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Products Liability in Pennsylvania

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COMMENTS

PRODUCTS LIABILITY IN PENNSYLVANIA

I. INTRODUCTION

Actions by consumers to recover damages for personal injury or property loss due to defective products represents a field of law marked by rapid development in both the courts and legislatures of the states. Pennsylvania typifies this continuing evolution. The purpose of the present discussion is to provide the Pennsylvania practitioner with a compilation of the pertinent decisions of Pennsylvania courts in the area of products liability. Recent commentary by scholars and jurists is similarly collected and analyzed in order to provide insight into academic thought on the subject. Since decisions in other jurisdictions are often indicative of trends which may become the law in Pennsylvania, they are also included within the scope of this discussion.

The ensuing analysis initially examines the negligence theory of liability. Under the rule originally enunciated in *MacPherson v. Buick Motor Co.*¹ and later adopted in Pennsylvania,² the requirement of privity in tort actions is abandoned and the potential liability of a manufacturer to a consumer for negligence is established. Because of the great impact of *MacPherson* on the field of products liability, the scope of that case's rule in Pennsylvania is scrutinized in detail. The analysis focuses on the *Restatement of Torts* on which much of Pennsylvania negligence law is based, and includes an in-depth study of the duties of care imposed upon manufacturers, middlemen, and retailers as well as the defenses available to such parties. The discussion will then focus on the action in assumpsit for breach of warranty under the Uniform Commercial Code which Pennsylvania adopted in 1953.³ The Code's provisions on warranties, both express and implied, and disclaimers to them are examined in connection with earlier decisions under the Sales Act.⁴ Related problems of notice and privity are likewise analyzed in order to present a complete exposition of Pennsylvania's law in this growing sector of products liability. Finally the ramifications of the theory of strict liability in tort are examined in light of Pennsylvania's recent adoption of section 402A of the *Restatement (Second) of Torts* in *Webb v. Zern*.⁵ This final section provides the practitioner with indications of where, how, and against whom such liability arises and presents the attendant defenses.

1. 217 N.Y. 382, 111 N.E. 1050 (1916).

2. See note 20 *infra*.

3. PA. STAT. ANN. tit. 12A (Supp. 1967).

4. Sales Act of May 19, 1915, Pa. Laws 543 (repealed 1953).

5. 422 Pa. 424, 220 A.2d 853 (1966), noted in 12 VILL. L. REV. 204 (1966).

II. THE CAUSE OF ACTION IN NEGLIGENCE

A. Introduction and History

To protect the consumer from the latent dangers found in products which inundate the marketplace, the law imposes on manufacturers, wholesalers, and retailers a duty to exercise a degree of care commensurate with their status in the distributive chain. A plaintiff who seeks redress for a product-caused injury by suing in negligence must establish: that the defendant was under a duty to exercise due care to prevent harm to the plaintiff or damage to his property; that the defendant breached that obligation by conduct falling below the standard required of a reasonably prudent man in the same or similar circumstances; and that the defendant's conduct was a proximate cause of the injury. The defenses of contributory negligence, assumption of risk, and misuse of the product are available to insulate the defendant from liability. It is the purpose of this section of the Comment to consider the history of the negligence action in Pennsylvania, the particular problems it raises, and the resolution of those problems under existing Pennsylvania law.

The common law was hesitant to impose duties of care on manufacturers, wholesalers, and retailers because of a desire to foster industrial growth and, therefore, a general rule was molded which precluded a cause of action in negligence where privity of contract was absent. The genesis of this rule was the misinterpretation of Lord Abinger's dictum in the case of *Winterbottom v. Wright*⁶ wherein he stated:

There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit would ensue.⁷

The foundation upon which the barrier of privity was erected in Pennsylvania was the case of *Curtin v. Somerset*⁸ wherein the court recognized

6. 10 M. & W. 109, 152 Eng. Rep. 402 (1842). *Winterbottom* involved an action for personal injuries by a plaintiff, not in privity of contract with the defendant, for breach of a contract to repair. The court's denial of recovery on the basis of lack of privity is unassailable to this day because the plaintiff brought his action in contract. See F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 76 (1926); Fricke, *Personal Injury Damages in Products Liability*, 6 VILL. L. REV. 1, 9-10 (1960).

7. 10 M. & W. 109, 114, 152 Eng. Rep. 402, 405 (1842).

8. 140 Pa. 70, 21 A. 244 (1891). In *Curtin* the plaintiff, a guest in a hotel, brought suit in negligence against the hotel builder for injuries sustained when the porch on which plaintiff was standing collapsed. The court, in denying recovery for want of privity, distinguished two earlier cases, *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731 (1853) and *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404 (1856), which had granted recovery on similar facts without discussing privity of contract. In *Hagerty* the employee of the lessee of a building was allowed to recover against the defendant builder and lessor, and in *Carson* the very same defendant was held liable for injuries to a lessee. In *Curtin* the plaintiff was distinguished on the grounds that the builder was also the owner and lessor.

the rule of *Winterbottom*.⁹ The rule of *Curtin* was soon embedded in the law of Pennsylvania¹⁰ and persisted until 1931.¹¹ In light of the economic and social environment of the times, the inception and perpetuation of the *Winterbottom-Curtin* rule is understandable. Several factors had coalesced to justify limiting responsibility for defects in products within the bounds of privity of contract: industry was in an embryonic stage of development, marketing techniques lacked sophistication, and products were simple in construction and design.¹² The courts, cognizant of these factors, gave effect to the prevailing desire to encourage industrial growth.

The intrinsic injustice of the rule in certain situations, however, induced the courts to develop exceptions. The forerunner of the exceptions was *Thomas v. Winchester*,¹³ where the court eliminated the requirement of privity if the product could be classified as inherently dangerous. Pennsylvania adopted the principle of this case initially in *Elkins, Bly & Co. v. McKean*,¹⁴ and subsequently in *Curtin v. Somerset*.¹⁵ A second exception, followed by Pennsylvania in *Catani v. Swift & Co.*,¹⁶ fixed liability on manufacturers for negligent preparation of food products. Absent the application of these two exceptions, however, Pennsylvania rigidly adhered to a rule of non-liability in cases where privity was absent.

The historic polestar in the area of products liability and the cause of action in negligence is Mr. Justice Cardozo's opinion in *MacPherson v. Buick Motor Co.*¹⁷ In *MacPherson* the plaintiff brought an action in negligence against the manufacturer for injuries sustained when the plaintiff's automobile, purchased from a retail dealer, suddenly collapsed as a result of a defective wheel. Justice Cardozo eliminated the defense of privity, thereby imposing on manufacturers an affirmative duty to exercise care

9. It is interesting to note at this point two matters of historical interest. First, the requirement of privity developed in Pennsylvania in situations where a plaintiff sought recovery for damages incurred as a result of a defendant's negligence in the construction of a *building*, not for negligence in the manufacture or handling of a *product*. Although no Pennsylvania cases have been found denying recovery for lack of privity where a defective product was involved, the express language of *Curtin* indicates that negligent manufacture was within the purview of its rule. Second, the *Winterbottom* rule is often stated in Pennsylvania not only in terms of a lack of duty to the plaintiff with whom there is no privity, but also in terms of causation. In *Curtin*, for example, the court stated that relinquishment of possession by the builder to the owner broke the causative chain between defendant's negligence and plaintiff's injury.

10. *Curtin* was followed in *Smith v. Pennsylvania R.R.*, 201 Pa. 131, 50 A. 829 (1902); *First Presbyterian Congregation v. Smith*, 163 Pa. 561, 30 A. 279 (1894); *Fitzmaurice v. Fabian*, 147 Pa. 199, 23 A. 444 (1892); *Stubbs v. Duquesne Light Co.*, 84 Pa. Super. 1 (1924).

11. *Curtin* was effectively overruled in *Grodstein v. McGivern*, 303 Pa. 555, 154 A. 794 (1931). See p. 808 *infra*.

12. See L. FRUMMER & M. FRIEDMAN, PRODUCTS LIABILITY § 5.01 (1967).

13. 6 N.Y. 397, 57 Am. Dec. 455 (1852).

14. 79 Pa. 493 (1875). In *Elkins* the court reversed a judgment for a manufacturer of oil in an action by a remote purchaser for injuries resulting from an explosion.

15. 140 Pa. 70, 80, 21 A. 244, 245 (1891). In *Curtin* the exception was approved but held inapplicable.

16. 251 Pa. 52, 95 A. 931 (1915). The court in *Catani* expressly rejected the argument of the defendant meatpacker that lack of privity with the ultimate consumer was a defense.

17. 217 N.Y. 382, 111 N.E. 1050 (1916).

in the fabrication of products which, though harmless in themselves, become dangerous when negligently made. In the words of the eminent jurist:

If the nature of the thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. . . .

. . . In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

. . . Yet the defendant [manufacturer] would have us say that he [the retail dealer] was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.¹⁸

The opinion recognized that the then existing status of industrial growth justified, and future progress would demand, abrogation of the privity defense. The *MacPherson* rule¹⁹ has been adopted in Pennsylvania,²⁰ as it has been in all other jurisdictions. Although some courts have misapplied the rule with hair-splitting distinctions and have rendered decisions

18. *Id.* at 389-91, 111 N.E. at 1053.

19. RESTATEMENT (SECOND) OF TORTS § 395 (1965) states the *MacPherson* rule as follows:

A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing physical harm to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use, is subject to liability for physical harm caused to them by its lawful use in a manner and for a purpose for which it is supplied.

20. See *Alexander v. Nash-Kelvinator Corp.*, 261 F.2d 187 (2d Cir. 1958), modified, 271 F.2d 594 (2d Cir. 1959) (applying Pennsylvania law); *Mannsz v. Macwhyte Co.*, 155 F.2d 445 (3d Cir. 1946); *Atlas Aluminum Corp. v. Borden Chem. Corp.*, 233 F. Supp. 53 (E.D. Pa. 1964); *Wilson v. American Chain & Cable Co.*, 216 F. Supp. 32 (E.D. Pa. 1963); *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888 (E.D. Pa. 1962), *rev'd on other grounds*, 320 F.2d 130 (3d Cir. 1963); *Magee v. General Motors Corp.*, 117 F. Supp. 101 (W.D. Pa. 1953), *rev'd on other grounds*, 213 F.2d 899 (3d Cir. 1954); *Doyle v. South Pittsburgh Water Co.*, 414 Pa. 199, 199 A.2d 875 (1964); *Evans v. Otis Elevator Co.*, 403 Pa. 13, 168 A.2d 573 (1961); *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949); *Bollin v. Elevator Constr. & Repair Co.*, 361 Pa. 7, 63 A.2d 19 (1949); *Maize v. Atlantic Ref. Co.*, 352 Pa. 51, 41 A.2d 850 (1945); *Henderson v. National Drug Co.*, 343 Pa. 601, 23 A.2d 743 (1942); *Ebbert v. Philadelphia Elec. Co.*, 330 Pa. 257, 198 A. 323 (1938); *Mattiuci v. C.F. Simonin's Sons*, 40 Pa. D. & C. 535 (Philadelphia County Ct. 1941).

frought with inconsistencies and confusion,²¹ Pennsylvania has recognized the true import of *MacPherson* and has achieved results consistent with its rationale.²²

B. *The Scope of MacPherson*

In *MacPherson* a remote purchaser was granted recovery for personal injuries against the manufacturer of a completed product on the ground that the manufacturer failed to exercise due care in the fabrication of his product. Under the law of Pennsylvania, the *MacPherson* rationale has been extended to afford protection to plaintiffs other than purchasers who lack privity of contract, to impose liability on all parties in the manufacturing and marketing chain, and to include recovery for property damage as well as for personal injury.

Numerous cases in Pennsylvania have applied *MacPherson* to non-purchasing plaintiffs,²³ and the question of whether a duty of care is owed to such plaintiffs is resolved by employing a foreseeability test. If the defendant could reasonably foresee that a class of persons of which the plaintiff was a member would be endangered by the risk created, then the defendant owes an obligation to the plaintiff to avoid its creation.²⁴ Illustrative of this principle is *Scurfield v. Federal Laboratories, Inc.*,²⁵ wherein the defendant manufacturer sold a tear gas gun resembling a fountain pen to a florist. The plaintiff, a business invitee in the florist's shop, picked up the "pen" from beside the cash register and, while examining it, unaware of the danger, accidentally discharged it into his face causing permanent injury. The court affirmed a dismissal of the action for failure to state a cause of action, holding that the defendant manufacturer owed no duty to warn the plaintiff of the dangerous nature of the pen because the defendant could not have reasonably anticipated that such a plaintiff would be endangered by its use. While the decision of the court may be criticized, first because the question of foreseeability is, in most cases, within the province of the jury, and secondly, because it is likely that the manufacturer could foresee a risk of harm to the florist's customers,²⁶ *Scurfield* nevertheless is an example of the application of the foreseeability test as the measure for determining the beneficiaries of a manufacturer's duties.

21. See 24 FORDHAM L. REV. 204 (1955) for the havoc wrought in New York, *MacPherson's* home jurisdiction.

22. In *Ebbert v. Philadelphia Elec. Co.*, 330 Pa. 257, 198 A. 232 (1938), the first Pennsylvania case applying *MacPherson*, the court refused to accept defendant's argument that the product causing harm must be inherently dangerous before a duty of care arises. The court said, "[A]s modern mechanisms multiply, the futility of invoking this phrase . . . [inherently dangerous] in the adjudication of cases becomes increasingly apparent." *Id.* at 262, 198 A. at 326.

23. See, e.g., *Hopkins v. E.I. DuPont De Nemours & Co.*, 199 F.2d 930 (3d Cir. 1952); *Montesano v. Patent Scaffolding Co.*, 213 F. Supp. 141 (W.D. Pa. 1962); *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949).

24. See RESTATEMENT (SECOND) OF TORTS § 395 (1965) quoted in note 19 *supra*.

25. 335 Pa. 145, 6 A.2d 559 (1939).

26. See *Scurfield v. Federal Laboratories, Inc.*, 335 Pa. 145, 152-53, 6 A.2d 559, 362-63 (1939) (dissenting opinion).

The rule and rationale of *MacPherson* warrants abrogation of the requirement of privity not only with respect to manufacturers of completed products, but also with respect to manufacturers of component parts, assemblers, wholesalers, and retailers whose negligence causes injury to foreseeable plaintiffs.²⁷ Pennsylvania has made such reasonable extensions of *MacPherson* and, as a general statement, it may be said that:

The substantive law of Pennsylvania supports the view that where a person is injured through the use of a chattel . . . such person is not limited in his right to recover for injuries sustained to the manufacturer but may point his cause of action against either the manufacturer, distributor or retailer, and liability is several.²⁸

A further extension of *MacPherson* has granted recovery to a plaintiff for damage to his property, notwithstanding the absence of personal injury. This issue arose for the first time in Pennsylvania in *Mattiucci v. C. F. Simonin's Sons*.²⁹ In this case the court rejected the defendant's argument that *MacPherson* applied solely to personal injuries, and permitted the plaintiff manufacturer of mayonnaise to recover against the defendant manufacturer of oil for spoilation of the mayonnaise due to foreign substances in the oil.³⁰

C. The Duty of Due Care

1. The Manufacturer

The manufacturer of a product is obligated to foreseeable plaintiffs to exercise due care in three specific respects: he must carefully fabricate his product, safely design it, and adequately warn consumers of dangers that may arise from its use. Resolution of the question of whether a duty should be imposed in a particular case should depend on the delicate balance between the degree of risk created and the social utility of the product.

Section 395 of the *Restatement*,³¹ which states the rule of *MacPherson*, imposes on manufacturers the duty to construct their products carefully, and the comments appended to that section particularize the matters

27. In *Miller v. Meadville Food Serv., Inc.*, 173 Pa. Super. 357, 98 A.2d 452 (1953), the court upheld a suit in negligence against both the maker of a pie and the manufacturer of the pie filling, and in *Alexander v. Nash-Kelvinator Corp.*, 261 F.2d 187 (2d Cir. 1958) (applying Pennsylvania law), the defendant assembler of an automobile was held liable for his negligence. Similarly, in *Topelski v. Universal South Side Autos, Inc.*, 407 Pa. 339, 180 A.2d 414 (1962), the retail dealer of an auto was held liable to the plaintiff who was injured in an accident with the purchaser of the automobile.

28. *Fleming v. John Deere Plow Co.*, 158 F. Supp. 399, 400 (W.D. Pa. 1958).

29. 40 Pa. D. & C. 535 (Philadelphia County Ct. 1941).

30. *Accord*, *Atlas Aluminum Corp. v. Borden Chem. Corp.*, 233 F. Supp. 53

31. *See* note 19 *supra*.

in which manufacturers are required to use due care. In addition to approving the *Restatement's* expression of the rule,³² Pennsylvania has adopted the comments as an accurate explication of the manufacturer's duties.³³ Reasonable care in the construction of a product requires that the manufacturer: (1) make "such inspections and tests during the course of manufacture and after the article is completed as the manufacturer should recognize as reasonably necessary to secure the production of a safe article . . .;"³⁴ (2) select carefully "material and parts to be incorporated in the finished article . . .;"³⁵ (3) ensure careful "fabrication of the article by every member of the operative staff no matter how high or low his position . . .;"³⁶ (4) pack "the article so as to be safe for those who must be expected to unpack it."³⁷

32. See, e.g., *Mannsz v. Macwhyte Co.*, 155 F.2d 445 (3d Cir. 1946); *Solomon v. White Motor Co.*, 153 F. Supp. 917 (W.D. Pa. 1957); *Wissman v. General Tire Co.*, 327 Pa. 215, 192 A. 633 (1937).

33. In *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949), the court quoted extensively from the comments. Although the court in *Foley* was applying Ohio law, the opinion reviews Pennsylvania law in the area of negligence and products liability, and has been given great weight in subsequent Pennsylvania cases.

34. RESTATEMENT (SECOND) OF TORTS § 395, comment *f* at 328 (1965) [hereinafter cited as RESTATEMENT, comment *f*].

In *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949), the court found the defendant manufacturer negligent because he failed to test and inspect the raw materials he used to construct a tank in order to discover latent defects in them. *Accord*, *Alexander v. Nash-Kelvinator Corp.*, 261 F.2d 187 (2d Cir. 1958), *modified*, 271 F.2d 254 (2d Cir. 1959) (applying Pennsylvania law). In *Newcomb v. Armour & Co.*, 39 F. Supp. 716 (M.D. Pa. 1941), the court stated that the manufacturer of food products owes to consumers the duty of reasonable inspection of his commodity before marketing it for consumption. However, in *Tavani v. Swift & Co.*, 262 Pa. 184, 105 A. 55 (1918), the court refused to hold the defendant liable for negligence for failing to discover trichinae in meat since no effective test existed by which such a discovery was possible.

35. RESTATEMENT, comment *f*. See *Foley* note 34 *supra*. See also RESTATEMENT (SECOND) OF TORTS § 395, comment *g* at 328-29 (1965).

36. RESTATEMENT, comment *f*.

The question of negligent fabrication arises most often in cases where the plaintiff has been injured by consumption of a defendant's food product. The Pennsylvania courts often state as a general rule that "[t]hose engaging in the business of manufacturing or compounding food or beverages for consumption must use a high degree of care to see that the food or beverage is free from foreign or deleterious substances that injuriously affect the user." *Rozumailski v. Philadelphia Coca Cola Bottling Co.*, 296 Pa. 114, 116, 145 A. 700 (1929); *accord*, *Newcomb v. Armour & Co.*, 39 F. Supp. 716 (M.D. Pa. 1941); *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942); *Miller v. Meadville Food Serv., Inc.*, 173 Pa. Super. 357, 98 A.2d 452 (1953); *Smith v. Coca Cola Bottling Co.*, 152 Pa. Super. 445, 33 A.2d 488 (1943); *Menaker v. Supplee-Wills-Jones Milk Co.*, 125 Pa. Super. 76, 189 A. 714 (1937); *Madden v. Great Atl. & Pac. Tea Co.*, 106 Pa. Super. 474, 162 A. 687 (1932); *Nock v. Coca Cola Bottling Works*, 102 Pa. Super. 515, 156 A. 537 (1931); *Murphy v. Yuengling Dairy Prods. Corp.*, 34 Pa. D. & C. 355 (C.P. Schuylkill County 1938).

