smith v. United States Gypsum Co.,* 612 P.2d 251 (Okla. 1980); *Bohnstedt v. Robscon Leasing, L.L.C.,* 994 P.2d 135 (Okla.Ct.App.1999); *Shuman v. Lavern Farmers Cooperative,* 809 P.2d 76 (Okla.Ct.App. 1991); *Spencer v. Nelson Sales Co., Inc.,* 620 P.2d 477 (Okla.Ct.App. 1980).

It is generally recognized that the existence of most defects in a product liability action must be proved by expert testimony. Though *Daubert v. Merrell Dow Pharm., Inc.*[51] has yet to be "officially" adopted by the Supreme Court of Oklahoma, it was cited with approval in *Cities Service Co. v. Gulf Oil Corp.*,[52] and is virtually uniformly followed by state court trial judges in Oklahoma. Hence, when faced with a proffer of expert scientific or engineering testimony, an Oklahoma trial court, acting as the gatekeeper, will determine at the outset whether the reasoning or methodology underlying the testimony rests upon a reliable foundation.[53] Moreover, the trial court must also determine whether an expert's testimony is "relevant to the task at hand." That is, the testimony must not only be relevant but it must "fit" the facts of the case.[54] Appellate review of a trial court's decision with respect to the admission of expert scientific testimony is made under the abuse of discretion standard.[55]

c. Unreasonably Dangerous Defect. The mere proof of a defect does not, per se, when coupled with the causation element, establish a product liability cause of action. Rather, as the court noted in *Kirkland,* the defect alleged and proven must render the product "unreasonably dangerous." The *Kirkland* court, adopting the standard set forth in Section 402A (comment g) of Restatement (Second) of Torts, defined "unreasonably dangerous" as follows: "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."[56] This definition of the term has been adopted in subsequent decisions.[57]

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[51]509 U.S. 579 (1993).

[52]980 P.2d 116, 132 (Okla. 1999).

[53]The following factors are among those to be considered to determine the reliability of scientific or engineering evidence: (1) whether the expert's theory or technique has been subject to peer review; (2) whether there is a known or potential rate of error; (3) whether the scientific methodology has been generally accepted in its field; and (4) whether it can be tested. *Daubert*, 509 U.S. at 592-593; *Hollander v. Sandoz Pharm. Corp.*, 95 F.Supp. 1230, 1234 (W.D. Okla. 2000); *see also*, *Tyler v. Sterling Drug, Inc.*, 19 F.Supp.1239 (N.D. Okla. 1998).

[54]*Daubert*, 509 U.S. at 592-593. It should be noted that in *Alfred v. Caterpillar, Inc.*, 262 F. 3d 1983 (10th Cir. 2001), the Tenth Circuit held that a district court may reject as untimely a *Daubert* motion raised late in the trial process, stating: "Counsel should not 'sandbag' *Daubert* concerns until the close of an opponent's case, thereby placing opposing counsel and the trial court at a severe disadvantage". *Id*. at 1087.

[55]*Gen. Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Black v. M&W Gear Co.*, 269 F.3d 1220, 1227 (10th Cir. 2001).

[56]*Kirkland*, 521 P.2d at 1363.

[57]*See, e.g., McMurray v. Deere & Co.*, 858 F.2d 1436, 1439 (10th Cir. 1988); *Brown v. McGraw-Edison Co.*, 736 F.2d 609, 613 (10th Cir. 1984); *Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 500 (10th Cir. 1984); *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442, 447 (10th Cir. 1976); *Lamke v. Futorian Corp.*, 709 P.2d 684, 686 (Okla.

The importance of properly stating the "unreasonably dangerous" element was emphasized in *Lamke v. Futorian Corp.*[58] In that case, the Oklahoma Supreme Court affirmed the trial court's dismissal of the plaintiff's product liability cause of action because the plaintiff had not sufficiently alleged that the products involved were more likely than would be expected by the ordinary consumer to cause the damages alleged. The court emphasized that a manufacturer may not be held responsible merely because its product is not as safe as other similar products. Rather, it must be shown that the product is less safe than expected by the ordinary consumer.[59]

d. Harm to Something Other Than The Product. In *Waggoner v. Town & Country Mobile Homes, Inc.*,[60] the Oklahoma Supreme Court addressed the issue of whether a plaintiff can pursue a product liability cause of action when there is only economic loss. The court reasoned that there is no need to extend the product liability theory into an area occupied by the Uniform Commercial Code, and held that "no action lies in product liability for injury only to the product itself resulting in purely economic loss."[61] If, however, there is personal injury or damage to other property that results from the product defect, the plaintiff may recover damages for the personal injury and/or the other property loss, as well as for the damage to the product.[62]

