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Recent Developments in Products Liability Law in Pennsylvania

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INTRODUCTION

The *Villanova Law Review* in 1968 published a lengthy Comment entitled *Products Liability In Pennsylvania,*[1] the avowed purpose of which was "to provide the Pennsylvania practitioner with a compilation of the pertinent decisions of Pennsylvania courts in the area of products liability."[2] However, since the time of publication, a number of significant decisions interpreting Pennsylvania law have been rendered by both the state and federal courts. Two of these decisions resulted in a marked departure from prior precedent, and the remaining four provided a much needed amplification on the present state of products liability law in Pennsylvania. It is the purpose of this discussion, therefore, to update the 1968 Comment and to provide the Pennsylvania practitioner with an analysis of the most recent decisions affecting the law of products liability in Pennsylvania.

I. THE CAUSE OF ACTION IN WARRANTY

A. Privity

In *Kassab v. Central Soya,*[3] the Supreme Court of Pennsylvania abolished the requirement of vertical privity of contract[4] when suing in assumpsit against a remote manufacturer for breach of warranty, thereby specifically overruling *Miller v. Preitz,*[5] decided only two years prior. Justice Roberts, speaking for the *Kassab* court, based the holding on two separate grounds: the need for symmetry in the law; and the comments of the original drafters of section 2–318 of the Uniform Commercial Code.

With respect to the first basis, the court found that prior to Pennsylvania's adoption of section 402A of the *Restatement (Second) of Torts,* a compelling argument for retaining the vertical privity requirement could be made; abolishment of vertical privity would allow recovery against the

1. 13 VILL. L. REV. 793 (1968).

2. *Id.*

3. 432 Pa. 217, 246 A.2d 848 (1968).

4. "Vertical privity" involves the question of which members of the distributive chain may be sued; whereas "horizontal privity" concerns itself with the problem of who may bring suit. Under the Uniform Commercial Code as adopted in Pennsylvania, horizontal privity is limited to

> any natural person who is in the family or household of the . . . [the] buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.

PA. STAT. ANN. tit. 12A, § 2–318 (Supp. 1969). Section 402A of the *Restatement (Second) of Torts,* on the other hand, extends horizontal privity to the "ultimate user or consumer" and expresses no opinion as to other injured persons. RESTATEMENT (SECOND) OF TORTS § 402A, caveat 1 at 348 (1965). *See* Comment, *Products Liability In Pennsylvania,* 13 VILL. L. REV. 793, 824–28, 842–47 (1968).

5. 422 Pa. 383, 221 A.2d 320 (1966).

remote manufacturer without proof of negligence when suing in *assumpsit* under the Code, but when suing in *trespass,* negligence on the part of the manufacturer had to be shown to permit recovery for the same wrong against the same defendant. Recovery would thus depend solely on the label plaintiff chose to give his complaint. However, with the adoption of section 402A in *Webb v. Zern*[6] the same evil arose. Under section 402A, recovery in a trespass action against the remote manufacturer may be had without a showing of either negligence or privity, since strict liability against all parties in the chain of distribution results for any damage inflicted upon the person or property of the plaintiff as a result of a defective product.[7] Thus, unless the requirement of vertical privity were abolished in assumpsit actions as well, recovery would again depend on the caption at the top of plaintiff's complaint. The *Kassab* court concluded that such a "dichotomy of result" should not exist in the law, and therefore held that on the issue of vertical privity, "the code must be coextensive with Restatement section 402a in the case of product liability."[8]

The *Kassab* court also examined comment 3 to section 2–318 of the Code[9] which specifically states that

> the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

This language indicated to the court that section 2–318 was never intended to set any limits on vertical privity, and the court concluded that Pennsylvania should join the growing list of jurisdictions[10] which have judicially abolished the requirement of vertical privity in breach of warranty cases.