In *Magee v. General Motors Corp.*, 117 F. Supp. 101 (W.D. Pa. 1953), *rev'd on other grounds*, 213 F.2d 899 (3d Cir. 1954) and *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888 (E.D. Pa. 1962), *rev'd on other grounds*, 320 F.2d 130 (3d Cir. 1963), the defendant manufacturers were held liable for defectively constructing driving apparatuses.

37. RESTATEMENT, comment *f*.

In the exploding bottle cases, the manufacturer may have been negligent in the packing of the item. See, e.g., *Braccia v. Coca Cola Bottling Co.*, 398 Pa. 386, 171 A.2d 177 (1961), *aff'd*, 370 U.S. 167, 62 S.Ct. 1121, 12 L.Ed.2d 119 (1962); *Dillon v. William S. Scull Co.*, 164 Pa. Super. 365, 64 A.2d 525 (1949).

Although the manufacturer may construct his article perfectly, its design may create a risk of harm to foreseeable plaintiffs. Pennsylvania has likewise adopted the *Restatement's* expression of this rule.³⁸

A manufacturer of a chattel made under a plan or design which makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or to be endangered by its probable use for physical harm caused by his failure to exercise reasonable care in the adoption of a safe plan or design.³⁹

In the cases that have arisen in Pennsylvania, negligent design has been recognized as the basis of liability in suits brought against the manufacturer of an airplane,⁴⁰ a meat grinder,⁴¹ a scaffolding bracket,⁴² and a gas tank.⁴³

A manufacturer may also be subject to liability for failing to warn foreseeable plaintiffs of the danger involved in the use of his product. A plaintiff who predicates his cause of action on such failure to warn must prove that a duty to warn existed and, if a warning was given, that it was inadequate.

A combination of the following three elements raises the duty of a manufacturer to warn:

- (1) the product must involve danger in its use;
- (2) the danger must be latent; and
- (3) the manufacturer must have actual or constructive knowledge of the danger.⁴⁴

38. See *Montesano v. Patent Scaffolding Co.*, 213 F. Supp. 141 (W.D. Pa. 1962); *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949).

39. RESTATEMENT (SECOND) OF TORTS § 398 (1965).

40. *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602 (3d Cir.), cert. denied, 358 U.S. 910 (1958).

41. *Smith v. Hobart Mfg. Co.*, 302 F.2d 570 (3d Cir. 1962).

42. *Montesano v. Patent Scaffolding Co.*, 213 F. Supp. 141 (W.D. Pa. 1962).

43. *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949). See generally *Katz, Liability of Automobile Manufacturers for Unsafe Design of Passenger Cars*, 69 HARV. L. REV. 863 (1956); *Noel, Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

44. RESTATEMENT (SECOND) OF TORTS § 388 (1965) states the rule as follows: One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

- (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
- (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
- (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

RESTATEMENT (SECOND) OF TORTS § 394 (1965) specifically applies section 388 to manufacturers. Section 388 has been adopted in Pennsylvania in numerous cases. See, e.g., *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602 (3d Cir. 1962); *McCreekin v. Gimbel Bros.*, 223 F. Supp. 896 (W.D. Pa. 1963); *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949).

Where a product is defective and injury ensues, the requirement that the product be dangerous to use is often easily met. Even without a defect, however, the nature of a product may require a warning. In *McMeekin v. Gimbel Bros.*,⁴⁵ the court held that the plaintiff was not entitled to a warning in the use of a lawnmower because he failed to prove that a lawnmower is a dangerous instrumentality. Where the product is dynamite, the requisite danger is apparent. The obviousness of the danger, however, raises a further problem because of the requirement that the danger be latent. In *Hopkins v. E. I. DuPont De Nemours & Co.*,⁴⁶ this exact issue was presented to the court when the husband of the plaintiff was killed by a discharge of dynamite placed in a freshly drilled hole while a drill was being operated a few feet away. The court held that the *general* danger inherent in dynamite does not obviate the necessity to warn of the *specific* danger of placing dynamite in the heat of a freshly drilled hole and in proximity to the vibrations of an operating drill.⁴⁷

The requirement that the manufacturer have actual or constructive knowledge of the danger usually presents the question whether the manufacturer should have made tests to discover the existence of danger in the use of his product or, if he has made tests, whether those tests were adequate.⁴⁸

If the duty to warn exists, then the manufacturer must exercise reasonable care to properly warn potential users of any known danger. Failure to give a warning is negligent conduct as a matter of law.⁴⁹ In cases where some warning has been given, the adequacy of the warning becomes the material issue. In evaluating the adequacy of the warning courts should recognize a manufacturer's natural reluctance to warn or to display such warnings conspicuously since he is generally attempting to promote the sale of his product.⁵⁰

45. 223 F. Supp. 986 (W.D. Pa. 1963).

46. 199 F.2d 930 (3d Cir. 1952).

47. The *Hopkins* case was on appeal from the trial court's decision to grant the defendant's motion to dismiss. The circuit court reversed, holding that the plaintiff presented sufficient evidence to go to the jury. Plaintiff's victory in the new trial gave rise to a second appeal. 212 F.2d 623 (3d Cir.), *cert. denied*, 348 U.S. 872 (1954). The court, taking a different approach, reversed the plaintiff's judgment holding that he failed to present sufficient evidence to go to the jury.

48. In *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), the plaintiff brought an action premised on negligence and breach of warranty, alleging that he had contracted lung cancer from the use of defendant's cigarettes and that the defendant should have warned him of the danger. The court held, *inter alia*, that a dismissal of the cause of action in negligence was improper because the question whether defendant should have conducted different or additional tests was for the jury.

Furthermore, where the tests reveal the danger, failure to warn is negligence. In *DeVito v. United Airlines, Inc.*, 98 F. Supp. 88 (E.D.N.Y. 1951) (applying Pennsylvania law), the court held that since the defendant plane manufacturer discovered, by testing, the possibility of carbon monoxide buildup in the cockpit, he should have warned the carrier of the danger.

49. See *De Vito v. United Airlines, Inc.*, 98 F. Supp. 88 (E.D.N.Y. 1951) (applying Pennsylvania law).

50. See Dillard & Hart, *Product Liability: Direction For Use of the Duty to Warn*, 41 VA. L. REV. 145 (1955) for an excellent discussion of the duty to warn.

The question of adequacy is two-pronged: first, have the appropriate persons been warned, and second, was the warning sufficient to instill in consumers knowledge of the danger? The resolution of the first question involves the application of the test of foreseeability: the manufacturer owes a duty to warn those whom he "should expect to use the chattel . . . or to be endangered by its probable use. . . ." ⁵¹ When a purchaser's employee is injured in using a manufactured product the issue arises whether a warning to the plaintiff's employer adequately discharges the manufacturer's duty. The *Restatement* resolves the question in the following manner:

Giving to the third person through whom the chattel is supplied all the information necessary to its safe use is not in all cases sufficient to relieve the supplier from liability. . . . The question remains whether this method gives reasonable assurance that the information will reach those whose safety depends upon their having it. ⁵²

The problem of whether the warning is sufficient to put consumers on notice of the danger presents a difficult factual question, hence it is best illustrated by an analysis of the cases that have discussed the point. In *Maize v. Atlantic Ref. Co.*, ⁵³ the plaintiff's wife died from the inhalation of carbon tetrachloride fumes present in the defendant's cleaning fluid. There was a warning on the container, in one-quarter and one-eighth inch lettering, cautioning users not to inhale the lethal fumes. On the other hand, the words "Safety-Kleen" appeared four times on the can, either in one-half or three-quarters inch lettering. In holding the warning to be inadequate, the court emphasized that a busy housewife could easily be lulled into a false sense of security by the conspicuous presence of the words "Safety-Kleen." Similarly, in *Hopkins v. E. I. DuPont De Nemours & Co.*, ⁵⁴ the court held a list of 63 warnings in the use of dynamite inadequate because none of the admonitions given covered the specific danger causing the explosion which injured the plaintiff. The *Maize-Hopkins* analysis imposes on the manufacturer a stringent duty of care in the presentation of his warnings, but the imposition is justified by the high degree of danger.

Another factor to consider in determining the effectiveness of a warning is the practicality of the method adopted by the manufacturer to convey knowledge of the danger. In *Oettinger v. Norton Co.*, ⁵⁵ the plaintiff's eye was injured when a piece of the spindle of a mounted abrasive point

51. RESTATEMENT (SECOND) OF TORTS § 388 (1965). See *Scurfield v. Federal Laboratories, Inc.*, 335 Pa. 145, 6 A.2d 559 (1939), discussed at p. 797 *supra*.

52. RESTATEMENT (SECOND) OF TORTS § 388, comment *n* at 308 (1965); accord, *Brandon v. Yale & Towne Mfg. Co.*, 220 F. Supp. 855, 859-60 (E.D. Pa. 1963).

53. 352 Pa. 51, 41 A.2d 850 (1945).

54. 199 F.2d 930 (3d Cir. 1952). This is the dynamite case discussed at pp. 800-01

55. 160 F. Supp. 399 (E.D. Pa. 1957), *aff'd*, 253 F.2d 712 (3d Cir. 1958).

severed due to the excessive speed at which it was operated. The issue was whether the defendant had adequately discharged his duty to warn by distributing pamphlets which contained information on the proper speeds at which to operate such abrasive points, or whether the defendant had an obligation to go further and also make appropriate warnings either on the point itself or on the container in which it was packaged. The court held that plaintiff's experience as a workman as well as his knowledge of the availability of instructional pamphlets amounted to contributory negligence. In so holding, the court accepted the defendant's argument that any method of warning other than the distribution of informative pamphlets would have been impractical.

A special problem arises in duty to warn cases when the plaintiff's injury is the result of an allergic reaction to a component of the defendant's product. No Pennsylvania cases have been found wherein the plaintiff based his cause of action in negligence for an allergy-caused injury. In *Barrett v. S. S. Kresge Co.*,⁵⁶ the plaintiff brought a breach of warranty action for injuries caused by an allergy to the material of a dress. The court reasoned that such liability could be imposed in allergy cases only where there is a definite class of allergics able to be foreseen and warned by the manufacturer. But, where the plaintiff's allergy is peculiar to him, as in *Barrett*, there is no breach of warranty. Similar reasoning is applicable to duty to warn cases.⁵⁷

56. 144 Pa. Super. 516, 19 A.2d 502 (1941).

57. See Fricke, *Personal Injury Damages in Products Liability*, 6 VILL. L. REV. 1 (1960); Noel, *The Duty to Warn Allergic Users of Products*, 12 VAND. L. REV. 331 (1959).

The *Restatement* imposes liability on manufacturers in three other situations which infrequently arise. In *Labick v. Vicker*, 200 Pa. Super. 111, 186 A.2d 874 (1962), the court based defendant's liability in part on section 389 which reads as follows:

One who supplies directly or through a third person a chattel for another's use, knowing or having reason to know that the chattel is unlikely to be made reasonably safe before being put to a use which the supplier should expect it to be put, is subject to liability for physical harm caused by such use to those whom the supplier should expect to use the chattel or to be endangered by its probable use, and who are ignorant of the dangerous character of the chattel or whose knowledge thereof does not make them contributorily negligent, although the supplier has informed the other for whose use the chattel is supplied of its dangerous character.

No Pennsylvania cases have been found calling for the application of sections 390 and 397 of the *Restatement*. Section 390 reads as follows:

One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Under section 397:

A manufacturer of a chattel which is compounded under a secret formula or under a formula which although disclosed should be recognized as unlikely to be understood by those whom he should expect to use it lawfully, is subject to liability for physical harm caused to them and persons whom he should expect to be endangered by its probable use by his failure to exercise reasonable care to adopt such a formula and to bring to the knowledge of those who are to use it the means of identifying the chattel as well as the lawfully intended use for which it is supplied.

2. Middlemen and Retailers

Middlemen and retailers are ordinarily conduits of products manufactured by another, but may, in some circumstances, be held to the same duties as manufacturers. The plaintiff has two avenues of approach to impose such liability. First, he may attempt to invoke section 400 of the *Restatement*, adopted by Pennsylvania in *Forry v. Gulf Oil Corp.*:⁵⁸ "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer."⁵⁹ This section is based on the economic fact that consumers rely on the brand names and trademarks of products, and consequently the sponsors of the products must assure them of quality.⁶⁰ In this connection it should be pointed out that dictum in *Forry* indicates that absence of reliance on the brand name or trademark of the defendant is a defense;⁶¹ the basic theory of section 400 seems to support this conclusion.⁶² The second approach may be taken where the manufacturer distributes or retails his product through a subsidiary corporation. Here the plaintiff may have an opportunity to impose manufacturer's liability by piercing the corporate veil.⁶³

Wholesalers and retailers may, of course, be liable for their own failure to exercise due care in their handling of a product. For example, where the defendant carelessly stores or transports an item the plaintiff may base an action on these specific acts of negligence. A seller of a chattel manufactured by another may also be subject to liability for failing to warn consumers of dangers or defects in that product. Section 399 of the *Restatement* imposes upon wholesalers and retailers the duty to warn of dangers inherent in the use of a product, the same duty considered above in connection with manufacturers under section 388.⁶⁴ However, unlike manufacturers, the *Restatement*, in section 402, imposes no duty on sellers to test and inspect items for latent flaws.⁶⁵ The questions whether and under what circumstances a vendor in Pennsylvania is under a duty to inspect are controversial ones.⁶⁶ When the item is received

58. 428 Pa. 334, 237 A.2d 593 (1968).

59. RESTATEMENT (SECOND) OF TORTS § 400 (1965).

60. See RESTATEMENT (SECOND) OF TORTS § 400, comment *d* at 338-39 (1965).

61. See *Forry v. Gulf Oil Co.*, 428 Pa. 334, 344, 237 A.2d 593, 599 (1968).

62. See *id.* at 349-50, 237 A.2d at 602 (dissenting opinion).

63. 2 L. FRUMMER & M. FRIEDMAN, PRODUCTS LIABILITY § 18.01[2] (1967).

64. See note 44 *supra*.

389 and 390. See note 57 *supra*.

65. RESTATEMENT (SECOND) OF TORTS § 402 (1965) reads as follows:

A seller of a chattel manufactured by a third person, who neither knows nor has reason to know that it is, or is likely to be, dangerous, is not liable in an action for negligence for harm caused by the character or condition of the chattel because of his failure to discover the danger by an inspection or test of the chattel before selling it.

66. See Eldredge, *Vendor's Tort Liability*, 89 U. PA. L. REV. 306 (1941); Eldredge, *Vendor's "Duty" to Inspect Chattels — A Reply*, 45 DICK. L. REV. 269 (1941); Farage, *Must a Vendor Inspect Chattels Before Their Sale? — An Answer*, 45 DICK. L. REV. 282 (1941); Farage, *Vendor's Duty to Inspect Chattels — A Rejoinder*, 45 DICK. L. REV. 282 (1941).

by a retailer or wholesaler in its original package, Pennsylvania imposes no duty to unpack and inspect the article for concealed dangers.⁶⁷ Where the item is unsealed or the original package broken, however, the issue whether there is an obligation to examine the article for hidden dangers is problematical. In *Ebbert v. Philadelphia Elec. Co.*,⁶⁸ the plaintiff brought an action against the defendant retailer of a washing machine for injuries sustained when a safety device on the machine failed to function properly. The defendant retailer maintained a staff of 100 men to service his appliances. When faced with the question of whether the retailer was under a duty to inspect for latent defects, the court, assuming that the staff was maintained to test and demonstrate appliances before they were sold, held that the retailer assumed this duty. *Ebbert* has been interpreted as imposing on retailers a duty to inspect unsealed articles.⁶⁹

A reevaluation of this interpretation seems necessary, however, in light of Pennsylvania's adoption of section 402.⁷⁰ The language of that section, as well as the comments to it, state a policy at variance with the imposition of a duty to inspect items, whether sealed or unsealed, for concealed dangers. In addition, the appendix to section 402 severely criticizes *Ebbert* and cases similar to it in other jurisdictions. It would seem, therefore, that the adoption of section 402 should limit *Ebbert* to its facts. Thus, the rule appears to be that a seller of a product manufactured by another is not subject to liability for failure to inspect either sealed or unsealed items, unless that duty is expressly assumed.

Although there is no duty to inspect for hidden dangers, actual knowledge of a defect or special circumstances which should put the seller on notice of a flaw should raise a duty to warn. This is the rule stated by section 401 of the *Restatement*.⁷¹ The comments appended thereto indicate that the section was intended to include situations where the seller should have been alerted to the danger by special knowledge gained through experience with the product, where he purchased the item from an unknown itinerant salesman, or where he recklessly misrepresented that the item was safe when in fact a reasonable man would have realized

67. See, e.g., *Elizabeth Arden, Inc. v. Brown*, 107 F.2d 938 (3d Cir. 1939); *Kratz v. American Stores Co.*, 359 Pa. 335, 59 A.2d 138 (1948); *Coralnick v. Abbotts Dairies, Inc.*, 337 Pa. 344, 11 A.2d 143 (1940); *Ebbert v. Philadelphia Elec. Co.*, 330 Pa. 257, 198 A. 323 (1938); *West v. Emanuel*, 198 Pa. 180, 47 A. 965 (1901); *McSorley v. Katz*, 53 Pa. Super. 243 (1913); *Checchio v. S. Goldman Sons*, 8 Pa. D. & C. 1 (Philadelphia County Ct. 1925).

68. 330 Pa. 257, 198 A. 323 (1938).

69. See *RESTATEMENT (SECOND) OF TORTS* § 402 (1965), appendix at 458-59 (1965); 2 L. FRUMMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 18.03[1][b] (1967).

70. See *McMeekin v. Gimbel Bros.*, 223 F. Supp. 896 (W.D. Pa. 1963); *Johnston v. Dick*, 401 Pa. 637, 165 A.2d 634 (1960).

71. *RESTATEMENT (SECOND) OF TORTS* § 401 (1965) reads as follows:

A seller of a chattel manufactured by a third person who knows or has reason to know that the chattel is, or is likely to be, dangerous when used by a person to whom it is delivered or for whose use it is supplied, or to others to whom the seller should expect to share in or be endangered by its use, is subject to liability for bodily harm caused thereby to them if he fails to exercise reasonable care to inform them of the danger or otherwise to protect them against it.

the contrary. No Pennsylvania case has been found adopting section 401 as it now stands. The original section, which has been adopted in Pennsylvania,⁷² was completely rewritten.⁷³ However, since both sections state the same basic policy of reliance on the competence of the seller it is reasonable to assume that Pennsylvania will accept the present statement of the rule.

D. The Expansion of MacPherson

Under the present interpretation of the *MacPherson* rule, manufacturers, distributors, and retailers cannot immunize themselves from liability for their negligence because of lack of privity. Moreover, the rule has been expanded in Pennsylvania to encompass other situations where the defense of lack of privity was once available.

Sections 403 and 404 of the *Restatement*, adopted by Pennsylvania in *Wissman v. General Tire Co.*,⁷⁴ impose on independent contractors who make, rebuild, or repair chattels the duties of a manufacturer. Under section 403, an independent contractor who knows or has reason to know that his labor has made a chattel unsafe for use is under a duty to warn foreseeable plaintiffs of the danger.⁷⁵ Section 404 imposes on the independent contractor the duty to exercise due care in his rebuilding and repairing, in the adoption of plans and designs, and in the selection and inspection of the materials he employs.⁷⁶

In addition to independent contractors who rebuild and repair chattels, other servicing contractors have been held subject to the rule of

72. See *Elizabeth Arden, Inc. v. Brown*, 107 F.2d 938 (3d Cir. 1939); *Ebbert v. Philadelphia Elec. Co.*, 330 Pa. 257, 198 A. 323 (1938).

