CHAPTER TWELVE

PRODUCTS LIABILITY

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Instruction No. 12.1

MANUFACTURERS' PRODUCTS LIABILITY — ELEMENTS

A party claiming damages under Manufacturers' Products Liability has the burden of proving each of the following:

1. [Defendant] [manufactured/sold/leased] the [description of product];

2. [Defendant] was in the business of [manufacturing/selling/leasing] such products;

3. The [description of product] was defective and because of the defect, the [description of product] was unreasonably dangerous to a person [or to the property of a person] who uses, consumes, or might be reasonably expected to be affected by the [description of product];

4. The [description of product] was defective at the time it was [manufactured/sold/leased] by [Defendant] or left [his/her/its] control;

5. [Plaintiff] was a person who used, consumed, or could have reasonably been affected by the [description of product];

6. [Plaintiff] sustained [personal injuries] [and/or] [damage to property] directly caused by the defect in the [description of product].

Comments

The leading case in Oklahoma on manufacturers' products liability is Kirkland v. General Motors Corp., 521 P.2d 1353 (Okla. 1974). In Waggoner v. Town & Country Mobile Homes, Inc., 808 P.2d 649 (Okla. 1990), the Oklahoma Supreme Court held that "in Oklahoma no action lies in manufacturers' products liability for injury only to the product itself resulting in purely economic loss." 808 P.2d at 653. However, where there are also personal injuries or damages to other property, damages for injury to the product itself are recoverable under a products liability theory. Dutsch v. Sea Ray Boats, Inc.,845 P.2d 187, 193-94 (Okla. 1992).
Instruction No. 12.2

**DEFECTIVE — DEFINED**

A product is defective when it is not reasonably fit for the ordinary purposes for which such products are intended or may reasonably be expected to be used. A defect may arise out of the [design/manufacture/packaging/labeling/or insert description of any other appropriate basis of liability] occurring while the product was in the control of [Defendant].

**Comments**


Instruction No. 12.3

**UNREASONABLY DANGEROUS — DEFINED**

"Unreasonably dangerous" means that the article must be dangerous to an extent beyond that which would be contemplated by the ordinary user or consumer who purchased it with the ordinary knowledge common to the community as to the product's characteristics.

**Comments**

Instruction No. 12.4

**DIRECT CAUSE — DEFINITION**

Direct cause means a cause which, in a natural and continuous sequence, produces injury and without which the injury would not have happened. For a defect in a product to be a direct cause it is necessary that some injury to [the property of] a person in [Plaintiff's] situation must have been a reasonably foreseeable result of the defect.

[There may be more than one direct cause of an injury. When an injury is the result of a defect in a product as well as the conduct of [(another person)/(other persons)], both the defect and the conduct of the other [person/persons] are direct causes of the injury regardless of the extent to which each contributed to the injury.]

**Notes on Use**

This Instruction is an adaptation of Instruction Nos. 9.6 and 9.7 for products liability cases. The last paragraph should be given where there is evidence offered of concurrent causation.

**Comments**

The Oklahoma Supreme Court held in Kirkland v. General Motors Corp., 521 P.2d 1353, 1367 (Okla. 1974), that Oklahoma's comparative negligence statute had no application to manufacturers' products liability. Accordingly, a manufacturer's liability will be joint and several with that of the other tortfeasors. See Boyles v. Oklahoma Natural Gas Co., 619 P.2d 613, 616 (Okla. 1980) (common law rule of joint and several liability controls in cases outside the purview of the comparative negligence statutes).
Instruction No. 12.5

PRODUCT DEFECTIVE IF NO WARNING GIVEN

A product that involves a risk of harm to [persons/property] when it is used [by an ordinary user] [(in the way that it was intended to be used)/(in a way that the manufacturer/seller/lessor could reasonably have foreseen)] is defective if:

1. The product does not have [(an adequate warning of its dangerous characteristics)/(adequate instructions for its safe use)] that [is/are] sufficient to inform an ordinary user of the risk of harm; and

2. The risk of harm is not one that an ordinary user would reasonably expect.

No [warning/instructions] [is/are] required if the particular danger would be apparent to an ordinary user from the nature of the product itself or from other information known to the user.

Notes on Use

The trial court should select the appropriate options from those presented in brackets. Instruction No. 12.1, "Manufacturers'/Products Liability — Elements", should ordinarily be given before this Instruction.

The last sentence should be given to the jury only if there is evidence to support it. In a case involving a learned intermediary, such as a prescribing physician, the Instruction should be modified by substituting the name of the learned intermediary for "the user" in the last sentence.

Because this Instruction has been drafted for strict liability cases, it contains no "duty of care" language. If a negligence claim is asserted, the jury should be given instructions on the duty of a supplier of a product to use reasonable care to provide warnings or instructions.