The *Kassab* court made it clear that its decision with respect to vertical privity has no impact on the issue of horizontal privity,[11] and therefore, at this point, only the buyer and the other beneficiaries enumerated in section 2–318 of the Code may maintain a warranty action.[12]

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6. 422 Pa. 424, 220 A.2d 853 (1966).
7. *See* RESTATEMENT (SECOND) OF TORTS § 402A & comment *a* at 348 (1965).
8. 432 Pa. at 231, 246 A.2d at 854.
9. As originally enacted in Pennsylvania, section 1–102(3)(f) of the Uniform Commercial Code provided that the official comments of the drafters could be used as an aid in construing the statute. Act of April 6, 1953, P.L. 3, § 1–102. However, the reenactment of the Code in 1959 failed to provide this specific reference to the comments. *See* PA. STAT. ANN. tit. 12A, § 1–102 (Supp. 1969). The *Kassab* court noted this deletion, but felt that it was not significant. 432 Pa. at 233 n.9, 246 A.2d at 855 n.9.
10. *E.g.,* Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967) (applying Va. law); Gherna v. Ford Motor Co., 246 Cal. App. 2d 639, 55 Cal. Rptr. 94 (1966); Smith v. Platt Motors, Inc., 137 So. 2d 239 (Fla. App. 1962); State Farm Mut. Auto Ins. Co. v. Anderson-Weber Co., 252 Iowa 1289, 110 N.W.2d 449 (1961); Spence v. Three Rivers Builders & Masonary Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958); Morrow v. Caloric Appliance Corp., 372 S.W.2d 41 (Mo. 1963); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Randy Knitwear, Inc. v. American Cyanamid Co., 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962); Ford Motor Co. v. Grimes, 408 S.W.2d 313 (Tex. Civ. App. 1966).
11. 432 Pa. at 232 n.8, 246 A.2d at 855 n.8.
12. *See, e.g.,* Miller v. Preitz, 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), 12 N.Y.L.F. 530 (1966), 20 VAND. L. REV. 665

B. Damages

The issue of what types of damages are recoverable under the Code was also presented to the court in *Kassab*. Plaintiffs' complaint alleged that defendant's inclusion of a foreign substance in its cattle feed had caused plaintiffs' cows to abort and their bull to become sterile. As a result, plaintiffs claimed that they were unable to sell their breeding stock except at beef prices, thus greatly diminishing the value of their property, and sought recovery in an amount equal to the diminution in value of their cattle.

Initially, the court noted that since direct "economic loss" — "the diminution in the value of the product because it is inferior in quality" — is clearly compensable under Restatement section 402A, it should be compensable under the Code as well,[13] for the same reasons of legal symmetry that necessitated the abolishment of vertical privity. However, the loss that plaintiffs were seeking in the instant case was not the difference between the product as warranted and the product as received, but rather was a loss directly resulting from defendant's breach of warranty. This, the court felt, was clearly compensable under section 2–715(2)(b) of the Code, which provides:

> (2) Consequential damages resulting from the seller's breach include . . . .
>
> . . . .
>
> (b) injury to person or property proximately resulting from any breach of warranty.[14]

Therefore, the court remanded the case to allow plaintiffs the opportunity to prove that their stock had become unmarketable as breeding animals and that the unmarketability of the cattle was the proximate result of defendant's breach of warranty.[15]

(1967), *and* 8 WM. & MARY L. REV. 694 (1967); Yentzer v. Taylor Wine Co., 414 Pa. 272, 199 A.2d 463 (1964), *noted in* 17 ALA. L. REV. 92 (1964), 14 CATHOLIC U.L. REV. 133 (1965), 14 DEPAUL 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); Hochgertel v. Canada Dry Corp., 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); Comment, *supra* note 5, at 824–28.