73. RESTATEMENT OF TORTS § 401 (1934), reads:

A vendor of a chattel made by a third person which is bought as safe for use in reliance upon the vendor's profession of competence and care is subject to liability for bodily harm caused by the vendor's failure to exercise reasonable competence and care to supply the chattel in a condition safe for use.

74. 327 Pa. 215, 192 A. 633 (1937); *accord*, *Frantz v. General Motors Corp.*, 176 F.2d 80 (3d Cir. 1949); *Doyle v. Atlantic Ref. Co.*, 357 Pa. 92, 53 A.2d 68 (1947).

75. RESTATEMENT (SECOND) OF TORTS § 403 (1965) reads:

One who as an independent contractor makes, rebuilds, or repairs a chattel for another and turns it over to the other, knowing or having reason to know that his work has made it dangerous for the use for which it is turned over, is subject to the same liability as if he supplied the chattel.

This section, in addition to imposing the duty to warn, imposes duties under sections 389 and 390. See note 57 *supra*.

The caveat appended to section 403 raises an interesting question. The caveat reads:

The Institute expresses no opinion that a contractor who fails to exercise reasonable care to inform his employer of a dangerous condition, which he is not employed to repair, but which he discovers in the course of making the repairs agreed upon and of which he realizes that his employer is unaware, may not be subject to the liability stated in this Section.

In the *Wissman* case this exact situation arose, but the defendant did in fact warn of the danger. The court did not rule whether, in absence of the warning, the defendant would have been subject to liability. No case seems to have passed on this point. See 1 L. FRUMMER & M. FRIEDMAN, *PRODUCTS LIABILITY* § 5.03[3] (1967).

76. RESTATEMENT (SECOND) OF TORTS § 404 (1965) reads:

One who as an independent contractor negligently makes, rebuilds, or repairs a chattel for another is subject to the same liability as that imposed upon negligent

MacPherson. In *Doyle v. South Pittsburgh Water Co.*,⁷⁷ the defendant, who was under a contract with a municipality to supply water to fire hydrants, was held liable to the plaintiff, a citizen of the municipality, for damage to the latter's home resulting from a water failure during a fire. In support of its holding that lack of privity was no defense to the action, the court quoted extensively from *MacPherson*.⁷⁸ Similarly, in *Evans v. Otis Elevator Co.*,⁷⁹ the defendant elevator company, which had contracted with plaintiff's employer to inspect elevators, was held subject to liability for failing to exercise reasonable care in the performance of its obligation.

Bailors of chattels have also been enveloped by *MacPherson*. Bailors for hire are subject to liability under sections 407 and 408 of the *Restatement*, adopted in Pennsylvania in *Lambert v. Richards-Kelly Constr. Co.*⁸⁰ By virtue of section 407, lessors of chattels who know or have reason to know that the leased chattel is dangerous to use are obligated to warn of the danger under section 388;⁸¹ section 408 imposes the duty to inspect chattels which are leased for immediate use for latent dangers.⁸² The liability of gratuitous bailees is governed by section 405 which imposes the obligation to warn of dangers under section 388.⁸³ However, no duty to inspect for hidden dangers is imposed, and in this respect the gratuitous bailee is treated the same as the seller of chattels manufactured by another.⁸⁴

Under the law of Pennsylvania, builders who negligently erect structures are liable to foreseeable plaintiffs notwithstanding lack of privity. This rule developed without reliance on *MacPherson*, although its in-

77. 414 Pa. 199, 199 A.2d 875 (1964).

78. It is interesting to note that Justice Cardozo refused to extend *MacPherson* on similar facts in *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928).

79. 403 Pa. 13, 168 A.2d 573 (1961).

80. 348 Pa. 407, 35 A.2d 76 (1944); see *Dunn v. Atlantic Ref. Co.*, 391 Pa. 65, 137 A.2d 262 (1958); *Trusty v. Patterson*, 299 Pa. 469, 149 A. 717 (1930).

81. RESTATEMENT (SECOND) OF TORTS § 407 (1965) reads:

A lessor who leases a chattel for the use of others, knowing or having reason to know that it is or is likely to be dangerous for the purpose for which it is to be used, is subject to liability as a supplier of a chattel.

This section includes liability under sections 389 and 390. See note 57 *supra*.

82. RESTATEMENT (SECOND) OF TORTS § 408 (1965) reads:

One who leases a chattel as safe for immediate use is subject to liability to those whom he should expect to use the chattel, or to be endangered by its probable use, for physical harm caused by its use in a manner for which, and by a person for whose use, it is leased, if the lessor fails to exercise reasonable care to make it safe for such use or to disclose its actual condition to those who may be expected to use it.

83. RESTATEMENT (SECOND) OF TORTS § 405 (1965) reads:

One who directly or through a third person gives or lends a chattel for another to use, knowing or having reason to know that it is or is likely to be dangerous for the use for which it is given or lent, is subject to the same liability as a supplier of the chattel.

This section also includes liability under sections 389 and 390. See note 57 *supra*.

Robinson v. Van Mos, 37 Pa. D. & C. 286 (C.P. Beaver County 1939), the only Pennsylvania case applying section 388 to gratuitous bailees, is inconclusive in its interpretation of the section. The court raised but did not answer the question whether the duty of a gratuitous bailee is limited to dangers about which he actually has knowledge.

fluence was undoubtedly substantial. It will be remembered that the requirement of privity in Pennsylvania evolved historically in defective building, not in defective manufacturing situations.⁸⁵ In *Curtin v. Somerset*,⁸⁶ the court established the rule requiring privity of contract between the negligent builder and the injured plaintiff. Forty years later, in *Grodstein v. McGivern*,⁸⁷ the wife of the owner of a building sued the builder for injuries sustained as a result of his negligence. The court granted recovery, holding that an "exception" to the *Curtin* rule existed where it was reasonable to expect that the builder could foresee injury to the plaintiff. Although the holding of *Grodstein* effectively overrules *Curtin*,⁸⁸ subsequent courts confronted with the same issue have only admitted that *Curtin* was "modified." These same courts, however, have continued to distinguish *Curtin* out of existence.⁸⁹ In *Krisovich v. John Booth, Inc.*, the court swept away the deadwood of such distinctions when it said:

Following the *Grodstein* case . . . our Supreme Court has consistently extended the principle of the *MacPherson* case by imposing liability also on any person who on behalf of the possessor of land negligently creates an artificial condition resulting in injury to others. . . .⁹⁰

E. Causation

An essential prerequisite to the establishment of a cause of action in negligence is proof that the defendant's negligence proximately caused plaintiff's injury. In products liability cases such proof consists of showing first that a defect in the defendant's product or the defendant's failure to warn was a cause of plaintiff's injury,⁹¹ and second, that it was a proximate or legal cause of his injury. In *Majors v. Brodhead Hotel* the court stated:

It is well established in Pennsylvania that in order to find that defendant proximately caused an injury it must be found that his allegedly wrongful conduct was a substantial factor in bringing about plaintiff's injury even though it need not be the only factor.⁹²

The substantial factor test of proximate causation applied in Pennsylvania is essentially that adopted by the *Restatement* in section 431. If the de-

85. See p. 795 *supra*.

86. 140 Pa. 70, 21 A. 244 (1891).

87. 303 Pa. 555, 154 A. 794 (1931).

88. See L. ELDRIDGE, MODERN TORT PROBLEMS 106 (1941).

89. See *Bisson v. John B. Kelly, Inc.*, 314 Pa. 99, 170 A. 139 (1934); *Griffith v. Atlantic Ref. Co.*, 305 Pa. 386, 157 A. 791 (1931); *Bastl v. Papale*, 142 Pa. Super. 33, 15 A.2d 476 (1940).

90. 181 Pa. Super. 5, 10, 121 A.2d 890, 892 (1956).

The court quoted section 385 of the *Restatement* as the law of Pennsylvania.

RESTATEMENT (SECOND) OF TORTS § 385 (1965) reads:

One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the liability of one who as a manufacturer or independent contractor makes a chattel for the use of others.

91. See *Ucci v. Keane*, 402 Pa. 467, 167 A.2d 147 (1961); 1 L. FRUMMER & M. FRUMMAN, PRODUCTS LIABILITY § 14.01 (1967).

92. 418 Pa. 265, 271, 205 A.2d 873, 877 (1965).

fendent's conduct is a substantial factor in bringing about the plaintiff's injury the fact that the defendant could not foresee that this harm would be brought about, or in what manner it would occur, would not prevent him from being held liable.⁹³ If, however, the court finds that it was "highly extraordinary" that the defendant's negligence should have brought about plaintiff's harm, defendant's negligence may be held not to be a legal cause of such harm.⁹⁴

The issue often arises in products liability cases as to whether the length of time which has elapsed between the time of manufacture and the time of sale prevents defendant's negligence from being a legal cause of plaintiff's injury. In *Foley v. Pittsburgh-Des Moines Co.*⁹⁵ the court held that such lapse of time, in and of itself, was insufficient to sever causation. This holding is consistent with section 433 of the *Restatement* which states that lapse of time is merely a factor to consider in determining whether negligent conduct is a substantial factor in plaintiff's injury.⁹⁶

The issue of proximate causation arises most often where a defendant manufacturer asserts that although his negligence was a substantial factor in causing plaintiff's harm, the intervening negligence of a third party superseded his negligence.⁹⁷ In some cases the manufacturer may claim that the failure of a third party to perform his duty to inspect an item superseded his negligence. It will be remembered that a manufacturer has a duty to inspect the component parts he receives from another⁹⁸ and that the lessor of a chattel for immediate use is under a duty to inspect the chattel before he leases it.⁹⁹ In addition, under Section 392 of the *Restatement* adopted by Pennsylvania in *Saganowich v. Hachikian*,¹⁰⁰ an employer who supplies his employees with chattels to be used in the employer's business is obligated to examine the chattels for latent dangers.¹⁰¹ The effect of a failure to inspect is resolved by section 396 of the *Restatement*, adopted in Pennsylvania in *Foley v. Pittsburgh-Des*

93. RESTATEMENT (SECOND) OF TORTS § 435 (1) (1965).

94. RESTATEMENT (SECOND) OF TORTS § 435 (2) (1965).

95. 363 Pa. 1, 68 A.2d 517 (1949).

96. RESTATEMENT (SECOND) OF TORTS § 433 (c) (1965).

97. RESTATEMENT (SECOND) OF TORTS § 440 defines superseding cause as follows: A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

98. See p. 799 *supra*.

99. See p. 807 *supra*.

100. 348 Pa. 313, 35 A.2d 343 (1944); *accord*, *Labick v. Vicker*, 200 Pa. Super. 111, 186 A.2d 874 (1962).

101. RESTATEMENT (SECOND) OF TORTS § 392 (1965) reads:

One who supplies to another, directly or through a third person, a chattel to be used for the supplier's business purposes is subject to liability to those for whose use the chattel is supplied, or to those whom he should expect to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by persons for whose use the chattel is supplied

(a) if the supplier fails to exercise reasonable care to make the chattel safe for the use for which it is supplied, or

(b) if he fails to exercise reasonable care to discover its dangers, condition

Moines Co.,¹⁰² which states the rule that such failure does not break the chain of causation.¹⁰³ In other cases the manufacturer may assert that a third party's negligence, other than a failure to inspect, superseded his negligence. Pennsylvania courts resolve the issue by asking whether the intervening negligence was foreseeable.¹⁰⁴ For example, in *Smith v. Hobart Mfg. Co.*¹⁰⁵ the court held that the plaintiff employee in an action against a manufacturer for injuries sustained by the operation of a meat grinder failed to present sufficient evidence that the latter could foresee that the employer would remove the grinder's safety guard. On the other hand, in *Heichel v. Lima-Hamilton Corp.*¹⁰⁶ the court held that where the manufacturer failed to provide a safety guard on a mining machine, the employer's continued operation of the machine was insufficient to defeat the employee's action. Similarly, an employer's knowledge of a dangerously designed chattel or of a danger latent in its use will not insulate the manufacturer from liability to an injured employee.¹⁰⁷

F. The Doctrine of Exclusive Control

The doctrine of exclusive control eases the plaintiff's burden of proving negligence by raising an inference of negligence in certain situations. In *Loch v. Confair*, the court expressed the doctrine of exclusive control in the following terms:

The theory of exclusive control is that, when the instrumentality which causes the injury is shown to be under the management and control of the defendant, and the accident is such that in the ordinary course of things does not happen if those who have the management and control use proper care, it affords reasonable evidence, in absence of

102. 363 Pa. 1, 68 A.2d 517 (1949); accord, *Alexander v. Nash-Kelvinator Corp.*, 261 F.2d 187 (2d Cir. 1958), modified, 271 F.2d 524 (2d Cir. 1959) (applying Pennsylvania Law).

103. RESTATEMENT (SECOND) OF TORTS § 396 (1965) reads:

A manufacturer of a chattel is subject to liability under the rules stated in §§ 394 and 395 although the dangerous character or condition of the chattel is discoverable by an inspection which the seller or any other person is under a duty to the person injured to make.

Section 396 is consistent with Section 452(1) of the *Restatement* which reads: [T]he failure of a third person to act to prevent harm to another threatened by the actor's negligent conduct is not a superseding cause of such harm.

104. This follows RESTATEMENT (SECOND) OF TORTS § 447 (1965) which states: The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

- (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
- (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
- (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

105. 302 F.2d 570 (3d Cir. 1962).

106. 98 F. Supp. 232 (N.D. Ohio 1951) (applying Pennsylvania law).

107. See *Brandon v. Yale & Towne Mfg. Co.*, 220 F. Supp. 855 (E.D. Pa. 1963); *Montesano v. Patent Scaffolding Co.*, 213 F. Supp. 141 (W.D. Pa. 1962). But see *Miseman v. General Tire Co.*, 327 Pa. 420, 192 A. 633 (1937) (concurring opinion).

explanation by defendant, that the accident was due to negligence. It is a doctrine applicable only where the proof as to the cause of accident is peculiarly or exclusively within the possession of the defendant.¹⁰⁸

The requirement that the instrumentality be in the exclusive control of the defendant places the burden on the plaintiff to prove that no factors which might have caused the accident intervened between the defendant's control and the plaintiff's injury.¹⁰⁹

The exclusive control requirement would also seem to preclude application of the doctrine against multiple defendants. In *Loch v. Confair*,¹¹⁰ however, the court alleviated the plaintiff's burden of proof where both the manufacturer and retailer are sued *jointly*, by raising an inference that one or the other of the joint defendants was negligent. The inference places the responsibility on the manufacturer and retailer to prove the cause of the accident. In *Braccia v. Coca Cola Bottling Co.*,¹¹¹ however, the court refused to extend the doctrine of *Loch* where the manufacturer was the sole defendant, thereby declining to shift the burden of proof to a single defendant.

G. Defenses

As in all negligence cases, the defenses of contributory negligence and assumption of risk are available to the defendant.¹¹² Where the plaintiff bases his cause of action on defendant's failure to warn of a latent danger, however, a special problem arises. Where no warning of the danger is given, the availability of the defenses should be limited to situations where the plaintiff is aware of the risk. The theory behind this limitation is that "[t]o allow these defenses is to indulge in circular reasoning, since usually the plaintiff cannot be said to have assumed the

108. 372 Pa. 212, 216-17, 93 A.2d 451, 453 (1953).

The Pennsylvania doctrine of exclusive control is similar to the doctrine of *res ipsa loquitur* as it is known in other jurisdictions. *Res ipsa loquitur* exists in Pennsylvania, but has different procedural consequences and is restricted to cases "involving injury to passengers through the transportation operations of common carriers or to patrons of utilities. . . ." *Sierocinski v. E.I. DuPont De Nemours & Co.*, 118 F.2d 531, 535 (3d Cir. 1941). *Accord*, *Ambrose v. Western Maryland Ry.*, 368 Pa. 1, 81 A.2d 895 (1951).

109. See *Sweeney v. Blue Anchor Beverage Co.*, 325 Pa. 216, 189 A. 331 (1937); *Werner v. Armour & Co.*, 320 Pa. 440, 183 A. 48 (1936); *Rozumailski v. Philadelphia Coca Cola Bottling Co.*, 296 Pa. 114, 145 A. 700 (1929); *Miller v. Meadville Food Serv., Inc.*, 173 Pa. Super. 357, 98 A.2d 452 (1953); *Dillon v. William S. Scull Co.*, 164 Pa. Super. 365, 64 A.2d 525 (1949); *Nock v. Coca Cola Bottling Works*, 102 Pa. Super. 515, 156 A. 537 (1931); *Murphy v. Yuengling Dairy Prods. Corp.*, 34 Pa. D. & C. 355 (C.P. Schuylkill County 1938).

Exclusive control does not require the instrumentality to be in the actual possession of the defendant. See cases cited *supra* this note. *But see* *Martin v. E.I. DuPont De Nemours & Co.*, 281 F.2d 801 (3d Cir. 1960); *Leggieri v. Philadelphia Coca Cola Bottling Co.*, 171 F. Supp. 749 (E.D. Pa. 1959).

110. 372 Pa. 212, 93 A.2d 451 (1953).

111. 398 Pa. 386, 157 A.2d 747 (1960).

112. See *Prashker v. Beech Aircraft Corp.*, 258 F.2d 602 (3d Cir.), *cert. denied*, 368 U.S. 958 (1961); *Widger v. Morrison*, 344 Pa. 434, 25 A.2d 324 (1942).

risk of which he was ignorant or to have contributed to his own injury when he had no way of reasonably ascertaining that the danger of injury existed."¹¹³ Although Pennsylvania apparently has not had the opportunity to pass on the issue, most courts have failed to see the logic of this theory and hold that the defenses are available in all cases.¹¹⁴

Where the defendant does give a warning, the question is whether it was sufficient to make the plaintiff cognizant of the danger,¹¹⁵ because failure to heed an adequate warning will establish a defense.¹¹⁶ Conversely, inadequacy of a warning should preclude establishment of a defense under the same reasoning as above in the no-warning cases.¹¹⁷

Another defense in products liability negligence actions arises where the plaintiff's injury results from an unforeseen use of the product. For example, in *Mannsz v. Macwhyte Co.*,¹¹⁸ the plaintiff sought to hold the defendant manufacturer responsible for the death of her husband, both on negligence and breach of warranty theories, when wire rope used to support a scaffold snapped. The court held with reference to the breach of warranty action that the decedent did not use the rope for a purpose intended by the manufacturer as manifested in a manual supplied with the rope. A similar analysis is appropriate in negligence actions.

III. THE CAUSE OF ACTION IN WARRANTY

A second theory of recovery, long known to Pennsylvania, is that of breach of warranty.¹¹⁹ The common law developed many concepts in the warranty field which were eventually codified in the Uniform Sales Act.¹²⁰ The subsequent enactment of the Uniform Commercial Code,¹²¹ although drafted within the framework of the Sales Act, modified warranty law. The Code preserves the traditional nomenclature of express and implied warranties; however, with respect to each warranty, the Code has made substantial changes. The purpose of this section is to analyze the changes and to discuss the judicial treatment of some problems that

113. Dillard & Hart, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 163 (1955).

As to knowledge from an independent source see *Hopkins v. E.I. DuPont De Nemours & Co.*, 212 F.2d 623 (3d Cir. 1954).

114. See Dillard & Hart, *supra* note 113, at 163.

115. See p. 801 *supra*.

116. See *Oettinger v. Norton Co.*, 160 F. Supp. 399 (E.D. Pa. 1957), *aff'd*, 253 F.2d 712 (3d Cir. 1958).

117. See *Maize v. Atlantic Ref. Co.*, 352 Pa. 51, 41 A.2d 850 (1945).

118. 155 F.2d 445 (3d Cir. 1946).

119. The concept of seller's warranties predates Pennsylvania's adoption of the Uniform Sales Act in 1915. See *Fraley v. Bisham*, 10 Pa. 320 (1849); *McFarland v. Newman*, 9 Watts 55 (Pa. 1839); *Armstrong v. Descalzi*, 48 Pa. Super. 171 (1911); *Pyott v. Baltz*, 38 Pa. Super. 608 (1909).