4. What Is The Applicable Statute of Limitations?

The *Kirkland* court noted that an action based on product liability is an action for injury to personal property or for injury to the rights of another, and thus concluded that the two year statute of limitations generally applicable in Oklahoma for tortious conduct would also apply in product liability cases.[63] The plaintiff may "extend" the limitations period by one year by filing then dismissing the action without prejudice.[64] In *Ross v. Kelsey Hayes,*

1985); *Smith v. United States Gypsum Co.,* 612 P.2d 251, 253 (Okla. 1980); *Attocknie v. Carpenter Mfg.*, 901 P.2d 221 (Okla.Ct.App. 1995).

[58]709 P.2d 684 (Okla. 1985).

[59]*Id.* at 686; *see also, Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998).

[60]808 P.2d 649 (Okla. 1990).

[61]*Id.* at 653; *see also, Oklahoma Gas & Electric Co. v. McGraw-Edison Co.,* 834 P.2d 980, 982 (Okla. 1992).

[62]*Waggoner*, 808 P.2d at 652; *Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 193-94 (Okla. 1992).

[63]*Kirkland*, 521 P.2d at 1361; *see* 12 O.S. § 95 (1981).

[64]12 O.S. § 100.

Inc.,[65] the court held that this applies so long as the initial action is filed before the limitations period expires. The defendant need not be served in order to activate the one year "extension."[66]

Oklahoma courts have applied the discovery rule in those product liability actions in which particular hardship or other circumstances justify different accrual rules.[67] In *Daugherty v. Farmers Cooperative Ass'n,*[68] the Oklahoma Supreme Court held that acquisition of sufficient information which, if pursued, would lead to the true condition of things, would start the running of the statute of limitations.[69]

In *Huff v. Fiberboard Corp.,*[70] the Tenth Circuit held that the statute allowing a personal representative two years from the date of the death of the injured party[71] to bring an action does not serve to extend the time to sue if the deceased, on the date of his death, had no cause of action against the manufacturer for the injuries which caused his death. Thus, where the decedent knew or reasonably should have known more than two years prior to his death that he had the condition for which the action is ultimately brought, and the defendant caused it, the action is time barred.[72]

Recognition of the discovery rule in product liability actions has raised the question of whether Oklahoma's statute of repose[73] applies in product liability actions. Early indications from the Oklahoma Supreme Court were that it did apply to manufacturers.[74] In *Ball v. Harnischfeger Corp.,*[75] the Oklahoma Supreme Court held that the statute of repose

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[65]825 P.2d 1273 (Okla. 1991).

[66]*Id.* at 1276-79.

[67]*See, e.g., Huff v. Fiberboard Corp.,* 836 F.2d 473 (10th Cir. 1987); *Williams v. Borden, Inc.,* 637 F.2d 731 (10th Cir. 1980); *Daugherty v. Farmers Cooperative Ass'n.,* 689 P.2d 947 (Okla. 1984).

[68]689 P.2d 947 (Okla. 1984).

[69]*Id.* at 951; *see* also, *Huff v. Fiberboard Corp.,* 836 F.2d 473, 479 (10th Cir. 1987).

[70]836 F.2d 473 (10th Cir. 1987).

[71]12 O.S. § 1053.

[72]*Huff,* 836 F.2d at 475-480.

[73]12 O.S. §§ 109-113.

[74]*Loyal Order Of Moore, Lodge 1785 v. Cavaness,* 563 P.2d 143, 147 (Okla. 1978).