13. 432 Pa. at 231 n.7, 246 A.2d at 854–55 n.7. *See* Dyson v. General Motors Corp., No. 43060, at 13 n.9 (E.D. Pa., Apr. 17, 1969); State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 (1961); Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965); Comment, *supra* note 5, at 847–48. *But see* Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965); Miller v. Prietz, 422 Pa. 383, 410–11, 221 A.2d 320, 335 (1966) (concurring-dissenting opinion); Prosser, *Strict Liability to the Consumer in California*, 18 HASTINGS L.J. 9, 35 (1966); Comment, *supra* note 5, at 847–48. *See generally* Comment, *Economic Loss In Products Liability Jurisprudence*, 66 COLUM. L. REV. 917 (1966); Comment, *Manufacturer's Liability to Remote Purchaser for "Economic Loss" Damages — Tort or Contract*, 114 U. PA. L. REV. 539 (1966).

14. PA. STAT. ANN. tit. 12A, § 2–715(2)(b) (Supp. 1969).

15. 432 Pa. 217, 236–37, 246 A.2d 848, 857–58 (1968).

Justice Roberts emphasized in a footnote,[16] however, that recovery for diminution in value of specific property affected by seller's defective product must be clearly distinguished from the "loss of good will to a business" resulting from the community's knowledge that the business had at one time sold defective products.[17] He stated that this latter loss is, under the rationale of *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*,[18] "too speculative" and therefore "not a compensable element of damages under section 2–715 of the code."[19]

This dictum by the Pennsylvania Supreme Court appears to place it in direct conflict with the position taken by the United States District Court for the Western District of Pennsylvania in *Neville Chemical Co. v. Union Carbide Corp.*,[20] a case decided only two weeks after *Kassab*. The district court, applying Pennsylvania law, held that loss of profits are compensable both in tort and contract where there is evidence to establish such a loss with reasonable certainty and to show that the loss was a proximate consequence of the wrong. Also, in contract actions, such a loss is compensable if it is within the contemplation of the parties.

A closer look at the court's decision in *Neville,* however, demonstrates that it should not be interpreted as broadly as the court's language indicates. Although the court stated that the loss of profits as a result of breach of warranty is compensable under sections 2–714(2) and 2–715(2) of the Uniform Commercial Code when that loss is within the contemplation of the parties,[21] it concluded that since negligence had also been established by the plaintiff, the "contemplation of the parties" element was not material to its decision.[22]

On the issue of whether loss of profits are too speculative to be compensable, the federal district court found that plaintiff had shown by the testimony of its former customers that they had abruptly ceased to buy from plaintiff, either temporarily or permanently, when they discovered the defective nature of plaintiff's product.[23] Since this evidence clearly established both the relationship between the defect in the product and the loss of profits, and the extent and duration of such loss, and since damages of this nature have been allowed in both contract[24] and tort[25] actions in prior Pennsylvania decisions, the court concluded that the jury's award of damages for loss of profits should be allowed to stand.[26]

16. *Id.* at 237 n.12, 246 A.2d at 857 n.12.
17. *Id.*
18. 396 Pa. 506, 153 A.2d 472 (1959).
19. 432 Pa. at 237 n.12, 246 A.2d at 857 n.12.
20. 294 F. Supp. 649 (W.D. Pa. 1968).
21. *Id.* at 661.
22. *Id.* at 661–62.
23. *Id.* at 660–61.
24. *See* Day & Zimmerman, Inc. v. Blocked Iron Corp., 200 F. Supp. 132 (E.D. Pa. 1961); Taylor v. Kaufhold, 368 Pa. 538, 84 A.2d 347 (1951); Western Show Co. v. Mix, 308 Pa. 215, 162 A. 667 (1932), *aff'd after remand,* 315 Pa. 139, 173 A. 183 (1934).
25. Watsontown Brick Co. v. Hercules Powder Co., 265 F. Supp. 268 (M.D. Pa.), *aff'd,* 387 F.2d 99 (3d Cir. 1967); Kosco v. Hachmeister, Inc., 396 Pa. 288, 152 A.2d 673 (1959); Ashcraft v. C.G. Hussey & Co., 359 Pa. 129, 58 A.2d 170 (1936).
26. 294 F. Supp. at 662.