120. Some common law concepts were not continued in the Sales Act. For instance, the technical requirements of specific words or intention as conditions precedent to a seller's liability based on breach of an express warranty was bypassed in favor of reasonable reliance on the buyer's part to the seller's expressions. Furthermore, the Uniform Sales Act implied certain warranties of quality independent of any contract for sale. Sales Act of May 19, 1915, Pa. Laws 543, §§ 12-16.

211. PA. S.A.L. ANN. tit. 12A, §§ 2-312 to -318 (Supp. 1967).

have arisen with respect to those changes. The ensuing analysis will focus on Code cases, but resort will be made to pre-Code cases where necessary for additional insight and illustration.

A. Classification of the Warranties

1. The Express Warranty

Prior to Pennsylvania's adoption of the Uniform Sales Act a cause of action for breach of express warranty required the buyer to establish that the seller intended to become answerable for his affirmations of fact.¹²² Both the Sales Act and the Code have abrogated the requirement of intent; the means by which it has been eliminated, however, differs under each. The Sales Act specified that any affirmation of fact or promise made by the seller relating to the goods constituted an express warranty if the natural tendency of such expression was to induce the buyer to purchase the goods in reliance on it.¹²³ Thus, for example, where the seller stated that rolls of barbed wire were a certain length and it was shown that the buyer relied on the statement, the court concluded that an express warranty had been created with respect to the wire's length.¹²⁴

Unlike the Sales Act which based an express warranty on the buyer's reliance, the Code bases its concept of express warranty on the "dickered aspects" of the bargain.¹²⁵ The Code provides that an express warranty may be formulated in one of three situations:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.¹²⁶

122. See, e.g., *Holmes v. Tyson*, 147 Pa. 305, 23 A. 564 (1892); *Pyott v. Baltz*, 38 Pa. Super. 608 (1909); *McAllister v. Morgan*, 29 Pa. Super. 476 (1905); *Jaeger, Privity of Warranty: Has the Tocsin Sounded?*, 1 *Duquesne L. Rev.* 1 (1963).

123. Sales Act of May 19, 1915, Pa. Laws 543, § 12. The Code is more explicit: It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty. . . .

PA. STAT. ANN. tit. 12A, § 2-313(2) (Supp. 1967). See *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966).

124. *Farrey's, Inc. v. Supplee-Biddle Hardware Co.*, 103 F. Supp. 488 (E.D. Pa. 1952); see *Mannsz v. Macwhythe Co.*, 155 F.2d 445 (3d Cir. 1946) (tables of tensile strength contained in manufacturer's manual); *Elliot-Lewis Corp. v. York-Shipley, Inc.*, 372 Pa. 346, 94 A.2d 47 (1953) (representations appearing in manufacturer's catalog). But cf. *Madison-Kipp Corp. v. Price Battery Corp.*, 311 Pa. 22, 166 A. 377 (1933); see generally Comment, 48 *MARQ. L. REV.* 521 (1959).

125. UNIFORM COMMERCIAL CODE § 2-313, Comment 1. Although not defined by the Code or the official comments, the phrase "dickered aspects" of the bargain probably means that part of the agreement which constitutes some part of the consideration.

126. PA. STAT. ANN. tit. 12A, § 2-313(1)(a) (Supp. 1967). In *Babcock Poultry Farm, Inc. v. Shook*, 204 Pa. Super. 141, 206 A.2d 399 (1964), the seller's promises that certain chicks would produce as well or better than the buyer's old strain was sufficient to charge him with having made an express warranty. For an analysis of the section's impact on national advertising see *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 616, 187 A.2d 575, 578 (1963); *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1960); *Richter v. Ford Motor Co.*, 85 Mont. Co. L.R. 431 (C.P. Montgomery County 1965); *Kennedy v. Ford Motor*

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.¹²⁷

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.¹²⁸

In examining the Code's treatment of express warranties it becomes apparent that sections 12, 14, and 16 of the Sales Act¹²⁹ have been consolidated and reclassified so that, instead of raising implied warranties that the bulk will correspond to the sample or description, express warranties are created to that effect. This change in classification is more in the spirit of logical consistency than in substance, and section 2-313 should not materially alter the results of much pre-Code case law.¹³⁰

The Code's shift in emphasis from reliance, required in the Sales Act, to the "dickered aspects" of the bargain has, however, occasioned a subtle change in the law with reference to sales by description and sample. The Code has relieved the buyer of the affirmative task of establishing particular reliance on the seller's sales talk¹³¹ by establishing a presumption that any sample or description, just as any affirmation of fact, is intended to become part of the basis of the bargain.¹³² Not all statements of the seller can be fairly characterized as becoming part of the basis of the bargain. Accordingly, the Code continues to follow the Sales Act distinction between affirmations of fact and mere puffing by relegating "an affirmation . . . of the value . . . or a statement purporting to be merely the seller's opinion or commendation of the goods"¹³³ to

Co., 84 Mont. Co. L.R. 142 (C.P. Montgomery County 1964); Comment, 48 MARQ. L. REV. 521 (1959).

127. PA. STAT. ANN. tit. 12A, § 2-313(1)(b) (Supp. 1967). See Boeing Airplane Co. v. O'Malley, 329 F.2d 585 (8th Cir. 1965) (applying Pennsylvania law); Fox Pools, Inc. v. Villarose, 77 York Leg. Rec. 165 (C.P. York County 1964).

The Uniform Commercial Code, section 2-313, Comment 5, explains what is meant by a description as follows:

A description need not be by words. Technical specifications, blueprints and the like can afford more exact description than mere language and if made part of the basis of the bargain goods must conform with them. Past deliveries may set the description of quality, either expressly or impliedly by course of dealing.

Of course, all descriptions by merchants must be read against the applicable trade usages with the general rules as to merchantability resolving any doubts.

128. PA. STAT. ANN. tit. 12A, § 2-313(1)(c) (Supp. 1967). See Loomis Bros. v. Queen, 17 Pa. D. & C.2d 482 (C.P. Delaware County 1957).

129. Sales Act of May 19, 1915, Pa. Laws 543, §§ 12, 14, 16.

130. W. HAWKLAND, SALES AND BULK SALES 38 (1958). Ostensibly, the result of such cases as Acro Metalscraft Co. v. Shaw, 364 Pa. 39, 70 A.2d 850 (1950); Bechtold v. Murray Ohio Mfg. Co., 321 Pa. 423, 184 A. 49 (1936); C.D. Brown Co. v. Standard Hide Co., 301 Pa. 543, 152 A. 557 (1930); and Hanes v. Cameron, 267 Pa. 90, 110 A. 81 (1920) would remain unchanged.

131. UNIFORM COMMERCIAL CODE § 2-313, Comment 3.

132. *Id.*

133. PA. STAT. ANN. tit. 12A, § 2-313(2) (Supp. 1967). This section was not designed, however, to foreclose a buyer's remedy for misrepresentation when the seller's statements of value are shown to be false. UNIFORM COMMERCIAL CODE § 2-313,

non-warranty status. Consequently, mild exaggerations¹³⁴ or statements such as "My wares are as good as anyone else's" would not lead to any different result today than prior to the adoption of the Code in Pennsylvania.¹³⁵

The paramount consideration in establishing an express warranty is whether the language or sample constitutes part of the basis of the bargain. The Code's language, unfortunately, does not define "basis of the bargain." A reasonable interpretation of this term of art is that it refers to an affirmation of the seller which becomes part of the contract and constitutes an element of the consideration given by the seller in exchange for the buyer's obligation.¹³⁶ Moreover, conduct subsequent to the closing of the contract which would otherwise result in the creation of an express warranty had it occurred during the negotiation stage, is not denied that classification if such conduct formed some part of the basis of the bargain.¹³⁷ Although no Code cases on point have been found, the official comments of the Code indicate that the subsequent warranty should be considered as a modification of the original contract and therefore become binding without the need for additional consideration.¹³⁸

2. *The Implied Warranties of Quality*

Historically, sales warranties were considered as consensual elements of a contract. Consequently, the now commonplace warranties of quality did not automatically arise with each sale.¹³⁹ The law, however, has developed to the point that it recognizes two distinct warranties of quality¹⁴⁰ which arise by operation of law and exist independently of the contract, and therefore will be imposed unless effectively disclaimed.¹⁴¹

The first, the implied warranty of merchantability,¹⁴² corresponds with section 15(2) of the Sales Act,¹⁴³ the second, the implied warranty

134. See *Michelin Tire Co. v. Schulz*, 295 Pa. 140, 145 A. 67 (1929); *Rothermel v. Phillips*, 292 Pa. 371, 141 A. 241 (1928).

135. See *Silverman v. Samuel Mallinger Co.*, 375 Pa. 422, 100 A.2d 715 (1953); *Madison-Kipp Corp. v. Price Battery Corp.*, 311 Pa. 22, 166 A. 377 (1933); *Jarecki Mfg. Co. v. Kerr*, 165 Pa. 529, 30 A. 1019 (1895); *Walker v. Kirk*, 72 Pa. Super. 534 (1919). *But see Babcock Poultry Farms, Inc. v. Shook*, 204 Pa. Super. 141, 206 A.2d 399 (1964).

With respect to the special problems of advertising see note 126 *supra*.

136. Cf. *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 616, 187 A.2d 575, 579 (1963).

137. UNIFORM COMMERCIAL CODE § 2-313, Comment 7.

138. *Id.* See also PA. STAT. ANN. tit. 12A, § 2-209 (Supp. 1967); *but see* UNIFORM COMMERCIAL CODE §§ 2-209 & Comment 3, -201, -202.

139. See *McFarland v. Newman*, 9 Watts 55 (Pa. 1839).

140. See PA. STAT. ANN. tit. 12A, §§ 2-314 and -315 (Supp. 1967).

141. See *Frigid dinners, Inc. v. Branchtown Gun Club*, 176 Pa. Super. 643, 109 A.2d 202 (1955). For a discussion of how implied warranties are disclaimed see pp. 820-23 *infra*.

142. PA. STAT. ANN. tit. 12A, § 2-314 (Supp. 1967).

143. Sales Act of May 19, 1915, Pa. Laws 543, § 15(2) provided:

Where the goods are bought by description from a seller who deals in goods of that description . . . there is an implied warranty that the goods shall be of merchantable quality.

of fitness for a particular purpose,¹⁴⁴ basically re-codifies sections 15(1), (4), and (5) of the Sales Act.¹⁴⁵ Although these warranties frequently attach to the same transaction and correspondingly overlap,¹⁴⁶ the distinction between the two certainly exceeds semantics. In *Pritchard v. Liggett & Myers Tobacco Co.* the court expressed the distinction as follows:

Under a warranty of fitness for a particular use, the seller warrants that the goods sold are suitable for the special purpose of the buyer, while the warranty of merchantability is that the goods are reasonably fit for the general purposes for which they are sold.¹⁴⁷

One commentator has ably illustrated the difference:

If a seller sold to a buyer an automobile that would not run, both warranties would be breached. An automobile that does not run is not an average automobile, nor does it fit the particular purpose (transportation) of the buyer, which is impliedly made known to the seller. On the other hand, if the buyer made known to the seller that he wanted the automobile for speed-racing purposes, the delivery to him of a fair, average car would satisfy seller's obligation relating to merchantability, but it would be a breach of the warranty of fitness for the particular purpose.¹⁴⁸

The question of which implied warranty will arise in a given fact situation may be perplexing. Depending on the particular circumstances of a transaction, either the warranty of merchantability or the warranty of fitness for a particular purpose or both may arise.

The Code provision on the implied warranty of merchantability reads in part as follows:

Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale

144. PA. STAT. ANN. tit. 12A, § 2-315 (Supp. 1967).

145. Sales Act of May 19, 1915, Pa. Laws 543, § 15 provided:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment . . . there is an implied warranty that the goods shall be reasonably fit for such purpose.

. . . .

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5) An implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade.

146. HAWKLAND, *supra* note 130, at 42; Bailey, *Sales Warranties, Product Liability and the UCC: A Lab Analysis of the Cases*, 4 WILLAMETTE L.J. 291, 301 (1967); see *Rufo v. Bastian-Blessing Co.*, 417 Pa. 107, 207 A.2d 823 (1965); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963); *Q. Vandenberg & Sons v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964); *DeGraff v. Myers Foods, Inc.*, 19 Pa. D. & C.2d 19 (C.P. Bucks County 1958). See generally PA. STAT. ANN. tit. 12A, § 2-317 (Supp. 1967).

147. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 296 (3d Cir. 1961).

148. HAWKLAND, *supra* note 130, at 42.

if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.¹⁴⁹

This section states two fundamental requirements in order for the warranty of merchantability to arise. First, the goods must be obtained from a merchant, and second, there must be a sale or a contract of sale. Ordinarily, the "merchant" requirement is easily complied with in light of the Code's expansive definition of the term. The statute defines a merchant as a

person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment. . . .¹⁵⁰

A questionable lower court decision, however, denied recovery when it characterized the defendant, who had furnished and installed an inadequate stoker boiler unit for the plaintiffs, as a handyman rather than as a merchant.¹⁵¹

As to the second requirement, that there be a sale, the Pennsylvania case of *Loch v. Confair*¹⁵² is instructive. In that case the plaintiff, injured by a soda bottle which exploded when her husband lifted it from the store's shelf, sued the supermarket in which the incident occurred. The Supreme Court of Pennsylvania denied the imposition of warranty liability on the ground that, since the soda had not been purchased at the time it exploded, there was neither a sale nor a contract for sale. Notwithstanding the Code's language and the *Loch* decision, the warranty of merchantability is not restricted to technical sales, but has been extended to merchants who, instead of selling, lease their wares.¹⁵³ The warranty does not extend, however, to sales of services.¹⁵⁴

Assuming that the warranty of merchantability exists, the question arises as to whether the seller's goods meet the standards of merchantability. Although merchantability was not defined by the Sales Act, the courts considered goods merchantable if they were reasonably fit for the *general*

149. PA. STAT. ANN. tit. 12A, § 2-314(1) (Supp. 1967).

150. PA. STAT. ANN. tit. 12A, § 2-104(1) (Supp. 1967). See also Sedgwick, Conley & Sleight, *Products Liability: Implied Warranties*, 48 MARQ. L. REV. 139, 140 (1964).

151. *Victor v. Barzaleski*, 19 Pa. D. & C.2d 698 (C.P. Luzerne County 1959).

152. 361 Pa. 158, 63 A.2d 24 (1949).

153. See, e.g., *Demos Constr. Co. v. Service Supply Corp.*, 153 Pa. Super. 623, 34 A.2d 828 (1943); *Hartford Battery Sales Corp. v. Price*, 119 Pa. Super. 165, 181 A. 95 (1935); *Airco Distrib. Co. v. Stuccio*, 45 Luz. L. Reg. Rep. 67 (C.P. Luzerne County 1955).

The implied warranty of merchantability attaches irrespective of whether the goods are new or used. See *Goepfert v. Town Motors Automotive Co.*, 1 Bucks Co. L.R. 134 (C.P. Bucks County 1951); cf. *McKeage Mach. Co. v. Osborne & Seaton Mach. Co.*, 124 Pa. Super. 387, 188 A. 543 (1936). See also UNIFORM COMMERCIAL CODE § 2-314, Comment c.

154. *Victor v. Barzaleski*, 19 Pa. D. & C.2d 698 (C.P. Luzerne County 1959).

or *ordinary* purposes for which they were sold,¹⁵⁵ or if they were of fair and average quality, free from harmful defects.¹⁵⁶ While the Code does not purport to define merchantability, unlike the Sales Act, it does set forth certain minimal objective standards which must be satisfied before the product is considered of merchantable quality. The merchandise must be at least such as

- (a) pass without objection in the trade under the contract description; and
- (b) in the case of fungible goods, are of fair average quality within the description; and
- (c) are fit for the ordinary purposes for which such goods are used; and
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
- (e) are adequately contained, packaged, and labeled as the agreement may require; and
- (f) conform to the promises or affirmations of fact made on the container or label if any.¹⁵⁷

The fact that the Code has delineated the concept of merchantability does not suggest that the fundamental tenets of that concept have changed.

Unlike the warranty of merchantability, the warranty of fitness for a particular purpose does not arise automatically with the sale, but attaches only when two conditions, common to both the Sales Act and the Code, are met. Section 2-315 of the Code provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

As to the first condition, that the seller have reason to know of the buyer's particular purpose, "reason to know" does not require that the buyer formally communicate his purpose for purchasing the seller's goods directly to the seller. The key is that the seller be made reasonably aware of his buyer's purposes, and the means by which the seller acquires information sufficient to charge him with such knowledge is irrelevant.¹⁵⁸

155. *See, e.g.*, *Eimco Corp. v. Joseph Lombardi & Sons*, 193 Pa. Super. 1, 162 A.2d 263 (1960); *Frigidiners, Inc. v. Branchtown Gun Club*, 176 Pa. Super. 643, 109 A.2d 202 (1955).

156. HAWKLAND, *supra* note 130, at 41. *See, e.g.*, *Frantz Equip. Co. v. Leo Butler Co.*, 370 Pa. 459, 465, 88 A.2d 702, 706 (1952).

157. PA. STAT. ANN. tit. 12A, § 2-314(2) (Supp. 1967).

158. *See* *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. 1964) (applying Pennsylvania law).

When the buyer attempts to establish that the seller had knowledge of his particular purpose problems of proof may arise because of the parol evidence rule. Under section 2-202 of the Code the terms of a writing intended by the parties as the final expression of their agreement may not be contradicted by evidence of any prior or contemporaneous agreement, although it may be supplemented or explained by consistent additional terms.¹⁵⁹ It may be argued that, since the warranty of fitness for a particular purpose is an implied warranty, it arises independently of the express contract of the parties by operation of law, and as such it is either not contradictory to the terms of the contract or is a supplemental, consistent, additional term.¹⁶⁰ This position is buttressed by the fact that section 2-316 requires that words or conduct negating express warranties comply with the parol evidence rule; it makes no similar requirement with respect to implied warranties. Hence, a buyer's statements which indicate his intended use of a product should be admissible to show that a seller had reason to know the particular purpose for which the goods are needed.

The second condition necessary to the creation of a warranty of fitness is that the buyer rely on the seller's skill or judgment in furnishing a suitable product. Thus, where the seller proved that the buyer had not relied on the seller's expertise, but rather on his own tests and inspections, the seller established a valid defense to the buyer's action for breach of the fitness warranty.¹⁶¹ Analogously, a seller successfully avoided imposition of the warranty of fitness for a particular purpose by proving that the buyer's reliance was placed on his own detailed specifications, and not on the seller's skill in the selection process.¹⁶² However, notwithstanding the submission of certain instructions as to type and color of paper by the buyer, reliance has been predicated upon the seller's skill in selecting the proper *quality* of material for the buyer's purpose.¹⁶³

159. PA. STAT. ANN. tit. 12A, § 2-202 (Supp. 1967) provides:

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

- (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
- (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

160. See *Frigidiners, Inc. v. Branchtown Gun Club*, 176 Pa. 643, 109 A.2d 202 (1954).

161. See *Vacuum Concrete Corp. v. Berlanti Constr. Co.*, 206 Pa. Super. 548, 214 A.2d 729 (1965); *Pantano v. Zamer Motor Sales Co.*, 170 Pa. Super. 317, 85 A.2d 681 (1952).

162. See, e.g., *Pennsylvania R.R. v. J. Jacob Shannon & Co.*, 363 Pa. 438, 70 A.2d 321 (1950); *Hill & MacMillan, Inc. v. Taylor*, 304 Pa. 18, 155 A. 103 (1931); *Vacuum Concrete Corp. v. Berlanti Constr. Co.*, 206 Pa. Super. 548, 214 A.2d 729 (1965); *Royal Pioneer Paper Box Mfg. Co. v. DeJonge*, 179 Pa. 155, 115 A.2d 837 (1955) (dictum).