[75]877 P.2d 45, 50 (Okla. 1994).

may bar a product liability claim if the manufacturer was acting as a designer, planner, construction supervisor or observer, or constructor of an improvement to real property. Similarly, in *O'Dell v. Lamb - Grays Harbor Co.*,[76] the court held that a product liability claim involving an allegedly defective conveyor was barred because the conveyor was an "improvement to real property" and the case was filed more than ten years after the conveyor was installed.[77]

5. What Defenses Are Available?

The *Kirkland* court noted three defenses available to the product liability defendant: lack of causation, abnormal use and assumption of risk.[78] Subsequent courts have continually reviewed the availability of these, as well as other defenses.[79]

a. Lack of Causation. If some act of the plaintiff caused the injury rather than the product itself, the plaintiff may not recover. Thus, abnormal use,[80] subsequent modification,[81] or events, acts or omissions over which the defendant had no control may serve to defeat the causation requirement.

b. Abnormal Use or Misuse. The leading case on the issue of what constitutes an abnormal use or misuse of a product is *Fields v. Volkswagen of America, Inc.*[82] In *Fields*, the Oklahoma Supreme Court significantly restricted the applicability of the abnormal use defense. The court noted that the defense of misuse or abnormal use of a product refers to cases where the method of using a product is not that which the maker intended or is a use that could not reasonably be anticipated by a manufacturer. As the court noted, a distinction must be made between use for an abnormal purpose and use for a proper purpose but in a careless manner (contributory negligence).[83] The court, however, emphasized the latter element of foreseeability, stating that "to determine whether the use of a product is abnormal,

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[76] 911 F. Supp. 490 (W.D. Okla. 1995).

[77] *Id.* at 493-94.

[78] *Kirkland*, 521 P.2d at 1366.

[79] "Defense" here is used in the broad sense of the word, indicating matters of proof that either serve as affirmative defenses or serve to rebut the plaintiff's *prima facie* case.

[80] See cases cited at note 34, *supra*.

[81] See cases cited at note 35, *supra*.

[82] 555 P.2d 48 (Okla. 1976).

[83] *Id.* at 56.

we must ask whether it was reasonably foreseeable by the manufacturer. A manufacturer is not liable for injuries resulting from such use if it is not foreseeable."[84] Thus, the *Fields* court characterized the plaintiff's alleged drinking and speeding as a "use for a proper purpose, but in a careless manner" and noted that such "contributory negligence" was not a defense unless it caused the accident.[85]

Subsequent cases have acknowledged the existence of the abnormal use or misuse defense in product liability cases under the proper factual circumstances.[86]

c. Comparative Negligence or Fault. In *Kirkland*, the court held that the Oklahoma comparative negligence statute[87] did not apply in product liability actions, and therefore the plaintiff's contributory negligence or fault is a defense only where it reaches the point where it was the cause of the injury alleged.[88] Despite a growing trend in other jurisdictions, subsequent Oklahoma decisions have consistently held that the plaintiff's negligence is not used to reduce the plaintiff's recovery in a product liability action.[89]

d. Assumption of Risk. Voluntary assumption of a risk is a complete defense to strict product liability under Oklahoma law.[90] But, general knowledge of a risk is insufficient to bar recovery.[91] Rather, the defendant must establish a "voluntary assumption

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[84] *Id.* The court, perhaps realizing the inconsistency with *Kirkland*, noted that while drunkenness could be misuse of a product, the facts in the present case did not establish such misuse. *See also, Black v. M&W Gear Co.*, 269 F.3d 1220, 1235 (10th Cir. 2001)(holding that evidence that plaintiff's alcohol consumption might have caused the accident is irrelevant because it did not rebut plaintiff's evidence that a defective product caused plaintiff's injuries).

[85] *Id.*; *see also, McMurray v. Deere & Co.,* 858 F.2d 1436 (10th Cir. 1988) (party injured when bypassing a neutral start switch was carelessly using product for a proper purpose).

[86] *See, e.g., Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1296 (10th Cir. 1989); *Stuckey v. Young Exploration Co.*, 586 P.2d 726, 730 (Okla. 1978); *Stewart v. Scott-Kitz Miller Co.*, 626 P.2d 329 (Okla.Ct.App. 1981); *Basford v. Gray Manufacturing Co*., 11 P.3d 1281, 1293 (Okla. App. 2000).

[87] 23 O.S. §§ 11 & 12.

[88] *Kirkland*, 521 P.2d at 1367. The court noted that the referenced statute applies to "negligence actions" and not products liability actions.