Thus, the law of Pennsylvania with respect to the compensability of loss of profits under the Code appears to be somewhat in doubt. The Pennsylvania supreme court still holds to the position that such damages are always too speculative and therefore not compensable, whereas the federal district court's position is that such damages, in certain circumstances, can be proven with reasonable certainty. The decision in *Neville,* however, is not dispositive on the issue of whether, once the loss has been clearly proven, it is compensable under the Code. The tenor of the opinion indicates that it would be, but the decision was limited by the fact that plaintiff had proven both breach of warranty and negligence.

II. STRICT LIABILITY IN TORT

A. Introduction

There have been four recent decisions[27] applying the Pennsylvania law of strict liability for a seller who creates a "product in a defective condition unreasonably dangerous to the user or consumer," as provided in *Restatement (Second) of Torts* 402A. Pennsylvania courts have had only two years experience with section 402A, but these decisions settle to a great extent what has been described as an "unsettled" area of the law in Pennsylvania.[28]

B. Defendants Under 402A

In *Speyer, Inc. v. Humble Oil & Refining Co.,*[29] plaintiffs brought an action in both negligence and strict liability under section 402A for fire damages allegedly resulting from: (1) the defective design of a gasoline hose supplied by defendant Humble Oil; and (2) the defective design of a casting and the failure to provide a "fail safe" device by defendant O.A. Smith Corp., the successor-in-interest to the manufacturer of the gasoline pump. The district court[30] found that the accident resulted not from any defect in the hose or the pump, but rather from "the failure of the driver whose duty it was to remove the nozzle from the filler pipe before driving away from the pump, so to do."[31] On appeal, the Third Circuit Court of Appeals affirmed the judgment.

With respect to the negligence issue, the *Speyer* court affirmed, finding that the sequence of events which resulted in the accident was not within the realm of forseeability, and therefore neither defendant had a duty to provide against the occurrence of such events.[32] With respect to the strict

27. Greco v. Bucciconi Eng'r Co., 407 F.2d 87 (3d Cir. 1969); Speyer, Inc. v. Humble Oil & Refining Co., 403 F.2d 766 (3d Cir. 1968); Dyson v. General Motors Corp., Civil No. 43060 (E.D. Pa., Apr. 17, 1969); Bartkewich v. Billinger, 432 Pa. 351, 247 A.2d 603 (1968).
28. Comment, *supra* note 5, at 832.
29. 403 F.2d 766 (3d Cir. 1968).
30. Speyer, Inc. v. Humble Oil & Refining Co., 275 F. Supp. 861 (W.D. Pa. 1967).
31. *Id.* at 871.
32. Speyer, Inc. v. Humble Oil & Refining Co., 403 F.2d 766, 771 (3d Cir. 1968).

liability claim, the court held that, although defendant O.A. Smith Corp. could be considered a "seller"[33] of the pump, it could not be held liable because the product had not reached the ultimate user or consumer "without substantial change in the condition in which it was sold,"[34] as required under section 402A. The court felt that the addition of the new flexiglass hose by Humble constituted a substantial modification of the original product.[35] As to defendant Humble Oil, the court held that it could not be classified as a "seller," much less "a seller engaged in the business of selling such a product," within the provisions of section 402A,[36] since "Humble was not in the business of selling pumps."[37]

The *Speyer* court's reasoning can be criticized in that it would tend to exempt from liability manufacturers and sellers of products that require the subsequent addition of component parts as well as the manufacturers and sellers of the component parts themselves. Such a rule is contrary to the line of cases which have held the manufacturers of component parts liable for negligence,[38] or which have held the manufacturer or

33. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *f* at 350–51 (1965); Comment, *supra* note 5, at 846.

34. RESTATEMENT (SECOND) OF TORTS § 402A(1)(b) (1965). However, comment *p* to section 402A specifically states that

> the Institute has refrained from taking any position as to the possible liability of the seller where the product is expected to, and does, undergo further processing or other substantial change after it leaves his hands and before it reaches those of the ultimate user or consumer.