163. *Royal Pioneer Paper Box Mfg. Co. v. DeJonge*, 179 Pa. Super. 155, 115 A.2d 837 (1955).

One important change wrought by the Code with respect to the buyer's reliance on the seller is the abrogation of the trade name exception.¹⁶⁴ Under the Sales Act a contract to sell or a sale of a specific article under its patent or trade name usually precluded the buyer's assertion of reliance on the seller's skill and judgment in selecting goods suitable for the buyer's purposes.¹⁶⁵ This factor, however, was not material to the general warranty of merchantability.¹⁶⁶ The Code has relaxed this rigid, formalistic approach by providing that the fact that the product was sold under its patent or trade name is but one *factor* added to the calculus of buyer reliance and hence is not conclusive on the issue.¹⁶⁷

With regard to either implied warranty there are two additional prerequisites to obtain recovery. First, a plaintiff must prove that the breach occurred at the time of the sale. For example, the seller was granted a directed verdict after the buyer failed to demonstrate that a lawnmower was unmerchantable at the time of its delivery, since there was convincing evidence that the allegedly defective lawnmower operated satisfactorily for a year prior to the injury.¹⁶⁸ Second, the buyer must prove that the breach of warranty proximately caused his injury.¹⁶⁹ Therefore, the seller may avoid liability by showing that the injury emanated from some superseding cause as where the buyer's injury is caused by his own failure to discover apparent defects during his inspection.¹⁷⁰

B. Avoidance of Warranty Liability

1. The Disclaimer

One method of obviating warranty obligations, express or implied, is to disclaim them. However, it is not usually economically feasible to exclude all warranties because without certain minimum assurances the buyer may be too reluctant to buy.

The Sales Act provided that modifications of the various implied obligations could be achieved by an express agreement or by necessary

164. See note 145 *supra*.

165. Sales Act of May 19, 1915, Pa. Laws 543, § 15(4); *Matteson v. Lagace*, 36 R.L. 223, 89 A. 713 (1914). *But see* *Green Mountain Mushroom Co. v. Brown*, 117 Vt. 509, 95 A.2d 679 (1953).

166. See, e.g., *Frantz Equip. Co. v. Leo Butler Co.*, 370 Pa. 459, 88 A.2d 702 (1952); *Tinius Olsen Testing Mach. Co. v. Wolf Co.*, 297 Pa. 153, 146 A. 541 (1929); *Eimco Corp. v. Joseph Lombardi & Sons*, 193 Pa. Super. 1, 162 A.2d 263 (1960); *Demos Constr. Co. v. Service Supply Corp.*, 153 Pa. Super. 623, 34 A.2d 828 (1943); *Hartford Battery Sales Corp. v. Price*, 119 Pa. Super. 165, 181 A. 95 (1935); *Sebastianelli v. Frank*, 108 Pa. Super. 550, 165 A. 664 (1933).

167. See *Frantz Equip. Co. v. Leo Butler Co.*, 370 Pa. 459, 88 A.2d 702 (1952); *Knapp v. Willys-Ardmore, Inc.*, 174 Pa. Super. 90, 100 A.2d 105 (1953).

Both buyer reliance and the seller's reasonable awareness of the buyer's particular purpose in making the purchase are questions of fact. UNIFORM COMMERCIAL CODE § 2-315, Comment 5; see *Allen v. Savage Arms Corp.*, 52 Luz. L. Reg. Rep. 159 (C.P. Luzerne County 1961). *But cf.* *McMeekin v. Gimbel Bros.*, 223 F. Supp. 896, 899 n.7 (W.D. Pa. 1963).

168. *McMeekin v. Gimbel Bros.*, 223 F. Supp. 896 (W.D. Pa. 1963).

169. See PA. STAT. ANN. tit. 12A, § 2-715(2)(b) (Supp. 1967).

170. *See* *PA. STAT. ANN. tit. 12A, § 2-715(2)(b)* (Supp. 1967); *James Motor Sales Co.*, 170 Pa. Super. 317, 85 A.2d

implication.¹⁷¹ The courts, however, did not look favorably upon disclaimers and tended to construe them strictly.¹⁷² Therefore, in one case, a seller's contention that all implied warranties were excluded by a contract provision which declared that the written contract encompassed the entire agreement fell on deaf ears. The court maintained that because implied warranties import independent obligations, they could be negated only by express agreement or by those express warranties which by necessary implication wholly incorporated the implied ones.¹⁷³

The Uniform Commercial Code also permits the seller to disclaim implied warranties within certain guidelines set forth in section 2-316.¹⁷⁴ That section provides that the implied warranty of merchantability may be excluded or modified orally, but that a disclaimer of the implied warranty of fitness for a particular purpose may only be disclaimed by a writing. If a party asserts disclaimers of either or both warranties in a writing, the language excluding the warranties must be conspicuous.¹⁷⁵ With respect to the implied warranty of merchantability, whether the disclaimer is oral or written the word "merchantability" must be mentioned.¹⁷⁶

Despite the aforementioned Code provisions which set forth strict requirements in order to establish disclaimers, section 2-316(3)¹⁷⁷ stipulates other ways in which warranties may be excluded. Where the contract of sale includes language such as "with all faults" or "as is" or similar language which clearly gives notice to a buyer that the seller is making no implied warranties, all implied warranties are excluded. Moreover, if before entering a contract of sale a buyer either refused to examine a sample or model or examined it as fully as he desired, no implied warranties exist with regard to defects that would have been revealed by inspection. Finally, implied warranties may be excluded or modified by course of dealing, course of performance, or usage of trade.¹⁷⁸

An example of the application of the conspicuousness criterion is *Boeing Airplane Co. v. O'Malley*¹⁷⁹ where the seller asserted a disclaimer,

171. Sales Act of May 19, 1915, Pa. Laws 543, § 71.

172. *E.g.*, *Elliot-Lewis Corp. v. York-Shipley, Inc.*, 372 Pa. 346, 94 A.2d 47 (1953); *cf.* *Boyd v. Smith*, 372 Pa. 306, 94 A.2d 44 (1953) (exculpatory clause in a lease).

173. *Frigidiners, Inc. v. Branchtown Gun Club*, 176 Pa. Super. 643, 109 A.2d 202 (1954).

174. PA. STAT. ANN. tit. 12A, § 2-316 (Supp. 1967).

175. Under the Code "conspicuous" is defined as:

A term or clause . . . when it is so written that a reasonable person against whom it is to operate ought to have noticed it. . . . Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. . . . Whether a term or clause is "conspicuous" or not is for decision by the court.

PA. STAT. ANN. tit. 12A, § 1-201(10) (Supp. 1967). See *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. 1964) (applying Pennsylvania law); *accord*, *S.F.C. Acceptance Corp. v. Ferec*, 39 Pa. D. & C.2d 225 (C.P. York County 1966).

176. PA. STAT. ANN. tit. 12A, § 2-316(2) (Supp. 1967).

177. PA. STAT. ANN. tit. 12A, § 2-316(3) (Supp. 1967); see *Kalodis v. Mayo Motors, Inc.*, 32 Pa. D. & C.2d 102 (C.P. Lehigh County 1963).

178. In a situation where the buyer knows that in a particular industry warranties ordinarily do not attach by common usage and he nevertheless enters into a contract, the disclaimer is conspicuous.

179. 329 F.2d 585 (8th Cir. 1964) (applying Pennsylvania law).

incorporated into the sales contract, as a defense to buyer's warranty action. The court held the disclaimer insufficient since it was neither in larger nor in a contrasting type or color. Undeniably, today's consumer is afforded much broader protection than he was under the Sales Act which demanded nothing comparable to the Code's language and conspicuousness criteria. The criteria to disclaim contemplate objective standards. The Code's requirement of objectivity in evaluating disclaimers is desirable since it affords the interested parties a greater degree of certainty, and thereby assures them that their acts will have the legal consequences sought.

Rather than limiting the extent of his warranty obligation, the seller may seek to reduce his liability by restricting the buyer to a remedy of the seller's choosing.¹⁸⁰ The Sales Act required that a modification of a remedy be by express agreement.¹⁸¹ The courts, however, interpreted such agreements most narrowly, especially in cases involving personal injury.¹⁸²

The Uniform Commercial Code likewise permits the seller to limit remedies available to the buyer for breach of a warranty.¹⁸³ The pertinent sections are 2-718(1) and 2-719.¹⁸⁴ The latter provides:

[1] (a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

. . . .

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Theoretically, under the Sales Act the buyer was fully competent to contract away his remedy with no discernable distinction between personal injury, consequential damages, and commercial loss. The Code has constructed such distinctions by freely allowing restrictions on remedies

180. See PA. STAT. ANN. tit. 12A, § 2-316(4) (Supp. 1967).

181. Sales Act of May 19, 1915, Pa. Laws 543, § 71; see *Sharples Separator Co. v. Domestic Elec. Refrigerator Corp. ex rel. Holmes Prods., Inc.*, 61 F.2d 499 (3d Cir. 1932); *Bechtold v. Murray Ohio Mfg. Co.*, 321 Pa. 423, 63 A.2d 397 (1936).

182. See, e.g., *Ebbert v. Philadelphia Elec. Co.*, 330 Pa. 257, 198 A. 323 (1938) (trespass action).

183. PA. STAT. ANN. tit. 12A, § 2-316(4) (Supp. 1967) provides:

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

184. PA. STAT. ANN. tit. 12A, §§ 2-718(1), -719 (Supp. 1967).

with respect to commercial and property loss,¹⁸⁵ while treating limitation of remedies for personal injury in the case of consumer goods as prima facie unconscionable.¹⁸⁶ However, this presents an anomalous situation. Whereas the Code has developed a mechanism which enables the seller to *disclaim* all warranties and thereby elude *all* liability, it nevertheless curiously stipulates that attempts to *limit* liability by limiting the remedy will be labeled prima facie unconscionable in personal injury cases involving consumer goods. Accordingly, the courts should read disclaimers in such cases as prima facie unconscionable. Furthermore, this alternative right of the seller to limit the remedy is barren of requirements such as conspicuousness which the Code mandates in the case of disclaimers. One lower court, however, has held that where the seller attempted to limit the buyer's remedy by contractual provision, conspicuousness was a manifestly necessary condition, inherent in the concept of excluding or limiting warranty liability. Therefore, it refused to enforce the contractual remedy.¹⁸⁷

In addition to directly disclaiming the responsibility to supply reasonably fit merchandise, some sellers have sought to accomplish the same result by disclaiming their obligations in a security agreement executed subsequently to the contract of sale. The Code has foreclosed this possibility by providing that "[w]hen a seller retains a purchase money security interest in goods the Article on Sales (Article 2) governs the sale and any disclaimer, limitation or modification of the seller's warranties."¹⁸⁸

Another means of excluding the implied warranty of merchantability arises when an express warranty is so inclusive that it necessarily negates any additional implied obligations with respect to general quality assurances. In one pre-Code case, where the seller's warranty of his material was so embracing, the Pennsylvania supreme court felt bound to deny the existence of an implied warranty of merchantability which would have otherwise arisen from the transaction.¹⁸⁹ The Code has substantially enacted the holding of this case into positive law. Section 2-317(c) declares that "[e]xpress warranties displace inconsistent implied warranties other than an implied warranty of fitness. . . ." The Code provision that the warranty of fitness for a particular purpose is not displaced by an inconsistent express warranty is sound, since the warranty of fitness should not be engulfed by an express warranty which ordinarily would not be inapposite to it.¹⁹⁰

185. See *Magar v. Lifetime, Inc.*, 187 Pa. Super. 143, 144 A.2d 747 (1958).

186. If the restriction is unconscionable, PA. STAT. ANN. tit. 12A, § 2-302 (Supp. 1967) is controlling.

187. *Warminster Township Municipal Authority ex rel. Robinson Clay Prod. Co. v. Berlanti Constr. Co.*, 13 Bucks Co. L. Rep. 527 (C.P. Bucks County 1964).

188. PA. STAT. ANN. tit. 12A, § 9-206(2) (Supp. 1967). *E.g.*, *L. & N. Sales Co. v. Stoski*, 188 Pa. Super. 117, 146 A.2d 154 (1958).

189. *See, e.g.*, *Tate-Jones & Co. v. Union Elec. Steel Co.*, 281 Pa. 448, 126 A. 813 (1924).

190. *See, e.g.*, *L. & N. Sales Co. v. Stoski*, 188 Pa. Super. 117, 146 A.2d 154 (1958).

2. *Privity*

Well before the sophistication of warranty law, the landmark decision of *Winterbottom v. Wright*¹⁹¹ was widely regarded as authority that neither a manufacturer nor a wholesaler was liable to a remote purchaser absent privity between the parties. Although the 1916 case of *MacPherson v. Buick Motor Co.*¹⁹² eliminated the requirement of privity in torts, it is still a necessity in actions based on breach of warranty. Although the attack on the traditional defense of privity has proceeded swiftly,¹⁹³ the siege has not been unqualifiedly successful.¹⁹⁴

In Pennsylvania, attempts to ease the privity requirement, which had begun under the Sales Act, were effectuated very slowly.¹⁹⁵ Only purchasers were granted warranty protection,¹⁹⁶ and they could only sue remote manufacturers in cases involving injuries resulting from impure food or a breach of an express warranty. These cases were considered exceptions to the traditional rule that purchasers received warranties only from their immediate sellers.

With respect to the express warranty exception, the situation often arises that the consumer, relying on the manufacturer's promises, purchases the advertised, though defective, product and is injured.¹⁹⁷ In these situations, the courts have not hesitated to impose liability on the distant manufacturer for breaching its express warranty.¹⁹⁸ The reason advanced for dispensing with privity is that the remote vendor contemplates that its extensive advertising will become part of the consideration given for the ultimate sale.¹⁹⁹ Therefore, when a cigarette smoking cancer victim charged Liggett & Myers with breaching its express warranties, want of vertical privity did not determine the result.²⁰⁰ The impure food

191. 10 M. & W. 109, 152 Eng. Rep. 402 (1842).

192. 217 N.Y. 382, 111 N.E. 1050 (1916); see pp. 795-97 *supra*. See generally 1 L. FRUMMER & M. FREIDMAN, PRODUCTS LIABILITY § 5.02 (1967).

193. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 180, 174 N.E. 441, 445 (1931). See generally Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Prosser, *The Face of the Citadel*, 50 MINN. L. REV. 791 (1966).

194. See *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).

195. Under the Sales Act only a buyer could sue, and only the immediate seller could be sued. *Timberland Lumber Co. v. Climax Mfg. Co.*, 61 F.2d 391 (3d Cir. 1932). However, the pre-Code courts sometimes resorted to legal ploys to circumvent the rule. Thus, an injured spouse recovered where the court found that the product was purchased by the other spouse as agent for him. See also *Bonenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1943).

196. See *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).

197. *Jaeger*, *supra* note 122, at 141; *Bailey*, *supra* note 146, at 296; see *Wilson v. American Chain & Cable Co.*, 216 F. Supp. 32 (E.D. Pa. 1963).

198. *E.g.*, cases cited in note 124 *supra*.

199. *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575, 578 (1963); cf. *Silverman v. Samuel Mallinger Co.*, 375 Pa. 422, 100 A.2d 715 (1953).

200. *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966). The assurances given and relied on included: "Chesterfields will help you throat and accessory organs not adversely affected by smoking Chesterfields." *Id.* at 482.

exception, on the other hand, is based on strong policy considerations to impose a higher standard on manufacturers of food products.²⁰¹

With the enactment of the Uniform Commercial Code, the attack on privity was revitalized. By expanding the benefits of any warranty beyond the buyer to "any natural person who is in [his] family or household" or to "a guest in his home,"²⁰² the Uniform Commercial Code overcame the traditional privity concept that only parties to the sales contract may enforce the warranties attached thereto against the immediate seller. Corresponding to this expansion of the lateral coverage of a warranty under the Code, the courts also tended to allow remote purchasers to recover against manufacturers.²⁰³

To determine the present status of the privity issue in Pennsylvania, it must be noted that the strictures of privity operate in two distinct directions, horizontally and vertically. Horizontal privity refers to the breadth of coverage of the seller's warranty. In other words, this concept would determine whether there were any beneficiaries of the warranty, in addition to the buyer, who could sue the seller if they were injured by the product. Vertical privity, on the other hand, focuses on whether the original seller's warranties extend to remote purchasers through the distributive chain. This concept would be dispositive of whether a consumer could sue the wholesaler under warranties made by the latter, notwithstanding a transaction with an intervening retailer.

The position of the privity question in Pennsylvania depends on the interaction of the Code with the courts' view of the legislative intent in its enactment. The scope of horizontal privity rests upon judicial construction of section 2-318 and whether the courts find any case law granting wider rights. With respect to vertical privity, section 2-318 makes no provision. Consequently, whether a remote purchaser may sue the manufacturer in warranty depends on case law.

In order to determine the present status of both the vertical and horizontal privity requirements, the cases of *Hochgertel v. Canada Dry Corp.*,²⁰⁴ *Yentzer v. Taylor Wine Co.*,²⁰⁵ and *Miller v. Preitz*,²⁰⁶ will be discussed at length.

201. *E.g.*, *Yentzer v. Taylor Wine Co.*, 414 Pa. 272, 199 A.2d 463 (1964); *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963).

202. PA. STAT. ANN. tit. 12A, § 2-318 (Supp. 1967).

203. *Duckworth v. Ford Motor Co.*, 211 F. Supp. 888 (E.D. Pa. 1962), *rev'd on other grounds*, 320 F.2d 130 (3d Cir. 1963); *cf.* *Thompson v. Reedman*, 199 F. Supp. 120 (E.D. Pa. 1961); *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

204. 409 Pa. 610, 187 A.2d 575 (1963), *noted in* 67 DICK. L. REV. 428 (1963), 51 GEO. L.J. 860 (1963), 25 U. PITT. L. REV. 99 (1963), 49 VA. L. REV. 1040 (1963), and 65 W. VA. L. REV. 326 (1963). *But cf.* *Childs v. Austin Supply Co.*, 408 Pa. 403, 184 A.2d 250 (1962).

205. 414 Pa. 272, 199 A.2d 463 (1964), *noted in* 17 ALA. L. REV. 92 (1964), 14 CATHOLIC U.L. REV. 133 (1965), 14 DE PAUL L. REV. 177 (1964); 48 MARQ. L. REV. 273 (1964), 25 MD. L. REV. 80 (1965), 17 VAND. L. REV. 1537 (1964), and 10 VILL. L. REV. 607 (1965).

206. 422 Pa. 383, 221 A.2d 320 (1966), *noted in* 33 BROOKLYN L. REV. 334 (1967), 16 DRAKE L. REV. 115 (1967), 15 KAN. L. REV. 219 (1966), 43 N.D.L. REV. 560 (1967), and 10 VILL. L. REV. 607 (1965). See also *Miller v. Preitz*, 408 Pa. 403, 184 A.2d 250 (1962), *noted in* 33 BROOKLYN L. REV. 334 (1967), 16 DRAKE L. REV. 115 (1967), 15 KAN. L. REV. 219 (1966), 43 N.D.L. REV. 560 (1967), and 10 VILL. L. REV. 607 (1965). See also *Miller v. Preitz*, 408 Pa. 403, 184 A.2d 250 (1962), *noted in* 33 BROOKLYN L. REV. 334 (1967), 16 DRAKE L. REV. 115 (1967), 15 KAN. L. REV. 219 (1966), 43 N.D.L. REV. 560 (1967), and 10 VILL. L. REV. 607 (1965).