[89] *Black v. M&W Gear Co.*, 269 F.3d 1220, 1234 (10th Cir. 2001)("In Oklahoma, use of a product `for a proper purpose but in a careless manner' is merely contributory negligence, which is not a defense to a products liability suit."); *McMurray*, 858 F.2d at 1439; *Saupitty v. Yazoo Mfg.*, 726 F.2d 657, 660 (10th Cir. 1984); *Bingham v. Hollingsworth Mfg.*, 695 F.2d 445, 454 (10th Cir. 1982); *Hogue v. A.B. Chance Co.*, 592 P.2d 973, 975 (Okla. 1979); *Fields v. Volkswagen of America, Inc.*, 555 P.2d 48, 55 (Okla. 1976).

[90] *Holt v. Deere & Co.*, 24 F.3d 1289, 1295 (10th Cir. 1994).

[91] *Hogue*, 592 P.2d at 975.

of a known risk created by a defect which existed in a product at the time it left the manufacturer."[92] In *Smith v. FMC Corp.,*[93] the Tenth Circuit stated the parameters of this defense, finding error in giving an assumption of risk instruction "in the absence of direct or credible and sufficient circumstantial evidence that the [defendant was] aware of the danger and voluntarily assumed the risk."[94] It is not, however, necessary that the plaintiff have "specific, technical knowledge of the cause of the product's dangerous, defective condition."[95] Rather, the plaintiff's general knowledge of the defective condition is sufficient to create a jury question on assumption of risk.[96]

e. Lapse of Time/Extended Use. Although the existence of a significant lapse of time between the manufacture of the product and injury is not a defense that can conclusively refute contentions that a product was defective, Oklahoma courts have found such evidence to be persuasive. In *Hawkins v. Larrance Tank Corp.,*[97] the court noted that while the existence of a significant lapse of time between the sale of the product and the accident was a "damaging fact – one which frequently prevents any inference that the product was defective when sold ... it does not preclude a finding of defectiveness at the time of sale."[98] Similarly, the extensive use of the allegedly defective product between its manufacture and the date of the injury, though not an absolute defense, has been held to be persuasive evidence as to the existence or non-existence of a defect at the time the product left the manufacturer's control.[99] Thus, the fact that an aircraft engine operated satisfactorily for 538 flying hours after its sale,[100] that bolts were in use three years prior to the date of an

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[92] *Smith v. FMC Corp.*, 754 F.2d 873, 876 (10th Cir. 1985). *See also, Holt v. Deere & Co.*, 24 F.3d 1289, 1292 (10th Cir. 1994); *Bingham v. Hollingsworth Mfg.*, 695 F.2d 445, 452 (10th Cir. 1972); *Barber v. General Electric Co.*, 648 F.2d 1272, 1277 (10th Cir. 1981).

[93] 754 F.2d 873 (10th Cir. 1985).

[94] *Id.* at 877; *McMurray v. Deere & Co.*, 858 F.2d 1436, 1440 (10th Cir. 1988).

[95] *Holt*, 24 F.3d at 1293.

[96] *Id.*

[97] 555 P.2d 91 (Okla.Ct.App. 1976).

[98] *Id.* at 94. In *Hawkins*, there was a three year lapse from the time of sale to the date of injury. *See also, Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495 (10th Cir. 1984) (30 year lapse of time does not preclude finding of defectiveness at time of sale).

[99] *See e.g., Sterner Aero AB v. Page Airmotive, Inc.,* 449 F.2d 709, 714 (10th Cir. 1974); *Hawkins v. Larrance Tank Corp.*, 555 P.2d 91, 94-95 (Okla.Ct.App. 1976).