Id. at 357.

35. 403 F.2d at 771–72.

36. RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965). *See* note 34 *supra.*

37. 275 F. Supp. 861, 868 (W.D. Pa.), *quoted in* 403 F.2d 766, 772 (3d Cir. 1968). The *Speyer* court also resisted the plaintiffs' argument that the pump was a "container" for Humble's product, and therefore Humble should be held liable under the line of cases which have held the distributors of food products liable for container explosions. *See, e.g.,* Bialek v. Pittsburgh Brewing Co., 430 Pa. 176, 242 A.2d 231 (1968); Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). With respect to this argument, the *Speyer* court held that the product and the container must be sold as an "integrated whole" and that under the facts this notion was "inconceivable." 403 F.2d at 772. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *h* at 352 (1965), where it is stated that "[n]o reason is apparent for distinguishing between the product itself and the container in which it is supplied; and the two are purchased by the user or consumer as an integrated whole." See also Prosser, *The Fall of the Citadel,* 50 MINN. L. REV. 791 (1966).

38. *See, e.g.,* Guarnieri v. Kewanee-Ross Corp., 263 F.2d 413, *modified on rehearing,* 270 F.2d 575 (2d Cir. 1959) (manufacturer of cylinder for guided missile); American Radiator & Standard Sanitary Corp. v. Tiatan Valve & Mfg. Co., 246 F.2d 947 (6th Cir. 1957) (liability of manufacturer of component part to injured person recognized but indemnity denied because of negligence of assembler in failing to properly inspect or test the valve); Spencer v. Madsen, 142 F.2d 820 (10th Cir. 1944) (manufacturer of semi-trailer chassis to which fuel tank was added); Noel v. United Aircraft Corp., 219 F. Supp. 556 (D. Del. 1963) (propellor manufacturer); Maryland v. Garzell Plastics Indus., 152 F. Supp. 483 (E.D. Mich. 1957) (manufacturer of hull of boat); Edison v. Lewis Mfg. Co., 168 Cal. App. 2d 429, 336 P.2d 286 (1959) (manufacturer of defective safety belt ring inserted by belt manufacturer); Carson v. Weston Hotel Corp., 342 Ill. App. 602, 97 N.E.2d 620 (1951) (manufacturer of cable used in elevator); Comstock v. General Motors Corp., 358 Mich. 163, 99 N.W.2d 627 (1959) (manufacturer of power brake master cylinder); Smith v. Peerless Glass, 259 N.Y. 292, 181 N.E. 576 (1932) (manufacturer of bottle filled with soda by another). *Cf.* RESTATEMENT (SECOND) OF TORTS § 402A, comment *q* at 358 (1965), where it is stated:

> The same problem arises in cases of the sale of a component part of a product to be assembled by another, as for example a tire to be placed on a new automobile, a brake cylinder for the same purpose, or an instrument for the panel

seller of replacement parts liable either for negligence[39] or in strict liability.[40]

However, the court noted that even if plaintiffs in this particular case had surmounted the hurdle of establishing Humble as a seller, they would probably have been unable to show that the hose and the pump were subjected to "normal handling," as required by comment *h* to section 402A.[41] Thus, what at first appears to be of an unsatisfactory result with respect to the issues of "substantial change" and "a seller engaged in the business of selling such a product" may be explained by this further finding of the court.

C. *Defenses*

There have also been three recent appellate court decisions applying Pennsylvania law which have dealt primarily with the concepts of "intended use" and the "unreasonably dangerous" character of the product.