In *Hochgertel*, an employee tending bar in his employer's clubhouse was injured by glass fragments from a bottle of carbonated soda water, which exploded while standing on the counter behind the bar. The bartender sued the manufacturer, although the employer had bought the bottle. In dismissing the employee's claim the court found the lack of horizontal privity decisive. Speaking for the court, Justice Eagen declared:

It is clear from the language used [UCC 2-318] that in order to qualify as a person (not a buyer), who is within the protection of the warranty, one must be a member of the buyer's family, his household or a guest in his home. An employee is definitely in none of these categories.²⁰⁷

The court, noting that "the code was not intended to restrict the case law in this field,"²⁰⁸ also considered the exception to the requirement of privity granted in food and beverage cases. After reviewing such cases, the court noted that in no case had recovery "against the manufacturer for breach of an implied warranty been extended beyond a purchaser in the distributive chain."²⁰⁹

The court, in dictum, was terse on the issue of vertical privity. It declared that exclusive of food cases, since an implied warranty of merchantability does not survive a resale, the only recourse in warranty available to an injured party who qualifies as a section 2-318 beneficiary is against his immediate vendor.²¹⁰ Since the Code offers no positive solution to the vertical privity problem, the court relied on policy to support its dictum. The court thus concluded that an extension of the warranty up the distributive chain would convert the manufacturer into a guarantor, a result too harsh and unjust to be palatable.²¹¹ This result also follows from the traditional distinctions between contract and tort.

The horizontal aspects of privity were reviewed in *Yentzer v. Taylor Wine Co.*,²¹² a case which corresponds closely to *Hochgertel*. On behalf of his employer, a hotel manager personally bought four bottles of champagne produced by the defendant. The manager and other employees were preparing to serve the champagne when a cap from one of the bottles suddenly ejected, hitting the manager in the eye. When the injured employee brought an action for breach of implied warranty of merchantability, the lower court held that *Hochgertel* controlled and dismissed his suit. The Pennsylvania supreme court reversed on the ground that the plaintiff was a buyer. The court said that *Hochgertel* was not meant to foreclose

207. 409 Pa. at 613, 187 A.2d at 577.

208. *Id.* at 614, 187 A.2d at 578.

209. *Id.* at 615, 187 A.2d at 578.

210. *Id.*

211. *Id.* at 616, 187 A.2d at 578. *But see* *Webb v. Zern*, 422 Pa. 383, 221 A.2d 320

212. 414 Pa. 272, 199 A.2d 463 (1964).

an actual purchaser from warranty protection,²¹³ and held that, since warranties run to buyers and the term "buyer" in section 2-318 is defined in section 2-103 as "a person who buys or contracts to buy,"²¹⁴ the plaintiff was protected.

The third decision, *Miller v. Preitz*,²¹⁵ arose when a defective home vaporizer killed the purchaser's 7-week-old nephew when it spewed boiling water over him. The vaporizer was being operated in the decedent's home, which was next door to the purchaser's. A survival action was begun against the druggist who sold the item, the distributor, and the manufacturer. The first issue presented was the status of the decedent under section 2-318 of the Code. By observing that section 2-318 was drafted in the disjunctive, the court decided that the word "family" was not intended to be restricted to the meaning of "household" or "home."²¹⁶ The court then had to ascertain whether the decedent came within the term "family." In meeting this problem the court resorted to policy in declaring: "[C]onsidering the remedial nature of the provision [section 2-318] and the natural connotations of the word (family), its meaning was not intended to be unduly restrictive."²¹⁷

In finding that the decedent was a family member the court utilized a test of foreseeability. It answered this factual question in favor of the decedent noting that the relevant considerations may include "remoteness of the family relation, the geographical connection between the buyer and the member of his family, and the nature of the product."²¹⁸

Once the court held that section 2-318 enabled the survivor to sue, the vertical privity issue was placed squarely before the court. The court turned to case law, noting that the vertical privity requirement still has great vitality in implied warranty actions in Pennsylvania. Since the

213. Compare *Kaczmarkiewicz v. J.P. Williams Co.*, 13 Pa. D. & C.2d 14 (C.P. Allegheny County 1957) where an injured employee was likewise awarded a recovery on the basis that he, although not the buyer, was a member of his family, with *Wolovitz v. Falco Prods. Co.*, 111 P.L.J. 185 (C.P. Allegheny County 1963) which denied recovery because the injured person was a guest not in the home of the buyer but in the home of the buyer's donee. Cf. *Facciolo Paving & Constr. Co. v. Road Mach., Inc.*, 8 Chest. 375 (C.P. Chester County 1958) which held that because the plaintiff corporation was not a natural person it was not encompassed by section 2-318, and therefore, could not enforce its predecessor's warranty rights.

214. 414 Pa. at 275, 199 A.2d at 465.

215. 422 Pa. 383, 221 A.2d 320 (1966).

216. 422 Pa. at 389, 221 A.2d at 323.

217. *Id.* at 390, 221 A.2d at 323.

218. *Id.* See *Marcus v. Spada Bros. Auto Serv.*, 41 Pa. D. & C.2d 794 (C.P. Philadelphia County 1967) where the court was faced with the analogous task of defining "guest in his home." There, the guest's injury could be traced to defective tires purchased by the host. However, since the plaintiff was a guest in the buyer's automobile rather than in his home, the court sustained the seller's demurrer based on want of privity. In light of the foreseeability test of *Miller* which considers the nature of the product as an operative fact, it is submitted that *Spada Bros.* was incorrectly decided; for where else would a buyer's guest be injured when the defective product is an automobile tire? Or, is it only that the word "family" was not intended to be unduly restrictive? *See also* *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966).

child was not a purchaser, and this was not an impure food case, the court sustained the demurrers of the distributor and manufacturer, referring to dictum in *Hochgertel*. The *Miller* holding is the final pronouncement on the vertical privity question in the warranty field. It appears very strongly that the supreme court is going to maintain the distinction between an action based on tort and one based on contract, since on the same day it decided *Miller* the court adopted as law in Pennsylvania section 402A of the *Restatement (Second) of Torts* in *Webb v. Zern*.²¹⁹

In summary, the status of the law in Pennsylvania as to privity seems clear. Absolutely no one, other than a buyer and the other beneficiaries enumerated in section 2-318 of the Uniform Commercial Code may maintain a warranty action. *Yentzer* indicates that contrary to what might be expected, the buyer (the person who made the actual transaction) will be covered by section 2-318 even if he is acting as an agent and obtains no title to the goods. The limits of the family provision and the foreseeability test will have to be determined in future cases. As to vertical privity, no one may be sued unless he is in privity with the buyer except in the well-established impure food cases and certain express warranty situations.

3. Defenses

Unlike the common law, the Code²²⁰ requires, as did the Sales Act,²²¹ that the buyer give notice to the seller of any breach of warranty within a reasonable time after the buyer should have discovered the breach. A failure to do so bars any remedy. The purpose of the notice requirement is to "defeat commercial bad faith, not to deprive a good faith consumer of his remedy."²²²

Under the Sales Act the courts' focus in applying the notice provision shifted from whether the buyer was guilty of laches²²³ to whether the seller was prejudiced by the delayed notification.²²⁴ Compliance with the notice requirement was not legally sufficient, however, unless the notice was clear and unambiguous. To comply, the buyer was required not only to isolate

219. 422 Pa. 424, 220 A.2d 853 (1966).

220. PA. STAT. ANN. tit. 12A, § 2-607(3)(a) (Supp. 1967):

(3) Where tender has been accepted

(a) a buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . (emphasis added).

221. Sales Act of May 19, 1915, Pa. Laws 543, § 49:

[I]f . . . the buyer fail[s] to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

222. UNIFORM COMMERCIAL CODE § 2-607, Comment 4.

223. *Kull v. General Motors Truck Co.*, 311 Pa. 580, 166 A. 562 (1933).

224. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 298 (3d Cir. 1961); *Bonker v. Ingersoll Prod. Corp.*, 132 F. Supp. 5, 6 (D. Mass 1955) (applying Pennsylvania law). *But see* *Necho Coal Co. v. Denise Coal Co.*, 387 Pa. 567, 128 A.2d 74 (1957); *General Foods, Corp. v. Bittinger*, 31 Pa. D. & C.2d 282 (C.P. York County 1963).

the specific defects with reasonable particularity but also to indicate whether consequential damages were being claimed.²²⁵

Cognizant of the case law which had evolved under the Sales Act perverting the notice concept, the Code draftsmen have endeavored in the official commentary to guide the courts in applying the notice provision. The commentary states:

The time of notification is to be determined by applying commercial standards to a merchant buyer. "A reasonable time" for notification from a retail consumer is to be judged by different standards so that in his case it will be extended. . . .

The content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched. There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer. . . . Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy. The notification which saves the buyer's rights under this Article need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.²²⁶

Perhaps inspired by the comments, the Pennsylvania courts no longer demand unrealistic formality to comply with the notice rule.²²⁷ It was held recently that the plaintiff had satisfied the technical requirements by submitting periodic progress reports which plainly evidenced that the goods in question were not performing as warranted.²²⁸ Similarly, in a case involving a malfunctioning helicopter, the fact that the seller's representative participated in efforts to rectify the faulty equipment was deemed sufficient to meet the notice requirement.²²⁹

The liberal approach of the Code and of the Pennsylvania courts to the notice requirement has severely circumscribed the defense of unreasonable delay in notification. Nevertheless, the buyer and seller may agree as to what constitutes a reasonable time within which notice must be given by making such a provision in their sales contract.²³⁰ However, the Code does limit the parties' freedom in this regard: "Whenever this Act requires any action to be taken within a reasonable time, any time which is not manifestly unreasonable may be fixed by agreement."²³¹ Consequently,

225. See *Texas Motorcoaches, Inc. v. A.C.F. Motors Co.*, 154 F.2d 91, 94 (3d Cir. 1946); *C.D. Brown & Co. v. Standard Hide Co.*, 301 Pa. 543, 552, 157 A. 557, 559-60 (1930); *Aaron Bodek & Son v. Avrach*, 297 Pa. 225, 146 A. 546 (1929).

226. UNIFORM COMMERCIAL CODE § 2-607, Comment 4.

227. See *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. 1964) (applying Pennsylvania law); *National Container Corp. v. Regal Corrugated Box Co.*, 383 Pa. 494, 119 A.2d 270 (1956).

228. *Babcock Poultry Farm, Inc. v. Shook*, 204 Pa. Super. 141, 203 A.2d 399 (1964).

229. *Boeing Airplane Co. v. O'Malley*, 329 F.2d 585 (8th Cir. 1964) (applying Pennsylvania law).

230. *Id.*

231. *Id.*

where a buyer commenced an action to recover for breach of the implied warranties, which breach could not have been detected within the agreed upon time limit, the court held that, under these circumstances, the agreed upon time was manifestly unreasonable.²³²

A second defense available is the statute of limitations. The Sales Act made no provision limiting the time within which actions could be brought, and thus the courts had to resort to state statutes to determine whether an action was barred. In Pennsylvania the pertinent statutes set forth a 6-year limit on contract actions²³³ and a 2-year limit for personal injury suits.²³⁴ In the past the latter statute has been construed as controlling an assumpsit action for personal injuries resulting from breach of warranty.²³⁵ The Code, however, provides a 4-year statute of limitations which begins to run at tender of delivery.²³⁶ In *Gardiner v. Philadelphia Gas Works*,²³⁷ the court was faced with the question whether to apply the 2-year personal injury or 4-year Code statute of limitations to warranty actions brought for personal injury. The court held, where plaintiffs brought their action more than 2 years after their injuries were incurred but less than 4 from tender of delivery, that the 4-year limit was applicable. The court based its holding on the Pennsylvania Bar Notes to section 2-725 which state that the 4-year period under the Code changes the prior law concerning assumpsit actions for personal injury.²³⁸ The language of the Code and the reasoning used in *Gardiner v. Philadelphia Gas Works* also lead to the conclusion that in warranty actions for property damage the Code statute of limitations supersedes the 6-year statute for contract actions.

With respect to other possible defenses it should be noted that the defense of contributory negligence is not available in an action in assumpsit.²³⁹

232. *Vandenberg & Sons v. Siter*, 204 Pa. Super. 392, 204 A.2d 494 (1964); cf. *Truscon Steel Co. v. Fuhrman & Schmidt Brewing Co.*, 327 Pa. 10, 192 A. 679 (1937).

233. PA. STAT. ANN. tit. 12, § 31 (1953).

234. PA. STAT. ANN. tit. 12, § 34 (1953).

235. *Jones v. Boggs & Buhl, Inc.*, 355 Pa. 242, 49 A.2d 379 (1946). *But see Ravetz v. Upjohn Co.*, 138 F. Supp. 66, 68 (E.D. Pa. 1955) which decided that whichever limitation comes first precludes an assumpsit action for personal injury.

236. PA. STAT. ANN. tit. 12A, § 2-725(1) (Supp. 1967):

An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

Section 2-725(2) provides:

A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Under this provision, where a complaint in assumpsit for breach of implied warranties was filed more than 4 years after the purchase of the goods, the action was barred, even though the defect was not discovered for over 1 year from the time of purchase. *Rufo v. Bastian-Blessing Co.*, 417 Pa. 107, 207 A.2d 823 (1965).

237. 413 Pa. 415, 197 A.2d 612 (1964).

238. *Id.* at 614.

239. *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 431, 156 A.2d 568, 574 (1960); see *Mannsz v. Macwhyte Co.*, 155 F.2d 445 (3d Cir. 1946); cf. *Robert H. Carr &*

In addition, the Court of Appeals for the Third Circuit in *Pritchard v. Liggett & Myers Tobacco Co.*²⁴⁰ stated that assumption of risk, in the sense of contributory negligence, would likewise not bar recovery in an action for breach of warranty, since both defenses sound in tort rather than contract. With regard to assumption of risk, however, the court went on to hold that "[i]f a consumer uses a product for a purpose not intended by the manufacturer and suffers an injury as a result, he may not recover because such misuse is beyond the scope of the warranty. . . ."²⁴¹ Thus, in assumpsit actions the defense of assumption of risk, in the sense of misuse of the product, will be available. Similarly, where a person is injured by his failure to detect apparent imperfections in purchased goods, recovery may be denied.²⁴² In general, the enunciated rule²⁴³ on lack of diligence is that of the *Restatement of Contracts* section 336: "Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense, or humiliation."

Finally, recovery will be denied in situations in which a party sustains injury as a result of his own peculiar susceptibilities rather than the product's defective nature. In one case, for example, a woman who developed a skin condition after wearing a dress was denied recovery when it was shown that the injury was a result of her unique allergy to a substance in the fabric rather than the defective condition in the material.²⁴⁴

IV. STRICT LIABILITY IN TORT

A. Introduction

In the recent case of *Webb v. Zern*²⁴⁵ the Pennsylvania supreme court adopted section 402A of the *Restatement (Second) of Torts*, and thereby introduced into Pennsylvania law a new concept of products liability. Section 402A provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject

Sons v. Yearsley, 31 Pa. D. & C.2d 262 (C.P. Chester County 1963). See generally Annot., 4 A.L.R.3d 501 (1965).

240. 350 F.2d 479 (3d Cir. 1965), cert. denied, 383 U.S. 987 (1966).

241. *Id.* at 485.

242. *Pantano v. Zamer Motor Sales Co.*, 170 Pa. Super. 317, 85 A.2d 681 (1952); cf. *Farrey's, Inc. v. Supplee-Biddle Hardware Co.*, 103 F. Supp. 488, 491 (E.D. Pa. 1952).

243. *Announced in Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 431, 156 A.2d 568, 574 (1960); cf. *S.F.C. Acceptance Corp. v. Feree*, 39 Pa. D. & C.2d 225 (C.P. York County 1966).

244. *Bylita v. S.S. Kirtz Co.*, 156 Pa. Super. 502 (1968).

245. 422 Pa. 424, 220 A.2d 853 (1966).

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.

What course Pennsylvania will follow in applying this recently adopted doctrine is not clear.²⁴⁶ Therefore, in order to gain some insight into how Pennsylvania courts will resolve these problems, it becomes necessary to examine the positions taken by other jurisdictions on problems similar to those which will surely arise in Pennsylvania courts. It is the purpose of this section to examine the doctrine of strict liability in tort as it has been applied by a number of courts, and to present arguments and considerations germane to such liability in areas which, at present, are unsettled.

B. History

It is the general consensus of opinion²⁴⁷ that the genesis of the theory of strict liability in tort for defectively manufactured products is found in those cases where the plaintiff was injured as a result of impure food and, notwithstanding lack of privity, was allowed to recover against the manufacturer. In order to effectuate a policy of protecting consumers from such hazards,²⁴⁸ the courts "labored hard to evolve a great many highly ingenious theories"²⁴⁹ to circumvent the problems of privity historically inherent in sales transactions.²⁵⁰

246. The Pennsylvania supreme court has decided three cases dealing with strict liability in tort: *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968); *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 223 A.2d 746 (1966); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966).

A fourth Pennsylvania case granting recovery in strict liability in tort was recently decided by the Court of Common Pleas for Allegheny County, *Bartkewich v. Billinger*, No. 1311 (C.P. Allegheny County, Oct. 9, 1967).

247. *E.g.*, Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1103-10 (1960); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 10-13 (1966).

248. See Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1104-06 (1960).

249. Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1106 (1960). For an array of these theories see Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 153-55 (1958).

250. For the most current listing of the jurisdictions allowing recovery directly against the manufacturer for injuries resulting from the use of impure foods see Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 15 n.40 (1966).

When Pennsylvania first considered the liability of the manufacturer for injuries resulting from the sale of impure foods²⁵¹ it premised liability on breach of the Pennsylvania Pure Food Statute,²⁵² it was not until sometime later²⁵³ that it based liability on the general policy considerations advanced by other courts.²⁵⁴ The first case in Pennsylvania extending liability to the manufacturer for defective products other than food was *Elkins, Bly & Co. v. McKean*,²⁵⁵ where a manufacturer of oil was held liable to a remote purchaser for injuries which resulted when the oil exploded. A second Pennsylvania case which allowed a purchaser to recover from a manufacturer was *Conestoga Cigar Co. v. Finke*.²⁵⁶ In that case the court found an express warranty of quality on the basis of a tag attached to the tobacco purchased by the plaintiff.

The leading case granting recovery to a remote buyer without proof of negligence or breach of an express warranty was *Spence v. Three Rivers Builders & Masonry Supply, Inc.*,²⁵⁷ where, in an action based on breach of an implied warranty, the Michigan supreme court granted recovery for damages resulting from defective cinderblocks made by the defendant. Similar results were reached in the cases of *Thompson v. Reedman Motors*²⁵⁸ and *Duckworth v. Ford Motor Co.*²⁵⁹ where the manufacturers were held liable for injuries resulting from manufacturing defects in their automobiles. In these cases, the courts considered the requirement of privity in implied warranty actions to be on the wane in Pennsylvania as a result of *Jarnot v. Ford Motor Co.*,²⁶⁰ where the plaintiff was found to have stated a cause of action against the manufacturer for property damages resulting from the defective condition of a truck. Although the authority of these decisions is questionable,²⁶¹ it seems clear that the courts were imposing a form of strict liability in tort while using the historic terms of warranty²⁶² and, as such, the decisions may give

251. Whether a foodstuff is considered impure will depend on whether the foreign material may be expected to be found therein. See *Bonnenberger v. Pittsburgh Mercantile Co.*, 345 Pa. 559, 28 A.2d 913 (1942).

252. PA. STAT. ANN. tit. 31, §§ 1-984 (1958). See, e.g., *Catani v. Swift & Co.*, 251 Pa. 52, 95 A. 931 (1915); *Nock v. Coca Cola Bottling Works*, 102 Pa. Super. 515, 156 A. 537 (1931).

253. See, e.g., *Caskie v. Coca Cola Bottling Co.*, 373 Pa. 614, 96 A.2d 901 (1953); *Bilk v. Abbotts Dairies, Inc.*, 147 Pa. Super. 39, 23 A.2d 342 (1941).

254. *E.g.*, *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942). 255. 79 Pa. 493 (1875).

256. 144 Pa. 159, 22 A. 868 (1891).

In *McCormick Harvesting Mach. Co. v. Nicholson*, 17 Pa. Super. 188 (1901), the court granted recovery to the purchaser of a defective rope for the full purchase price, notwithstanding the fact that he was not in privity with the manufacturer, on the basis of an express warranty made by the sales agents of the manufacturer.