[100] *Sterner Aero AB v. Page Airmotive, Inc.*, 449 F.2d 709, 714 (10th Cir. 1974).

injury,[101] or that a vehicle was driven 19,500 miles before an accident[102] has been held admissible to refute allegations that the product was defective at the time it left the possession and control of the defendant.

f. State of the Art. "State of the art," as used in product liability actions, is construed by Oklahoma courts to mean simply the custom and practice in an industry. Compliance with such standards does not constitute an absolute defense to product liability actions.[103] Nor does compliance with a federal safety standard, in and of itself, establish a product is not defectively designed.[104] However, as the court noted in *Bruce v. Martin-Marietta Corp.,*[105] state of the art evidence is helpful in determining the expectation of the ordinary consumer, and thus is relevant in determining whether a particular product is defective.[106] Further, state of the art evidence may be considered relevant to whether the manufacturer is or should be aware of various dangers associated with the product.[107]

g. Substantial Change in the Product. Oklahoma cases have adopted the Restatement (Second) of Torts § 402A(1)(b) which imposes liability only when the product "is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."[108] Most decisions have stated that the plaintiff must establish that a defect existed in the product at the time it left the control of the manufacturer.[109] In

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[101] *Hawkins v. Larrance Tank Corp.,* 555 P.2d 91, 94-95 (Okla.Ct.App. 1976).

[102] *Braden v. Hendricks,* 695 P.2d 1343, 1350 (Okla. 1985).

[103] *O'Banion v. Owens-Corning Fiberglass Corp.,* 968 F.2d 1011, 1016 (10th Cir. 1992). *See also, Smith v. FMC Corp.,* 754 F.2d 873, 877 (10th Cir. 1985); *Robinson v. Audi NSU Auto Union Aktiengesellschaft,* 739 F.2d 1481, 1485 (10th Cir. 1984); *Smith v. Minster Mach. Co.,* 669 F.2d 628, 633 (10th Cir. 1982).

[104] *Attocknie v. Carpenter Mfg.,* 901 P.2d 221, 228 (Okla.Ct.App. 1995); *Edwards v. Basel Pharm.,* 993 P.2d 298, 301 (Okla. 1997). Issues concerning federal preemption as affecting a state common law product liability claim are discussed in *Johnson v. G.M. Corp.,* 889 F.Supp. 451 (W.D. Okla. 1995) and *Bokis v. American Medical Systems, Inc.,* 875 F.Supp. 748 (W.D. Okla. 1995).

[105] 544 F.2d 442 (10th Cir. 1976).

[106] *Id.* at 447.

[107] *Obanion* at 968 F.2d 1011, 1016 (10th Cir. 1992); *Smith* at 669 P.2d 628, 634 (Okla. 1982).

[108] *Saupitty v. Yazoo Mfg.,* 726 F.2d 657, 659 (10th Cir. 1984).

[109] *Hurd v. American Hoist & Derrick Co.,* 734 F.2d 495, 499 (10th Cir. 1984); *Mayberry v. Akron Rubber Mach. Corp.,* 483 F.Supp. 407, 412 (N.D. Okla. 1979); *Dutsch v. Sea Ray Boats, Inc.,* 845 P.2d 187, 191-92 (Okla. 1992); *Manora v. Watts Regulator Co.,* 784 P.2d 1056, 1059 (Okla. 1989); *Messler v. Simmons Gun Specialities, Inc.,* 687 P.2d 121, 125 (Okla. 1984); *Stuckey v. Young Exploration Co.,* 586 P.2d 726, 730 (Okla. 1978); *Cunningham v. Charles Pfizer & Co.,* 532 P.2d 1377, 1379 (Okla. 1974); *Hawkins v. Larrance Tank Corp.,* 555 P.2d 91, 94 (Okla.Ct.App. 1976).

Saupitty v. Yazoo Mfg.,[110] however, the court noted that while the general rule is that a manufacturer is not liable when an unforeseeable subsequent modification alone causes the plaintiff's injury, the manufacturer may be held liable where the subsequent modification was foreseeable.[111]

h. Learned Intermediary. Oklahoma courts have recognized that the duty to warn may be abated or lessened in cases where the user is not an "ordinary consumer" but is someone who does or reasonably should possess special skills or knowledge regarding the safe use of the product.[112] The Oklahoma Supreme Court held in *Duane v. Oklahoma Gas & Electric Co.,*[113] that where a product is used in an industrial setting by one supposedly skilled at his job, a manufacturer has "no duty to warn of dangers inherent in the task or which are created by the oversight or negligence of the contractor or fellow employees."[114] In *Hutchins v. Silicone Specialties, Inc.,*[115] the court distinguished between products marketed toward the ordinary consumer and those distributed to professionals, and reasoned that a product that might be unreasonably dangerous in the hands of a home handyman may not be defective when used at a commercial work site by professionals.[116] Similarly, a drug or medical device manufacturer may, in most cases, warn the physician, rather than the patient/consumer, of dangers associated with the product.[117] This creates the ability, in the proper factual scenario, to urge that the duty to warn is abrogated, or at least delegated, to the knowledgeable purchaser.[118]

i. Obvious Defect. In the context of a duty to warn case, whether in negligence or product liability, the duty to warn exists only when those to whom the warning is to be communicated can reasonably be perceived to be ignorant of the dangers disclosed in a