Comments

Products liability may arise from a failure to warn as well as from a manufacturing or design defect. Barber v. General Elec. Co., 648 F.2d 1272, 1277 (10th
Cir. 1981) ("Oklahoma follows the well accepted principle that failure to warn may be, in itself, a defect within the product."); Mayberry v. Akron Rubber Mach Corp., 483 F. Supp. 407, 412 (N.D. Okla. 1979) ("At least three types of unreasonably dangerous defects may exist under [Restatement of Torts 2d] Section 402A. A product may be defective because of manufacturing or supplier flaws, defective design, or failure to supply proper warning about the product's dangers"). The following cases deal with various issues concerning a manufacturer's liability for failure to warn: Duane v. Oklahoma Gas & Elec. Co., 833 P.2d 284 (Okla. 1992) (discussing supplier's duty to warn); McKee v. Moore, 648 P.2d 21, 23 (Okla. 1982) ("[E]ven if a product is faultlessly designed and the manufacturer has exercised all possible care in the preparation and sale of his product, it may be considered unreasonably unsafe or defective if it is placed in the hands of the ultimate consumer without adequate warnings of the dangers involved in its use."); Smith v. U.S. Gypsum Co., 612 P.2d 251, 254 n.3 (Okla. 1980) ("Although breach of a `duty to warn' on part of manufacturer is an element of a negligence, it is not applicable in strict liability."); Steele v. Daisy Mfg. Co., 743 P.2d 1107, 1108-09 (Okla. Ct. App. 1987) ("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 the warnings are unclear or inadequate to apprise the consumer of the inherent danger, the product may be defective, particularly where a manufacturer has reason to anticipate danger may result from the use of his product); Rohrbaugh v. Owens–Corning Fiberglas Corp., 965 F.2d 844 (10th Cir. 1992) ("A failure to warn may result in a product being defective and unreasonably dangerous. [Citation omitted.]. This duty to warn, however, only extends to ordinary consumers and users of the products."); Percival v. American Cyanamid Co., 689 F. Supp. 1060, 1062 (W.D. Okla. 1987) (learned intermediary defense).

**Instruction No. 12.6**

**Adequacy of Warnings**

[Plaintiff] contends that the warnings are inadequate. A warning must adequately inform the ordinary user of the precautions, if any, [he/she] must take and the risk, if any, that [he/she] is exposed to in the use of the product. The warning must reasonably communicate the extent or seriousness of the harm that could result from the danger.
Where an adequate warning is given, the manufacturer and distributor may reasonably assume that it will be read and that the product will be used according to the directions or instructions. A product bearing such a warning, which is safe for use if it is followed, is not defective, nor is it unreasonably dangerous.

Comments


Instruction No. 12.7

**LIABILITY FOR INJURY FROM FOOD OR BEVERAGE**

[Defendant] is not liable for the injury suffered by [Plaintiff] which was directly caused by [specific incident causing damage], if the substance causing injury should be "reasonably expected" to be in the [name of food or beverage].

Notes on Use


Comments

Instruction No. 12.8

**DEFINITION OF SUBSTANCE WHICH COULD BE "REASONABLY EXPECTED" TO BE PRESENT IN A FOOD OR BEVERAGE**

The term "reasonably expected" as used in these instructions means that type of substance that a consumer would consider probably to be found in a [name of food or beverage].

**Comments**


Instruction No. 12.9

**AFFIRMATIVE DEFENSE OF MISUSE OF PRODUCT**

[Defendant] has raised the defense in this case that [Plaintiff] misused the [Specify Product] and the misuse was the sole cause of [Plaintiff]'s injury. Misuse of a product is a use that could not reasonably be anticipated by its maker. If [Plaintiff] was using the [Specify Product] in a way that was foreseeable or should have been anticipated by [Defendant], it is not misuse even if [Plaintiff] was negligent in using it.

**Comments**

The Oklahoma Supreme Court recognized an affirmative defense of misuse of product in *Kirkland v. General Motors Corp.*, 521 P.2d 1353, 1366 (Okla. 1974). In *Fields v. Volkswagen of Am., Inc.*, 555 P.2d 48, 56 (Okla. 1976), the Supreme Court distinguished the defense of misuse of product from contributory negligence as follows:

Generally when we speak of the defense of misuse or abnormal use of a product we are referring to cases where the method of using a product is not that which the maker intended is a use that could not reasonably be anticipated by a
manufacturer. A distinction must be made between use for an abnormal purpose and use for a proper purpose but in a careless manner (contributory negligence).

The *Fields* case was followed in *Treadway v. Uniroyal Tire Co.*, 766 P.2d 938, 941 (Okla. 1988), where the Supreme Court explained: "Negligence in the use of a product does not bar recovery under this tort [manufacturer's product liability] even though the negligence "contributed" to the accident." *See also Farrell v. Klein Tools, Inc.*, 866 F.2d 1294, 1297 (10th Cir. 1989) (approving instruction stating that "if the use of the equipment was a use that the defendant could reasonably foresee, then such use does not constitute abnormal use"); *McMurray v. Deere & Co., Inc.*, 858 F.2d 1436, 1442 (10th Cir. 1988) ("Courts applying Oklahoma law have continued to recognize the difference between use for an abnormal purpose, and careless use for a proper purpose.").