257. 353 Mich. 120, 90 N.W.2d 873 (1958).

258. 199 F. Supp. 120 (E.D. Pa. 1961), modified, 320 F.2d 130 (3d Cir. 1963).

259. 211 F. Supp. 888 (E.D. Pa. 1962).

260. 191 Pa. Super. 422, 156 A.2d 568 (1959).

261. See *Miller v. Preitz*, 422 Pa. 383, 392 n.7, 221 A.2d 320, 325 n.7 (1966); pp. 825-28 *supra*.

262. In *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427, 429 (N.D. Ind. 1965), the court in characterizing strict liability in tort said:

Without attempting an exhaustive explanation, it may fairly be said that the

some indication of the result of an action brought on similar facts under section 402A.

In 1963 the California supreme court, following the suggestions of Dean Prosser,²⁶³ completely disassociated the liability imposed upon manufacturers for personal injuries resulting from defective products from any contractual principles, and imposed liability as a matter of policy sounding wholly in tort.²⁶⁴ The effect that this decision has had on the law of products liability was probably best expressed by Dean Wade when he said: "[I]f you look only to the authorities rendered in the last four or five years [which favor strict tort liability over contractual liability], the result is not just decisive, it is overwhelming. . . ."²⁶⁵

Strict liability in tort is generally predicated upon two propositions:

- 1) such liability is properly allocable as a cost of maintaining enterprises which, although beneficial to the general public, inevitably present risks to human life and limb;²⁶⁶
- 2) the presence of a product on the market is a representation to the user that said product may be safely used for its intended purposes.²⁶⁷

Courts have, for the most part, utilized both propositions in adopting strict liability in tort,²⁶⁸ and in the majority of cases it will make little difference which policy is adopted.²⁶⁹ However, it is clear that the policy origins of strict liability in tort are quite broad, and there is no clear limitation on the liability which may be imposed on the economic chain. Therefore, the courts are presented with a vast area of new tort liability to which they must give form and substance.

implied warranty when stripped of the contract doctrines of privity, disclaimer, requirements of notice of defect, and limitations through inconsistencies with express warranties.

263. In Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099, 1134 (1960), it was submitted: "If there is to be strict liability in tort, let there be strict liability in tort, declared outright, without an illusory contract mask."

264. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

265. Wade, *Recent Developments in the Law of Strict Liability for Products*, 33 INS. COUNSEL J. 552, 553 (1966). See Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 14-15 & n.39 (1966).

266. James, *General Products — Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957). See also Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 19-20 (1966) and cases cited in note 267 *infra*.

267. *E.g.*, *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965); *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967); *Santor v. A & M Karagheusian*, 44 N.J. 52, 207 A.2d 305 (1965).

268. See cases cited in note 267 *supra*; Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 19-20 (1966).

269. The only area where the use of one or the other of these two theories of recovery might be of significance is in the injured bystander situation. See pp. 843-44

C. *The Cause of Action*

In Pennsylvania an action²⁷⁰ brought under 402A against everyone in the chain of distribution²⁷¹ for injuries resulting from the normal use²⁷² of the product will require the plaintiff to prove:

- 1) that the product was both defective and unreasonably dangerous to the user or consumer;²⁷³
- 2) that said defect caused the plaintiff's injury;
- 3) that the defendant in some way participated in placing the product on the market for the plaintiff's use or consumption.²⁷⁴

There is no need to prove that the manufacturer, distributor, or retailer was negligent.²⁷⁵ Moreover, the plaintiff is not required to give notice of injury to such defendants or show that he relied on any representations made by the parties in the economic chain.²⁷⁶ In addition, strict liability in tort cannot be disclaimed.

More importantly, it is not necessary that the injured user or consumer prove that he acquired the product by a sale.²⁷⁷ In fact, in light of the *Delaney v. Towmotor Corp.*²⁷⁸ and *Cintrone v. Hertz Truck Leasing & Rental Serv.*²⁷⁹ decisions it is not even necessary to prove that there

270. Normally, a suit in trespass will be instituted by joining all those parties in the economic chain who are amenable to service of process. *E.g.*, *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 223 A.2d 746 (1966); *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966).

271. The distributive chain will include all those parties which were directly responsible for placing the product on the market. It "applies to any manufacturer of such a product, to any wholesaler or retail dealer or distributor. . . ." RESTATEMENT (SECOND) OF TORTS § 402A, comment *f* at 350 (1965).

272. It is not clear at this stage of the development of strict liability whether the plaintiff must prove that he was using the product in its intended fashion or whether misuse is a defense which the defendant has the burden of proving. *See pp. 848-49 infra.*

273. In *Greco v. Bucciconi Eng'r Co.*, Civil Nos. 64-976, 65-317 (W.D. Pa., Dec. 26, 1967), in denying the defendant's motion for a judgment n.o.v., the court reasoned that the quantum of proof necessary to prove a defect under 402A was analogous to that required to prove a breach of warranty of fitness, and held that the plaintiff produced sufficient evidence of a defect in the product by showing that it malfunctioned.

274. In the alternative to a cause of action in strict liability based on 402A, plaintiff may rely on section 402B in situations where a person is injured as a result of his reliance on the representations of the seller. RESTATEMENT (SECOND) OF TORTS § 402B (1965) states:

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.

275. RESTATEMENT (SECOND) OF TORTS § 402A(2) (a) (1965).

276. RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* at 355-56 (1965).

277. RESTATEMENT (SECOND) OF TORTS § 402A, comment *p* at 354 (1965).

278. 339 F.2d 4 (2d Cir. 1964).

279. 45 N.J. 434, 212 A.2d 769 (1965).

was a sale at anytime. The *Delaney* court referred to the use of the word seller in 402A

as a description of the situation that has most commonly arisen rather than as a deliberate limitation of the principle to cases where the product has been sold, intentionally excluding instances where a manufacturer has placed a defective article in the stream of commerce by other means.²⁸⁰

If there is no requirement of a sale, then the next question is whether the defendant must be "in the business of selling such a product."²⁸¹ The decision in *Cintrone* holding a bailor for hire liable for injuries resulting from the defective condition of a leased truck indicates that there is no such requirement.

An unsettled problem in the area of strict liability is whether a wrongful death action may be premised on section 402A.²⁸² In *Miller v. Preitz* the court dismissed a count in assumpsit for wrongful death stating that an "action provided by the 'Wrongful Death' statute could be brought only in trespass. . . ."²⁸³ In *Webb v. Zern*, in which Pennsylvania adopted section 402A, the court stated that an action subject to the provisions of 402A is "explicitly a cause of action in trespass for defective products liability."²⁸⁴ Thus, it appears that a wrongful death action brought under 402A will be allowed. However, if the policy behind strict liability for injuries resulting from defective products is to place the costs of such injuries upon those who can allocate the burden to a large group, then, since the average consumer usually has some protection through life insurance, such costs are thereby prorated among a large group, and the policy is served.²⁸⁵ Thus, it is arguable that no action for wrongful death should be permitted.

D. The Product and its Defect

Comment *g* of section 402A defines a defective condition as one "not contemplated by the ultimate consumer which will be unreasonably dangerous to him."²⁸⁶ Thus, whether a product is defective is determined by the norm of whether it meets the standards of safety reasonably expected by the user or consumer.²⁸⁷ It is difficult to delineate what are

280. *Delaney v. Towmotor Corp.*, 339 F.2d 4, 6 (2d Cir. 1964).

281. RESTATEMENT (SECOND) OF TORTS § 402A (1) (a) (1965) (emphasis added).

282. *Miller v. Preitz*, 422 Pa. 383, 221 A.2d 320 (1966).

283. 422 Pa. 383, 387, 221 A.2d 320, 322 (1966).

284. 422 Pa. 424, 427, 220 A.2d 853, 855 (1966).

285. Keeton, *Recent Decisions and Developments in the Law of Products Liability*, 32 INS. COUNSEL J. 620, 632 (1965).

286. RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* at 351 (1965). Also, in comment *i* at 352, it is stated: "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."

287. See Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 18 (1965), where it is posited "that the court makes the determination that strict liability will

reasonable expectations of a consumer; however, to require a manufacturer to make his product completely safe or as safe as it may be made has been determined to be unreasonable.²⁸⁸ Decisions of the courts indicate that a defective product²⁸⁹ usually is one that functions improperly,²⁹⁰ is adulterated,²⁹¹ is improperly assembled,²⁹² or has a weakened part.²⁹³

In order to state a cause of action against anyone in the economic chain for injuries resulting from the defective condition of the product, it must be shown that the defect was unreasonably dangerous to the user or consumer and that the defect created the product's unreasonably dangerous condition.²⁹⁴ Both the defect and a causal relationship between it and the unreasonably dangerous condition of the product must be alleged in the complaint, and both elements must be proved at the trial or recovery will be denied.

Confusion arises when a defendant manufacturer attempts to rebut a showing of defect in his product by proving that the product conforms in all respects to the industry norm. In a situation such as this, it must be clearly understood that a defect is to be determined by the norm of whether it meets the standards reasonably expected by the user or consumer and that compliance with an industrial norm would only be some evidence that it complies with the former standards and is by no means conclusive on the issue.²⁹⁵

What will ultimately be a more burdensome question is whether a manufacturer has a duty to incorporate a known safety device into his product, and whether a failure to do so will result in a defectively designed

be applied to products in general" and "will sometimes make the determination for the kind of product . . . and leave to the jury the question of whether the particular article involved was *reasonably safe*" (emphasis added).

288. See, e.g., *Brown v. General Motors Corp.*, 355 F.2d 814 (4th Cir. 1966); *Wade, Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 16 (1965).

289. See Freedman, "Defect" in the Product: *The Necessary Basis for Products Liability in Tort and in Warranty*, 33 TENN. L. REV. 323 (1966); Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

290. E.g., *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. 1966).

291. E.g., *Caskie v. Coca Cola Bottling Co.*, 373 Pa. 614, 96 A.2d 901 (1953).

292. E.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

293. E.g., *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964).

294. RESTATEMENT (SECOND) OF TORTS § 402A, comment i at 352 (1965). Some of the considerations which may be used to determine the unreasonably dangerous nature of the product were stated in *Wade, Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 17 (1965) as:

- 1) the usefulness and desirability of the product,
- 2) the availability of other and safer products to meet the same needs,
- 3) the likelihood of injury and its probable seriousness,
- 4) the obviousness of the danger,
- 5) common knowledge and normal public expectation of the danger (particularly for established products),
- 6) the avoidability of injury by care in use of the product (including the effect of instructions and warnings), and
- 7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

295. See Traynor, note 289 *supra*, at 370; RESTATEMENT (SECOND) OF TORTS § 402A, comment i at 352 (1965).
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product unreasonably dangerous to the user or consumer.²⁹⁶ If it is decided that the manufacturer does not have a duty to make use of new safety devices as they are discovered, then an anomalous situation is created. The manufacturer who refuses to incorporate such devices in his product would not be liable for injuries which would not have occurred had he used these new devices,²⁹⁷ whereas the manufacturer who does incorporate such devices may be held liable if they malfunction. Nevertheless, the standard of safety which will reasonably be expected by the consuming public should keep pace with technological advances, and what may have been considered a reasonably safe product today may not be so considered tomorrow. Automobiles present recent case history in this respect and the current furor over the emission of radiation from color televisions and x-ray devices may create similar problems for the manufacturer of those products.²⁹⁸

It is doubtful, however, whether future business decisions to incorporate safety devices in a product will be influenced by the imposition of strict liability in tort upon manufacturers as a result of increasingly stringent consumer expectations.²⁹⁹ The cost of litigation, judgments, and insurance will normally not be that significant in relation to other factors³⁰⁰ to compel a managerial decision to include or not to include a newly developed safety feature as part of the product. Thus, to impose liability upon the manufacturer for failure to incorporate a new safety mechanism on the product would be based on a theory of allocation of the costs of the injury which the user has incurred rather than on an attempt to force the manufacturer to make a safer product.³⁰¹

A defective condition in a product is not limited to the situation where the manufacturer fails to properly make the product or to incorporate common safety features. A defect may also arise if the manufacturer fails to properly warn consumers or users of a reasonably foreseeable danger inherent in his product's normal use.³⁰² A danger is reasonably fore-

296. In *Bartkewich v. Billinger*, No. 1311 (C.P. Allegheny County, Oct. 9, 1967), the court held that the failure to incorporate a known safety device created a defect in the design of the product (wire covering over rollers in a glass cutting machine). See also *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964); *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

297. Compare *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964) and *Wright v. Massey Harris, Inc.*, 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966) with *Brown v. General Motors Corp.*, 355 F.2d 814 (4th Cir. 1966) and *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966).

298. See 114 CONG. REC. 802 (1968) (remarks of Senator Magnuson).

299. See Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products — An Opposing View*, 24 TENN. L. REV. 938, 945 (1957) where the author states: "While it may be conceivable that the imposition of strict liability could increase in some small measure the pressure upon a few backward manufacturers to make their products safe, it is doubtful that it will add very much to existing pressures."

300. For example, such factors might be the cost of labor, the cost of retooling his production line, and impairment of the esthetic appeal of his product to the public.

301. If the desired result is to try to force the manufacturer to make a safer product, it is best achieved by legislation imposing criminal penalties rather than by imposition of money judgments.

302. RESTATEMENT (SECOND) OF TORTS § 402A, comment *j* at 353 (1965).

seeable when the manufacturer knows or should know that the consuming public will be endangered by normal use of his product.³⁰³ Thus, the abnormal user³⁰⁴ will not be protected and, similarly, a manufacturer will not be required to warn against unintended or abnormal uses of his product.³⁰⁵ When a warning is required, it must be clearly and adequately given or it will be treated in the same manner as if no warning were given.³⁰⁶

A unique group of products which, because of the current state of knowledge, cannot be made safer and pose significant danger to the user or consumer, requires a different approach to determine whether such products are defective.³⁰⁷ Products grouped under this classification would include blood and certain drugs and other products intended for internal use such as an anesthetic. These products are set apart from others as a result of a policy determination that the benefit which may be derived from their use overshadows the inherent risk of harm to the user.³⁰⁸ However, even if these products are classified as "reasonably" dangerous, they must meet a standard of safety which is far higher than that imposed upon manufacturers of safer products. The duty of the manufacturer in this situation is to know of any and all possible means of making his product safer, whereas the manufacturer of other products is only required to meet the reasonable expectations of the consumer or user in order to avoid creating an unreasonably dangerous product.³⁰⁹

Another problem related to the issue of defects concerns the point in time when the defect exists. Comment *g* to section 402A of the *Restatement* states that that section will impose liability upon a seller³¹⁰ only if the plaintiff can prove that the defective condition existed at the time it left the seller's hands.³¹¹ However, in *Vandermark v. Ford Motor Co.*,³¹² the California supreme court ruled that if the manufacturer delegates a part of the manufacturing process to an intermediate or retail seller, he will not avoid liability if that person's failure to perform the delegated function results in a defective condition. Subsequently, in the case of

303. *E.g.*, *Crane v. Sears Roebuck & Co.*, 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963).

304. RESTATEMENT (SECOND) OF TORTS § 402A, comment *j* at 353 (1965). Therefore, the result of *Barrett v. S.S. Kresge Co.*, 144 Pa. Super. 516, 19 A.2d 502 (1941), wherein the plaintiff was denied recovery for injuries resulting from her peculiar susceptibility to some unknown toxic element in a cotton dress would not be changed by the advent of strict liability in tort.

305. *Cf. Mannsz v. Macwhythe Co.*, 155 F.2d 445 (3d Cir. 1946).

306. *E.g.*, *Crane v. Sears, Roebuck & Co.*, 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963); *Love v. Wolf*, 226 Cal. App. 2d 378, 38 Cal. Rptr. 183 (1964).

307. RESTATEMENT (SECOND) OF TORTS § 402A, comment *k* at 353 (1965).

308. *E.g.*, *McLeod v. W.S. Merrell Co.*, 174 So. 2d 736 (Fla. 1965).

309. Automobiles present a clear example of this distinction. The maker of an automobile is not required to make his product as safe as possible in the event that it may be involved in a collision. *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966). But, if the standard of care imposed upon the manufacturer of "unavoidably dangerous" products were used, then the automobile manufacturer would have to take all possible precautions to avoid the risk of injury resulting from a collision.

310. See pp. 845-47 *infra* for a discussion of the definition of seller.

311. RESTATEMENT (SECOND) OF TORTS § 402A, comment *g* at 351 (1965).

Alvarez v. Felker Mfg. Co.,³¹³ a California court of appeals applying *Vandermark* found the manufacturer of a concrete cutting machine liable for the faulty installation of a bushing by the retailer³¹⁴ which resulted in an explosion causing the loss of the plaintiff's right eye. Although these cases cast grave doubt on the efficacy of comment *g* in California, other jurisdictions have applied it to reach different conclusions on similar facts. In *State Stove Mfg. Co. v. Hodges*,³¹⁵ the Supreme Court of Mississippi held that the manufacturer would not be liable for damages which were the result of the builder's failure to install a temperature relief valve in a hot water heater as the manufacturer had instructed. The court noted that there was "a substantial change in the condition in which the manufacturer sold it."³¹⁶ On similar facts the Supreme Court of New Jersey in *Schipper v. Levitt & Sons*³¹⁷ denied the plaintiff's action against the manufacturer of a hot water heater not solely because the defect originated while in the hands of the builder, but also on the dubious theory that the plaintiff already had one sufficiently solvent defendant.³¹⁸

A central question arises from this conflict as to what effect directions³¹⁹ or instructions given by the manufacturer will have on his liability. In order to resolve this question it is essential to indicate at the outset that the parties involved are the retailers, wholesalers, and manufacturers. There would seemingly be no reason to include the user or consumer of the "do-it-yourself-kit" within the purview of the issue of instructions, since the manufacturer and retailer would seem to have a right to expect that the user or consumer will follow the enclosed instructions.³²⁰ In a situation such as this, the manufacturer or retailer has no effective means of controlling the conduct of the user or consumer, whereas in the manufacturer-wholesaler-retailer situation there is a degree of proximity which could give rise to a duty on the part of the manufacturer to use all reasonable means to insure that the wholesaler or retailer follows his instructions.³²¹

If the policy which permeates the area of products liability is to protect the user or consumer from potential hardships resulting from an injury

313. 230 Cal. App. 2d 987, 41 Cal. Rptr. 514 (1964).

314. The court in *Alvarez* stated: "Such [strict] liability extends to the manufacturer even though the defect was caused by a dealer or retailer who was not the agent or employee of the manufacturer." *Id.* at 996-97, 41 Cal. Rptr. at 520.

315. 189 So. 2d 113 (Miss. 1966), *cert. denied*, 386 U.S. 912 (1967). *But see id.* at, 189 So. 2d at 125 (dissenting opinion).

316. *Id.* at 122.

317. 44 N.J. 70, 207 A.2d 314 (1965).

318. *Id.* at 98, 207 A.2d at 329. See pp. 841-42 *infra* for a discussion of this aspect of strict liability.

319. See pp. 848-49 *infra* relating to misuse of the product of plaintiff's failure to follow directions.

320. This does not necessarily preclude the manufacturer's liability for injuries resulting from latent defects in the product or for giving the user inadequate instructions. This would be analogous to the approach which is taken to warnings. See pp. 838-39 *supra*.