In *Bartkewich v. Billinger,*[42] the Pennsylvania supreme court held that plaintiff could not recover for injuries sustained while attempting to remove a jammed piece of glass from a glass crushing machine. The court decided that plaintiff had "*voluntarily* [*put*] *himself* at so obvious a risk"[43] and therefore the manufacturer of the machine could not be held liable for failure to install a guard rail or an additional safety switch since he

> was entitled to believe that the machine would be used in its usual manner, and need not be an insurer for the extra-ordinary risks an operator might choose to take.[44]

The court agreed with plaintiff's contention that the lack of a proper safety device could constitute a defective design subjecting the manufacturer to liability under section 402A.[45] However, it held that this rule

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of an airplane. Again the question arises, whether the responsibility is not shifted to the assembler. It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer. But in the absence of a sufficient number of decisions on the matter to justify a conclusion, the Institute expresses no opinion on the matter.

39. *See, e.g.,* Rauch v. American Radiator & Standard Sanitary Corp., 252 Iowa 1, 104 N.W.2d 607 (1960); Sears v. Mund-Boilers, Inc., 336 S.W.2d 243 (Tex. Civ. App. 1960).

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

41. 403 F.2d at 772 n.16. *See* RESTATEMENT (SECOND) OF TORTS § 402A, comment *h* at 351-52 (1965), which provides:

> A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, . . . the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, . . . he may be required to give adequate warning of the danger (see Comment *j*), and a product sold without such warning is in a defective condition.

42. 432 Pa. 351, 247 A.2d 603 (1968).

43. *Id.* at 356, 247 A.2d at 606.

44. *Id.*

45. *Id.* at 354, 247 A.2d at 605. *See generally* Dickerson, *Products Liability: How Good Does A Product Have To Be,* 42 IND. L.J. 301 (1967); Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product,* 71 YALE L.J. 816 (1962).

is applicable only where the absence of such a device caused an injury "of the type that could be expected from the normal use of the product."[46]

Three months after the Pennsylvania supreme court's decision in *Bartkewich,* the Third Circuit decided a case arising out of a similar fact situation. In *Greco v. Bucciconi Engineering Co.,*[47] the plaintiff brought an action in strict liability to recover for injuries suffered due to a design defect when a steel sheet-piler unexpectedly released a pile of steel which crushed plaintiff's hand. Although the court found that the plaintiff had voluntarily placed his hand under the piler while it was in operation, it distinguished *Bartkewich* on the basis that:

> In the first place, plaintiff in *Bartkewich* was not injured because of a misoperation of the machine, such as here. Secondly, the court in *Bartkewich* relieved the manufacturer of liability because the plaintiff assumed an abnormal, unanticipated work position when he reached into the machine with knowledge that the danger existed at that time. Here, however, the evidence permits the inference that the manufacturer knew that employees would have to reach under the fingers of the piler to properly perform their job.[48]

Thus, taking *Bartkewich* and *Greco* together, it can be seen that in order for a seller to escape liability, he must show that the plaintiff voluntarily made some unreasonable or "abnormal" use of his product which was not within the realm of forseeability and which the seller therefore had no duty to anticipate and guard against.

This conclusion is further supported by Judge Fullam's recent decision in *Dyson v. General Motors Corp.*[49] There plaintiff brought an action in both negligence and strict liability for injuries suffered when the automobile in which she was a passenger left the road and overturned. Plaintiff conceded that the alleged defect of design — the removal of full frame doors and center-posts to create a "hardtop convertible" effect in a 1965 Buick Electra — was not the cause of the accident, but contended that the failure of the roof to support the weight of the overturned car contributed greatly to the extent of her injuries.

The court found that the issues involved were twofold: (1) whether the rollover of the vehicle was forseeable (under negligence concepts) or within the contemplated "normal use" of the product (under section 402A),

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46. 432 Pa. at 354, 247 A.2d at 605. The plaintiff in *Bartkewich* relied on the Illinois case of Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966), where the court held that the question of whether the lack of a safety screen which would have prevented the plaintiff from reaching into the machine to alleviate a jammed condition constituted a "defective condition unreasonably dangerous to the user" was for the jury. The *Bartkewich* court, however, while recognizing that the decision in *Wright* "is legally indistinguishable" from the case at hand, chose "to reject its result." 432 Pa. at 354, 247 A.2d at 605.