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[110] 726 F.2d 657, 659 (10th Cir. 1984).

[111] *Id.* at 659.

[112] *Akin v. Ashland Chemical Co.*, 156 F.3d 1030, 1037 (10th cir. 1998).

[113] 883 P.2d 284 (Okla. 1992).

[114] *Id.* at 287.

[115] 64 O.B.J. 20 at 1554 (Okla. May 18, 1993).

[116] *Id.* at 1556.

[117] *Woulfe v. Eli Lilly Co.*, 965 F. Supp. 1478, 1482 (E.D. Okla 1997). Exceptions to the rule are discussed in *Edwards v. Basel Pharmaceuticals*, 933 P.2d 298, 300-03 (Okla. 1997). *Tansy v. Dacomed Corp.*, 890 P.2d 881, 886 (Okla 1994).

[118] *Duane*, 833 P.2d at 287.

warning. That is, if the dangers or potential dangers are known or should reasonably be known to the user, no duty to warn exists.[119]

j. Unavoidably Unsafe Product. In *Tansy v. Dacomed Corp.*,[120] the court recognized the principles of Comment K of the Restatement (Second) of Torts, Section 402A. Under these principles, some products that otherwise create a significant risk, but have great utility may be deemed "unavoidably unsafe." Comment K serves as an affirmative defense where the product is incapable of being made safe under present technology, but the social need for the product warrants its production.[121] The defense is available only when the product is properly manufactured and contains adequate warnings.[122]

k. Government Contractor Defense. This defense, originally articulated by the United States Supreme Court in *Boyle v. United Technologies Corp.*[123] provides product manufacturers with insulation from tort liability under state law for injuries allegedly caused by equipment manufactured according to specifications dictated by the military. The elements of the government contractor defense are as follows: (1) that the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) that the supplier warned the United States about the dangers and the use of the equipment that were known to the supplier but not to the United States. In *Andrew v. Unisys Corp.*,[124] Judge Russell, noting a split of authority concerning whether the government contractor defense applied to nonmilitary contracts, found that a manufacturer of a nonmilitary product is entitled to assert the government contractor defense so long as it meets the threshold test established in *Boyle*.[125]

6. What Damages Are Recoverable?

The *Kirkland* decision was considered by the court as an appeal from a defendant's verdict and it did not address the issue of what damages are recoverable in a product liability action.

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[119] *Mayberry v. Akron Rubber Machinery Corp.*, 483 F. Supp. 407,413 (N.D. Okla. 1979); *Graves v. Superior Welding, Inc.*, 893 P.2d 500, 503-04 (Okla. 1995).

[120] 890 P.2d 881 (Okla. 1994).

[121] *Id.* at 885.

[122] *Id.* at 886.

[123] 487 U.S. 500, 507-508, 108 S.Ct. 2510, 2515-16, 101 L.Ed.2d 442 (1988).

[124] 936 F.Supp. 821 (W.D. Okla. 1996).

[125] *Id.*, at 830.