321. The *Alvarez* and *Vandermark* decisions seem to indicate that California will follow this rationale, whereas the *Hodges* and *Schipper* cases indicate that Mississippi follows the Restatement and its comments.

caused by a dangerously defective product,³²² then the soundest approach to the problem of instructions or delegation of the manufacturing process is to require the plaintiff to prove only that he received the product in a dangerously defective condition from someone in the economic chain.³²³ This approach is not new to Pennsylvania law, as it has been applied in products liability cases involving the doctrine of exclusive control³²⁴ and the underlying policies which dictated the results in those cases are just as applicable when the court is invoking 402A. Thus, parties in the economic chain should be considered jointly and severally liable³²⁵ for any injuries which result from the placing of a dangerously defective product on the market and they should be left to "adjust the costs of such protection between them in the course of their continuing business relationship."³²⁶

The liability of a seller of a defective product which will be substantially changed or processed by another is expressly left open by a caveat to section 402A.³²⁷ The pivotal issue here is not whether the subsequent processing will amount to a delegation of the manufacturing process, but whether the subsequent processor will have the responsibility to detect the defect before it reaches the ultimate user or consumer. If this transfer of responsibility is imposed, it would appear that the seller of the preprocessed product might reasonably expect the subsequent processor to find the defect and either remedy the situation or notify the seller of its defective condition. What may be reasonably expected will necessarily depend upon the product in question, the character of the subsequent processing, the nature of the defect, the degree of danger, and the relationship between the parties.³²⁸ These considerations are by no means exclusive, and others will appear as cases are decided by the courts. Nevertheless, there seems to be no reason why the manufacturer of the defective material may not be joined in the action by the plaintiff.³²⁹ This approach would be consistent with the proposition that the parties in the economic chain are liable to the plaintiff both jointly and severally, and that it is best left to those parties to determine which one of them should properly shoulder the burden of any judgment which is rendered.

Another problem area which creates peculiar difficulties similar to those of the substantially changed product concerns the role of the component part supplier. In the case of *Goldberg v. Kollman Instrument Co.*³³⁰ the New York court of appeals was faced with this issue and decided

322. See pp. 836-38 *supra*.

323. The defendants should then have a cause of action to be indemnified for the cost of any judgment as they had in *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

324. See pp. 810-11 *supra*.

325. *But see* pp. 839-40 *supra*.

326. *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 263, 391 P.2d 168, 172, 37 Cal. Rptr. 896, 900 (1964).

327. RESTATEMENT (SECOND) OF TORTS § 402A, caveat 2 at 348 (1965).

328. See Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 23 (1966).

329. *But see State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966);

Schlippe v. Villanovita, 50 S.W.2d 14, N.Y. 297 A.2d 814 (1965) Repository, 1968

330. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

that "adequate protection is provided for the injured passengers of the airplane by casting in liability the airplane manufacturer which put into the market the completed aircraft,"³³¹ thereby dismissing the action as to the supplier of the defective altimeter. This disposition of the component part supplier issue was also adopted by the New Jersey supreme court in *Schipper v. Levitt & Sons*.³³² However, in *Suwada v. White Motor Co.*,³³³ the Supreme Court of Illinois found "no reason why Bendix [the component part supplier] should not come within the rule of strict liability"³³⁴ for injuries which resulted from the defective condition of the brakes which they supplied to the manufacturer of a truck.

There is no apparent substantive reason why these courts have taken different views of the problem of the component part supplier. At best, resolution of this problem seems to hinge on the issue of the assembler's solvency. Thus, there appears to have arisen a rule in some jurisdictions limiting the plaintiff to one solvent defendant regardless of the fact that the defect arose while in the hands of the component part manufacturer. Only in the *Schipper* case was any mention made of the possible transfer of responsibility to the assembler for his failure to detect the defect,³³⁵ and this was premised on the assembler's failure to heed instructions³³⁶ given him by the supplier. The shifting of the responsibility to the assembler should be the pivotal issue to be decided by the courts. And, again, the plaintiff's recovery should not rest on which way this question is resolved. The determination of this issue should only effect the respective liability of the defendant assembler and defendant supplier of the component part.³³⁷

E. Plaintiffs Under 402A

The ultimate disposition of the issue as to who can sue under section 402A will most probably be that "any human being who sustains injury is a proper plaintiff."³³⁸ Thus far, recovery has been granted to the employee of a gratuitous bailee of a product,³³⁹ the donee of a product,³⁴⁰ the employee of a lessor of a product,³⁴¹ and an airline passenger.³⁴²

331. *Id.* at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595.

332. 44 N.J. 70, 207 A.2d 314 (1965). See p. 840 *supra*.

333. 32 Ill. 2d 612, 210 N.E.2d 182 (1965); accord, *Putnam v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964).

334. 32 Ill. 2d at 622, 210 N.E.2d at 188.

335. *Schipper v. Levitt & Sons*, 44 N.J. 70, 98, 207 A.2d 314, 329 (1965).

336. See pp. 839-41 *supra*.

337. See pp. 839-41 *supra*.

338. Lascher, *Strict Liability in Tort for Defective Products: The Road to and Past Vandermark*, 38 S. CAL. L. REV. 30, 55 (1965).

339. *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964).

340. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

341. *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965).

342. *Adelman v. Hertz Truck Leasing & Rental Serv. Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

tion of cost theory. However, if a court adopts the misrepresentation theory of recovery as the underlying rationale of strict liability in tort a contrary result should be reached because the misrepresentation concept has only been expressed in terms of the user or consumer and not in terms of the general public. Most of the courts at this time have presented both policies as the reasons for adopting section 402A, and unless the misrepresentation theory is expanded to the general public, then a decision as to which policy is more persuasive will dictate the disposition of the bystander problem.³⁵⁰

Also to be considered within the realm of the bystander problem is the situation where an employee, who is either assembling component parts or processing supplied materials, is injured as a result of the dangerously defective condition of the supplied part or material. Here, the employee is using the article but he is not the "ultimate user or consumer"³⁵¹ in the sense of being, for example, a purchaser. Therefore, he would appear not to be within the current scope of 402A protection. Recovery by the employee may turn on whether coverage is granted to the bystander.

There is no real reason why the bystander should not be accorded the right to expect that he will not be injured by a dangerously defective product. The policies underlying strict liability in tort present cogent arguments and considerations for permitting the bystander to recover.³⁵² He will suffer the same disproportionate amount of hardship from his injuries as the user or consumer and he should be granted the same protection from dangerously defective products.

Another problem is whether a repairman who, while servicing a product, is injured as a result of its defective condition may sue under 402A. Comment *l* includes within the definition of user anyone "who [is] utilizing it [a product] for the purpose of doing work upon it."³⁵³ This group of potential plaintiffs should present problems due to their peculiar relationship to the product. The repairman normally will receive the product only when it is functioning improperly and he will necessarily inspect³⁵⁴ the product to locate the cause of the malfunction. Also, he will have more extensive knowledge of the cause of the malfunction and the potential dangers involved. With this expertise and notice, he will be more susceptible than the average user or consumer to proof of actual knowledge of the defect and of the degree of danger involved.³⁵⁵ However, if he received the product only for the purpose of a general inspection, and if

350. Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 32-33 (1966).

351. RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965) (emphasis added).

352. *E.g.*, *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965).

353. RESTATEMENT (SECOND) OF TORTS § 402A, comment *l* at 354 (1965). See *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968).

354. In *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), liability was predicated partly on the assumption that the manufacturer could not expect the user to inspect the product. However, in the repairman situation he has every reason to expect that the user will inspect the product before

355. See p. 849 *infra*.

the injury resulted from a defect which he had no reason to anticipate, there would be no basis to distinguish his position from that of the ordinary user or consumer.

F. Defendants Under 402A

Generally, anyone in the economic chain is subject to strict liability in tort under section 402A. Those who have been held liable under 402A include manufacturers,³⁵⁶ wholesalers,³⁵⁷ retailers,³⁵⁸ component part suppliers,³⁵⁹ builder-developers,³⁶⁰ bailors for hire,³⁶¹ gratuitous bailors³⁶² and assemblers.³⁶³ The only apparent qualification which has been placed on the possible number of defendants is the dubious practice of limiting the plaintiff to one solvent defendant and dismissing other possible defendants as being unnecessary for the protection of the injured plaintiff.³⁶⁴

On the other side of the coin is the case of *Connor v. Conejo Valley Dev. Co.*³⁶⁵ where the court posed this question in dictum:

Since we recognize the obligation of the manufacturer who has the capacity to launch numerous potentially hazardous products on the market, should we not be prepared to impose *similar standards* of responsibility on the experienced and knowledgeable home-lending institution when it financially launches an untried developer by assisting him to produce and sell residential units to the uninformed public?³⁶⁶

Although the court in *Connor* posed this question with regard to financiers of real estate developments, the question may be valid in situations where manufacturers or distributors, for example, obtain the requisite funds for their operations from lending institutions. In light of the practice of financing institutions to thoroughly investigate the intended use of the funds that they loan, as well as their own knowledge and expertise of commercial and business affairs, should such financiers be held liable for defectively made products on the theory that they are in direct relationship with the manufacturer? This relationship would not be vertical, that is, ascending up the distributive chain from the consumer to the manufacturer, but rather horizontal, that is, a lending institution would be considered as

356. *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

357. *Canifax v. Hercules Powder Co.*, 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

358. *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966).

359. *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E.2d 182 (1965).

360. *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965).

361. *Cintrone v. Hertz Truck Leasing & Rental Serv.*, 45 N.J. 434, 212 A.2d 769 (1965).

362. *Delaney v. Towmotor Corp.*, 339 F.2d 4 (2d Cir. 1964).

363. *Putman v. Erie City Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964).

364. *E.g., Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963); *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965); see pp. 839-42 *supra*.

365. 253 Cal. App. 2d 186, 61 Cal. Rptr. 333 (1967).

one with the manufacturer and the institution would thus assume the same responsibility as the manufacturer to a party injured by a defective product.³⁶⁷ In this age of credit buying, it is hard to conceive of any product which at some point was not affected by a party other than those in the vertical chain of manufacture and distribution. The *Connor* case cannot be said to have started a trend in the field of products liability but it may be valuable in a case where there is difficulty in finding a defendant capable of sustaining the costs of judgment. However, it must also be pointed out that the solvency of one party should not be the criteria for the potential liability of another party.³⁶⁸

It is clear that a defendant's liability does not depend on his actual possession of the goods before they reach the user or consumer. In *Canifax v. Hercules Powder Co.*,³⁶⁹ a wholesaler of dynamite who ordered the goods from the manufacturer who in turn shipped the goods directly to the user was held strictly liable in tort. In *Canifax* the issue of whether the defendant had exercised due care by inspecting the goods before the sale was of no significance as to his liability as a seller.³⁷⁰ Therefore, the focal point of liability for dangerously defective conditions in the product is the economic chain, and the physical chain which the product has followed will have little or no significance. However, this is not to discount the possibility that in the process of shipping the product it might have been mishandled, creating a dangerous condition which caused plaintiff's injury. If this situation arises it should be left to the parties in the economic chain to determine who is responsible for the mishandling of the product.

Expressly excluded from liability under 402A is the occasional seller³⁷¹ — one who sells his car to a neighbor or who trades his product as part of the consideration for the purchase of another product, and innumerable comparable situations.³⁷² In these types of transactions the policy of protecting the consumer and of allocating the costs of injuries would have no apparent application. The occasional seller is usually as incapable of withstanding such a loss as the injured user and would normally have no greater ability to detect and remedy the defect.

The seller of used chattels will most probably be another defendant who will find himself within the purview of section 402A.³⁷³ There is no reason to differentiate him from other retailers, and the only aspect of a case brought against him which will be peculiar to his trade is the element of wear and tear which is characteristic of used chattels. The effect of

367. This is similar to the vertical and horizontal privity discussed at pp. 825-28 *supra*, except that the horizontal relationship relates to the economic chain and not to the consumer.

368. *Putman v. Eric Mfg. Co.*, 338 F.2d 911 (5th Cir. 1964).

369. 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965).

370. *But see* *Forry v. Gulf Oil Corp.*, 428 Pa. 334, 237 A.2d 593 (1968), where in dictum the Pennsylvania supreme court predicated the liability of the wholesaler on section 400 of the *Restatement*. See p. 804 *supra*.

371. *RESTATEMENT (SECOND) OF TORTS* § 402A, comment *f* at 350-51 (1965).

372. *Id.* at 351.

373. See Lascher, *Strict Liability in Tort for Defective Products: The Road to* *Restatement (Second) of Torts* § 402A, 54 *Harvard Law Review* 30, 57-58 (1965).

this element of wear and tear will be to create a more difficult burden upon the plaintiff to prove that the defect resulted from the manufacturing of the product, and not from the wear and tear.

G. Damages

In a strict liability case, a plaintiff may recover for all personal injuries proximately resulting from the dangerously defective condition of the product.³⁷⁴ Recovery has also been granted for damages to the product³⁷⁵ and damages to other property owned by the plaintiff.³⁷⁶

A most perplexing problem is whether a plaintiff may recover for economic losses. There is a split on this issue and at present Pennsylvania has not taken a definite stand. In *Seely v. White Motor Co.*,³⁷⁷ the California supreme court when confronted with this issue stated:

The law of sales has been carefully articulated to govern the economic relations between the suppliers and consumers of goods. The history of the doctrine of strict liability in tort indicates that it was designed, not to undermine the warranty provisions of the sales act or of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries.³⁷⁸

However, the New Jersey supreme court took a different view of the situation in *Santor v. A & M Karagheusian, Inc.*,³⁷⁹ and posited:

The range of its operation [strict liability in tort] must be developed as the problems arise and by courts mindful that the public interest demands consumer protection. And, in this connection, obviously one measure of the nature of the manufacturer's obligation necessarily must be the price at which the manufacturer reasonably contemplated that the article might be sold.³⁸⁰

As a matter of policy, the conflict appears to be between the desire to protect the consumer from defective products when he has no adequate means of protecting himself and the overstepping of judicial power by disregarding a legislative mandate in the form of the Uniform Commercial Code.³⁸¹ Dean Prosser resolves this conflict in favor of a warranty action, premising his position on the expectations of the seller and buyer as the key considerations in determining whether any loss has been sustained.³⁸² An action for loss of bargain necessarily sounds in contract and not in

374. See, e.g., *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966).

375. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

376. E.g., *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441 (Ky. 1966).

377. 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

378. *Id.* at 15, 403 P.2d at 149, 45 Cal. Rptr. at 21.

379. 44 N.J. 52, 207 A.2d 305 (1965).

380. *Id.* at 67, 207 A.2d at 313.

381. Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 713 (1965).

382. See Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 35 (1966).

strict liability in tort. Also, the manufacturer is the supplier of the goods and has no adequate means of policing what bargain the parties may strike.

One indication of what Pennsylvania's position will be on this issue is the remark of Justice Jones in his concurring-dissenting opinion in *Miller v. Preitz*.

I believe that Section 402a (sic) . . . furnishes the appropriate vehicle for the recovery of damages for injuries to the person or property arising from defective products while actions for the recovery of damages for "economic loss" arising from defective products should be maintained under the Uniform Commercial Code.³⁸³

Moreover, this result is also signalled by the decision in *Atlas Aluminum Corp. v. Borden Chem. Co.*,³⁸⁴ where recovery for lost profits was denied in a suit against the manufacturer of adhesives for property and commercial losses resulting from the adhesives' failure to hold glass placed in window frames made by the plaintiff.

The weight of the argument to grant recovery for economic losses under 402A must not be overlooked, since the policies underlying strict liability are as applicable to economic loss as to physical injury. In applying the allocation theory of strict liability in tort it must be noted that the financial hardship inuring to the plaintiff in an economic loss situation may be just as overwhelming as that which would result from a physical injury.

H. Defenses

Neither privity, nor failure to give notice, nor contributory negligence, nor disclaimer is a defense to an action based on strict liability in tort.³⁸⁵ Privity is expressly disavowed by the language of 402A. Notice is not required, as it is in warranty actions, because the liability is not imposed on the basis of breach of an implied condition of a sales contract but is in tort for breach of a duty imposed as a policy of the law. Contributory negligence is not a defense since the liability of the defendant is not predicated on fault, but is strict regardless of the exercise of due care. The liability of the parties in the economic chain cannot be disclaimed by agreement since liability is based on tort rather than contract principles.

The defendant does, however, have a right to expect that the user or consumer will use his product in the manner in which it was intended.³⁸⁶ It is not clear whether improper use of the product is a defense which the defendant must raise and bear the burden of proving, or whether it is part of the plaintiff's case to prove that he was using the product

383. 422 Pa. 383, 410-11, 221 A.2d 320, 335 (1966) (concurring-dissenting opinion).

384. 233 F. Supp. 53 (E.D. Pa. 1964).

385. RESTATEMENT (SECOND) OF TORTS § 402A, comment *m* at 356 (1965).

386. See *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27

in the way intended when the mishap occurred.³⁸⁷ Although Pennsylvania has not as yet ruled on this point, the most tactically advantageous approach for the defendant's attorney might be to present evidence of plaintiff's misuse of the product on the issues of defect or causation, and thereby avoid the burden of proof on the issue which would result from raising misuse as an affirmative defense to the action.³⁸⁸ This approach is buttressed by the argument that the plaintiff has more facts available to him as to how he was using the product at the time of the accident than does the remote manufacturer. On this basis, there is good reason to make this a part of the plaintiff's case and to impose on him the burden of proof.

With respect to the defense of assumption of risk, the Supreme Court of Pennsylvania stated in dictum in *Ferraro v. Ford Motor Co.*,³⁸⁹ "that if the buyer knows of the defect and *voluntarily* and *unreasonably* proceeds to use the product or encounter a known danger, this should preclude recovery and constitute a complete defense to the action even in cases of strict liability."³⁹⁰ Apparently this position is a countervailing consideration or policy based on the theory that although a manufacturer by placing goods on the market impliedly represents that they are safe, there can be no misrepresentation where a party voluntarily and unreasonably disregards a known danger. Before the user is precluded from recovery for his injuries, however, it must be shown that the user had actual knowledge of the defect. Proof that he negligently failed to discover the defect is insufficient.³⁹¹ Furthermore, as was pointed out in *Ferraro*, the mere fact that he knew of the defect and voluntarily used the product will not establish the defense; it must also be proven that his actions were unreasonable.

Finally, the affirmative defense of the statute of limitations may be available to defendants in an action based on strict liability. In Pennsylvania three different statutes of limitations may be applicable depending on whether redress is sought for personal injuries, property damages, or wrongful death. The statute of limitations for personal injuries begins to run at the time of injury for a period of 2 years.³⁹² In the case of property damages the statutory period is 6 years after the damages are incurred.³⁹³ Wrongful death actions must be brought within 1 year after death.³⁹⁴ The above mentioned statutes of limitations, and not the statute of limitations of the Uniform Commercial Code,³⁹⁵ will apply to strict liability actions since actions under 402A are trespass actions.³⁹⁶

387. See *Erickson v. Sears, Roebuck & Co.*, 240 Cal. App. 2d 793, 50 Cal. Rptr. 143 (1966).

388. See *Swain v. Boeing Airplane Co.*, 337 F.2d 940 (2d Cir. 1964).

389. 423 Pa. 324, 223 A.2d 746 (1966).

390. *Id.* at 327, 223 A.2d at 748.

391. *Ferraro v. Ford Motor Co.*, 423 Pa. 324, 329, 223 A.2d 746, 749 (1966);

RESTATEMENT (SECOND) OF TORTS § 402A, comment n at 356 (1965).

392. PA. STAT. ANN. tit. 12, § 34 (1953).

393. PA. STAT. ANN. tit. 12, § 31 (1953).

394. PA. STAT. ANN. tit. 12, § 1603 (1953).

395. PA. STAT. ANN. tit. 12, § 1603 (1953).

396. *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 855 (1966).

V. CONCLUSION

In light of the increasingly liberal means of obtaining redress for injuries resulting from defective products now afforded parties under the theories of negligence, warranty, and strict liability in tort, legislation in the area of products liability may well be the next step in the development of this field of law. Such legislation may fashion a plan similar to Workmen's Compensation. If such a procedure were enacted, in order to recover an injured party would be required to prove only that his personal injury or property damage was caused by a defective product. Under such a "Consumer Compensation" plan, manufacturers, wholesalers, and retailers would contribute to a common fund from which payments to compensate for defective product-caused injuries would be made. The cost of such contributions would then be allocable to the consuming public, together with other overhead costs of producing goods. Such a program would greatly economize the time of the courts and provide an efficient means for injured consumers to obtain compensation.

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