47. 407 F.2d 87 (3d Cir. 1969).

48. *Id.* at 92.

49. Civil No. 43060 (E.D. Pa., Apr. 17, 1969).

therefore creating a duty on the part of defendant to protect plaintiff from such a hazard;[50] and (2) if so, whether the facts alleged in plaintiff's complaint establish a breach of that duty.

With respect to the first issue, the district court,[51] citing to *Bartkewich* and *Greco* among others, held that

> a Pennsylvania court would reject the narrow concept of "intended purpose" or "normal use" urged by defendant in this case, and would not preclude the imposition of liability for the "second accident," *i.e.*, the contact between the passenger and the interior of the vehicle. The correct rule, in my opinion, can be stated either of two ways: (1)

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50. On this issue the defendant placed particular reliance on the Seventh Circuit's decision in Evans v. General Motors Corp., 359 F.2d 822, *cert. denied,* 385 U.S. 836 (1966). There the court held that

> [t]he intended purpose of an automobile does not include its participation in collisions with other objects, despite the manufacturer's ability to foresee the possibility that such accidents may occur. . . . We cannot agree with the plaintiff that the defendant had a duty to equip all its automobiles with side rail perimeter frames. . . . Defendant had a duty to test its frame only to insure that it was reasonably fit for its intended purpose.

Id. at 825. *See* Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); Shumard v. General Motors Corp., 270 F. Supp. 311 (S.D. Ohio 1967); Willis v. Chrysler Corp., 264 F. Supp. 1010 (S.D. Tex. 1967).

Plaintiff, on the other hand, placed particular reliance on the Eighth Circuit's recent decision in Larsen v. General Motors Corp., 391 F.2d 495 (1968), where the plaintiff alleged a defect in design on the part of defendant as a result of the steering column of the automobile protruding 2.7 inches forward of the front tires. The Court of Appeals for the Eighth Circuit reversed the trial court's grant of summary judgment in favor of defendant, finding that

> the "intended use" construction urged by General Motors is much too narrow and unrealistic. Where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in design. These injuries are readily foreseeable as an incident to the normal expected use of an automobile. While automobiles are not made for the purpose of colliding with each other, a frequent and inevitable contingency of normal automobile use will result in collisions and injury-producing impacts. No rational basis exists for limiting recovery to situations where the defect in design or manufacture was a causative factor of the accident, as the accident and the resulting injury, usually caused by the so-called "second collision" of the passenger with the interior part of the automobile, are all foreseeable. Where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable. The sole function of an automobile is not just to provide a means of transportation, it is to provide a means of safe transportation or as safe as reasonably possible under the present state of the art.

Id. at 502. *See* Nader & Page, *Automobile Design and the Judicial Process,* 55 CALIF. L. REV. 645 (1967); Note, *Manufacturer's Liability for an "Uncrashworthy" Automobile,* 52 CORNELL L.Q. 444 (1967); Note, *Liability for Negligent Automobile Design,* 52 IOWA L. REV. 953 (1967); Note, *Foreseeability in Product Design and Duty to Warn Cases — Distinctions and Misconceptions,* 1968 WISC. L. REV. 228; 80 HARV. L. REV. 688 (1966); 42 N.D. LAW. 111 (1966); 1966 UTAH L. REV. 698.

51. Judge Fullam found it "interesting to note the relationship" between the court's language in *Greco, i.e.,* "abnormal, unanticipated work position," and that in *Bartkewich, i.e.,* "an accidental injury which was the type that could be expected from normal use of the product." He found both cases to be quite consistent with comments *k* and *j* of section 395 of the *Restatement (Second) of Torts* and with comment *k* of section 402A of the *Restatement,* all of which define intended use "to include not only the specific use for which the product was manufactured, but also other anticipated uses." Dyson v. General Motors Corp., Civil No. 43060 at 17–18 (E.D. Pa., Apr. 17, 1969).