a. Compensatory Damages. Oklahoma courts have generally, without discussion, followed the general tort principle that one injured by the wrongful act or omission of another is entitled to fair and just compensation commensurate with the loss or damage sustained.[126] Damages may be recovered for personal injuries arising out of a product liability action by an adult,[127] a minor child,[128] the parent or guardian of a minor child,[129] and a spouse of an injured plaintiff.[130] Children may also have a cause of action for loss of parental consortium, which is defined as the love, care, companionship and guidance given by a parent to a minor child. For a child to recover on a loss of parental consortium claim, the jury must make findings set out in OUJI – Civ. No. 4.7. The measure of damages for loss of parental consortium is based upon the amount of money which will reasonably and fairly compensate the child for the loss of the value of the parental consortium that he or she has lost, and for the value of the loss of parental consortium he or she is reasonably certain to sustain until he or she reaches the age of eighteen. Any award to the child will be reduced by the court in proportion to the percentage of negligence the jury attaches to the injured parent. OUJI – Civ. No. 4.8. Damages caused by a product failure are also, of course, recoverable in a wrongful death action.[131] Damage items which may be considered as a result of the wrongful death of a minor child are enumerated in OUJI – Civ. No. 8.2. The proper plaintiffs to a wrongful death action are determined by Oklahoma wrongful death and probate statutes.[132] A survival action may be brought by the personal representative of the decedent.[133]

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[126]This principle is codified in 23 O.S. § 61.

[127]The elements that may be considered by the jury in fixing an amount to be awarded to an adult for personal injuries are enumerated in OUJI – Civ. No. 4.1.

[128]The elements that may be considered by the jury in fixing an amount to be awarded to a minor child for personal injuries are the same as set out in Footnote 127 above, except for loss of earnings, which are not considered. OUJI – Civ. No. 4.2.

[129]In a derivative action brought by the parent or guardian of a minor child who has suffered person injuries, the jury is allowed to consider the elements set out in OUJI – Civ. 4.3.

[130]In order for a plaintiff to recover on a claim of loss of spousal consortium, the jury must make findings as set out in OUJI – Civ. 4.5. The measure of damages for loss of spousal consortium is the amount of money which will reasonably and fairly compensate the plaintiff for the value of the loss of consortium he or she has sustained, and for the value of the loss of consortium he or she is reasonably certain to sustain in the future. Any award to the plaintiff will be reduced by the court in proportion to the percentage of negligence the jury attaches to the injured spouse. OUJI – Civ. 4.6.

[131]An action for wrongful death is derivative, brought in the name of the decedent. Elements that may be considered by the jury in determining the amount of damages are described in OUJI – Civ. No. 8.1.

[132]12 O.S. §§ 1053-1055 and, 84 O.S. § 213.

[133]The personal representative may recover damages the decedent might have otherwise sustained had he or she lived. 12 O.S. § 1053(a).

b. Punitive Damages. In *Thiry v. Armstrong World Industries,*[134] the Oklahoma Supreme Court held that plaintiffs may allege and prove exemplary or punitive damages as an element of damage in a product liability action. The court, reasoning that such awards were authorized by Oklahoma statute,[135] stated that "punitive damages may be assessed against the manufacturer of a product injuring the plaintiff if the injury is attributable to conduct that reflects a *reckless disregard* for the public safety."[136] "Reckless disregard" for public safety is shown when the evidence indicates: (1) the defendant was aware of the defect, and the likelihood that the injury would result from it; (2) the defendant could either remedy the defect or prevent the injury caused by it; and (3) notwithstanding the above, the defendant deliberately failed to take action to remedy the defect or prevent the injury.[137] Under the applicable Oklahoma statute,[138] a jury may not award punitive damages in excess of actual damages unless the court, at the conclusion of the evidence, before submission to the jury, on the record and out of the presence of the jury, makes a determination that there is "clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed ...."[139] In *Moore v. Subaru of America,*[140] the Tenth Circuit held that, absent presentation of such evidence, the court may properly refuse to instruct on the issue of punitive damages.

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[134] 661 P.2d 515 (Okla. 1983).

[135] 23 O.S. § 9.

[136] *Thiry,* 661 P.2d at 518.

[137] *Id.* at 517-18; s*ee also, Johnson v. General Motors Corp.*, 889 F. Supp. 451, 454 (W.D. Okla. 1995).

[138] 23 O.S. § 9.

[139] *Id.* Noting the absence of such a finding on the record, the court in *Shuman v. Laverne Farmers Cooperative*, 809 P.2d 76, 79 (Okla. Co. App. 1991) reduced the punitive damage award to equal the compensatory damages awarded.

[140] *Id.* The court rejected the argument that a defendant's resistance in producing material in discovery constitutes an implied admission of punitive guilt, and reasoned that such evidence, if admissible, is relevant to liability, not damages.