**Instruction No. 12.10**

**AFFIRMATIVE DEFENSE OF VOLUNTARY ASSUMPTION OF THE RISK OF A KNOWN DEFECT**

[Defendant] has raised the defense in this case that [Plaintiff] voluntarily assumed the risk of injury from a known defect in the [product]. Assumption of the risk occurs where a person voluntarily and unreasonably exposes [himself/herself] to a known, appreciated, and avoidable danger of injury from the defect in the [product]. To establish this defense, [Defendant] must show by the weight of the evidence that:

1. A defect in the [product] existed, which created a risk of injury;
2. [Plaintiff] knew of the risk and appreciated the degree of danger;
3. [Plaintiff] had the opportunity to avoid the risk; and
4. [Plaintiff]'s use of the [product] was voluntary and unreasonable and was the direct cause of [his/her] injury.
Notes on Use

In order to give this Instruction the court must determine that there is evidence in the record that the plaintiff voluntarily assumed the risk of a known defect.

Comments

Assumption of the risk was recognized as a defense in products liability cases in Kirkland v. General Motors Corp., 1974 OK 52, ¶ 46, 521 P.2d 1353, 1366. The Tenth Circuit has described the elements of this defense as follows: "Paramount then, to the viability of an assumption of risk defense under the laws of Oklahoma is the voluntary assumption of a known risk created by a defected which existed in a product at the time it left the manufacturer." Smith v. FMC Corp., 754 F.2d 873, 876 (10th Cir. 1985) (emphasis in original). See also Hogue v. A. B. Chance Co., 1979 OK 2, ¶ 8, 592 P.2d 973, 975 ("Under [Kirkland] there must be a showing the plaintiff knew of a defect unreasonably dangerous in nature, yet voluntarily used the product. Only then is he precluded from recovery under this defense.") (emphasis in original) (footnote omitted); McMurray v. Deere & Co., Inc., 858 F.2d 1436, 1440 (10th Cir. 1988) ("Subjective awareness of the defect and consequent risk of injury must be demonstrated.").

The defense of assumption of risk is sometimes known by the Latin phrase volenti non fit injuria, and it is to be distinguished from contributory negligence, which is not recognized as a defense in products liability cases when it is based on a plaintiff's failure to discover or guard against a defect in a product. The distinction between assumption of risk and contributory negligence is discussed in Thomas v. Holliday By and Through Holliday, 1988 OK 116, ¶¶ 9-10,764 P.2d 165, 169-71.

In McMurray v. Deere & Co., Inc., 858 F.2d 1436, 1440-41 (10th Cir. 1988), and Smith v. FMC Corp., 754 F.2d 873, 876 (10th Cir. 1985), the Tenth Circuit Court of Appeals held that the trial courts erred by giving instructions on voluntary assumption of a known risk of a defect, when there was no evidence offered that the plaintiffs had knowledge of the risk.
Instruction No. 12.11

AFFIRMATIVE DEFENSE OF UNAVOIDABLY UNSAFE PRODUCT

Against the claim of [Plaintiff] that the [Specify Product] was defectively designed, [Defendant] has raised the defense that the [Specify Product] was unavoidably unsafe. Some products cannot be made safe for their intended use, but their benefits are great enough to justify their risks of harm. To establish the defense that the [Specify Product] was unavoidably unsafe, [Defendant] must prove by the greater weight of the evidence that:

1. The benefits of the [Specify Product] justified its risks; and
2. At the time of manufacture and distribution, the [Specify Product] could not be made safer for its intended use applying the best available testing and research.

[This defense does not apply if [Plaintiff] has proved by the greater weight of the evidence that [Specify Product] was improperly manufactured or had inadequate warnings.]

Notes on Use

In order to give this Instruction the court must determine that Restatement of Torts 2d § 402A comment k (1971) is applicable to the product.

This defense applies only in a design defect case. If the plaintiff has offered evidence of a manufacturing defect or inadequate warnings, the court should give the last bracketed paragraph to inform the jury that the defense does not apply to those theories.

Comments

This Instruction is based on the Oklahoma Supreme Court's decision in Tansy v. Dacomed Corp., 1994 OK 146, ¶ 14, 890 P.2d 881, 886, in which the Court approved the unavoidably unsafe product defense.

The Restatement (Third) of Torts: Products Liability § 6 (1997) uses a somewhat

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**Instruction No. 12.12**

**PRODUCTS LIABILITY — PUNITIVE DAMAGES**

INSTRUCTION DELETED