> Vehicular accidents are so commonplace as to constitute a readily forseeable misuse of motor vehicles; or (2) vehicular accidents are incidental to normal and intended use of motor vehicles on today's highways.[52]

Having found that the rollover was forseeable or within the "normal use" of an automobile, and that defendant therefore owed a duty to plaintiff with respect to such use, the court then held that the facts as alleged constituted a breach of that duty by stating:

> [T]he law does not impose *any* . . . obligation [to manufacture a "crash proof" automobile]. . . . . But it is the obligation of an automobile manufacturer to provide more than merely a movable platform capable of transporting passengers from one point to another. The passengers must be provided a reasonably safe container within which to make the journey. The roof is a part of such container, and, except in the case of vehicles like convertibles . . . the roof should provide more than merely protection against rain.[53]

The court concluded by noting the difficulty that plaintiff may have in proving the proximate cause of her injuries.[54] However, the complaint was sufficient to withstand defendant's motion for judgment on the pleadings,[55] and the action was therefore remanded to allow plaintiff to pursue discovery.

The *Dyson* decision appears to extend the concept of "normal use" under section 402A to the outer limits of foreseeability of risk. Thus, in order for a manufacturer to avoid strict liability under section 402A, he must show that the consequences which occurred were not readily foreseeable as incident to the normal use of his product.

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52. *Id.* at 18. As an illustration of this approach to the concept of intended use, Judge Fullam set forth the following example:

> [T]he manufacturer would not be held liable for the vicissitudes of using a passenger automobile on a racetrack or a plowed field, . . . but might be held liable for the foreseeable, though accidental, traumatic consequences of the use of passenger cars on highways by occupants.

Id. at 18–19.

53. *Id.* at 19–20. The defendant argued that the court's holding was equivalent to declaring all "convertibles" unreasonably dangerous *per se*, at least in the absence of roll bars. The court rejected this argument, however, finding that

> all that is involved is differentiation between various models of automobile, and a recognition of the inherent characteristics of each. The manufacturer cannot be expected to provide a convertible which is as safe in roll-over accidents as a standard four-door sedan with center posts and full-door frames. But the manufacturer can be expected to provide a convertible which is as safe as it reasonably can be made, and which is not appreciably less safe than other convertibles. So, too, in the present case, the manufacturer was not necessarily under an obligation to provide a hardtop model which would be as resistant to roll-over damage as a four-door sedan; but the defendant was required, in my view, to provide a hardtop automobile which was a reasonably safe version of such model, and which was not substantially less safe than other hardtop models.

Id. at 20–21.

54. *Compare* Barber v. Kohler, 428 Pa. 219, 237 A.2d 224 (1968) *and* Frisch v. Texas, 363 Pa. 618, 70 A.2d 837 (1950) *with* Doyle v. South Pittsburgh Water Co., 414 Pa. 199, 199 A.2d 875 (1964).

55. *See* FED. R. CIV. P. 12(c).

III. CONCLUSION

In the past year, Pennsylvania courts have abolished the requirement of vertical privity, expanded the areas of compensable loss, and held "normal use" to be coextensive with the outer limits of foreseeable risk. In the conclusion to the products liability comment of Volume 13 of the *Villanova Law Review,* the authors recommended a "Consumer Compensation" plan similar to Workman's Compensation, whereby the members of the distributive chain "would contribute to a common fund from which payments to compensate for defective product-caused injuries would be made."[56] This plan was felt to be necessary in order to alleviate the product liability cases that crowd the court calendars due to the increasingly liberal means of obtaining redress. If the trend toward allowing redress was considered liberal at the time of that comment, the past year's decisions render it even more so. And correspondingly, since a "Consumer Compensation" plan was thought necessary at that time, the need for it today has increased significantly.

Warren W. Faulk

56. Comment, *supra* note 5, at 850.