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Contracts - Warranties - Vertical Privity

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Recent Decisions

CONTRACTS—WARRANTIES—VERTICAL PRIVITY—The Supreme Court of Pennsylvania has held that privity is no longer required in assumpsit suits by purchasers against remote manufacturers for breach of implied warranty.

Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968).

Plaintiffs, who are engaged in the cattle-breeding business, purchased a cattle feed mixture from John Pritts, one of the defendants in this action, with whom they had previously done business. Pritts had purchased a feed supplement from Central Soya, which he used in the preparation of the feed mixture. Shortly after having fed the mixture to their herd, plaintiff discovered that the cows had aborted and that the breed bull had become sterile. Sensing that the feed was the cause, plaintiffs had the feed chemically analyzed and it was discovered that the drug stilbestrol was present, a drug normally used only in the feed for beef cattle. This drug tends to induce abortion in cows and sterility in bulls. In particular, this drug was found in the feed supplement, obtained originally from Central Soya.

Plaintiffs instituted an action in assumpsit against both Pritts and Central Soya,[1] seeking damages for (1) the direct loss due to the sterility of the bull and the abortion of the cows, and (2) the economic loss of future sales resulting from community knowledge that the cattle had eaten tainted feed. The trial court, sitting without a jury, ruled against liability on the ground that the presence of stilbestrol in the feed was not the cause of plaintiff's injury, and refused to hear testimony on the damages question.

After dispensing with appellants' first two contentions on procedural grounds,[2] Justice Roberts, writing for the majority, turned to the merits

1. McMillan Feed Division of Central Soya was also joined as a defendant.

2. In the trial court, both counsel consented to waive the requirement that the decision of the court be in writing. PA. STAT. ANN. tit. 12, § 689 (1953). Appellant contended on appeal that, despite his consent to waive the rule, there was no compliance with the statute, since it is in itself mandatory. Appellant contended also that, since the act required a formal written opinion, all evidence on liability and damages must be heard. The court determined that since they were not dealing with a constitutional right, there was no authority to prevent a relaxation of the statuory provisions.

Appellants also attacked the procedure of the litigation on the ground that the parties did not stipulate in the office where the suit was pending that the suit be tried without

of the controversy. He agreed with appellants' contention that, since there was a clear breach of the implied warranties of merchantability and of fitness for a particular purpose, the trial court had erred in finding for appellees on the basis that appellants had failed to prove that the tainted feed caused any injury to the cattle. He reasoned that the amount of injury to the cattle was relevant only to the question of the *amount* of damages, since the mere presence of the stilbestrol in the feed constituted a prima facie case for breach of implied warranty.

Appellees argued that they were not individually liable under the several different implied warranty provisions of the Uniform Commercial Code. Pritts maintained that he was not liable under section 2-315,[3] since appellants in no way relied on his skill and judgment in selecting the proper feed for their cattle. The court, however, did not discuss this contention, since they held that Pritts was clearly liable under section 2-314[4] of the Uniform Commercial Code in that he impliedly warranted that the feed he sold to appellants was fit for the ordinary purposes for which such supplement is used, i.e., as feed for breeding cattle.

Central Soya, however, raised a more formidable question: Must there be privity of contract between the manufacturer and the purchaser in order to hold the manufacturer liable for breach of implied warranty?

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a jury. This fact was noticed shortly before the trial court judge announced his verdict, but both parties agreed to read the required stipulation into the record at this point. The supreme court rejected this contention for the same reasons given above, citing and quoting from Pittsburgh's Petition, 243 Pa. 392, 395-96, 90 A. 329, 330 (1914). *Pittsburgh's Petition* as quoted by the *Kassab* court at 223-24 of 432 Pa. 217 and at 851 of 246 A.2d 848:

> There was no formal agreement for such submission [to a judge sitting alone] and waiver [of a jury] filed in this case; but to allow a party at whose instance a proceeding [trial without jury] has been appointed, and who has taken advantage of it by pursuing it, to afterwards defeat it, against the wishes of the opposing party, by alleging his own default in the matter of filing a formal written agreement would be to suffer the strict letter of the law to overcome its clear purpose.

3. PA. STAT. ANN. tit. 12A, § 2-315 (Supp. 1969) which states:
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 . . . an implied warranty that the goods shall be fit for such purpose.

4. *Id.*, § 2-314(1)(2), which states:
(1) [A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
(2) Goods to be merchantable must be at least such as
. . .
(c) are fit for the ordinary purposes for which such goods are used; and
. . .
(e) are adequately contained, packaged, and labeled as the agreement may require;
. . . . . .

Having decided that there was a breach of warranty of merchantability, and that the question of who may be liable for this breach was properly before the court,[5] Justice Roberts proceeded to decide the principle question, stating that "this Court is now of the opinion that Pennsylvania should join the fast growing list of jurisdictions[6] that have eliminated the privity requirement in assumpsit suits by purchasers against remote manufacturers for breach of implied warranty."[7] (Footnote added). By so stating, Roberts expressly overruled that part of *Miller v. Preitz*[8] relating to vertical privity.[9]

The court referred to the Uniform Commercial Code's pronouncements on vertical and horizontal privity to aid its decision. The concept of vertical privity concerns the relationship between the manufacturer and the purchaser in the distributive chain.[10] The requirement of vertical privity permits only the immediate purchaser of the manufacturer's product to recover from the manufacturer for any injury resulting to him from a defect in that product. There is a vertical chain, extending down from the manufacturer through various retailers and other sellers to the ultimate buyer (note the use of the word "buyer" as opposed to the more-encompassing term "consumer").[11]

5. Justice Roberts first concerned himself as to whether the privity issue was properly before the court. He noted that in the trial court, at the close of appellants' evidence, the appellees first raised the privity question in a motion for a non-suit. This motion was denied, and it was not raised again in the lower court trial. Under ordinary circumstances, the failure to reintroduce the privity question at the close of appellees' own evidence would have prevented its use in any appeal. *See* Jordan v. Sun Life Assurance Company of Canada, 366 Pa. 495, 77 A.2d 631 (1951); Liebendofer v. Wilson, 175 Pa. Super. 632, 107 A.2d 133 (1954). However, since this was a non-jury trial, Roberts concluded that "[a]*fter* the verdict is rendered, exceptions may be filed within twenty days. The procedure obviously does not contemplate the making of the usual motions that are made in a jury case before the verdict; rather, the intent is to expedite the rendering of the verdict by avoiding those motions. . . ." (Emphasis in original). 432 Pa. at 225 and 246 A.2d at 851-52. Appellees could not be expected to take exception, since the lower court ruling was in their favor.

Justice Cohen, however, disagreed with the majority on this point. In a concurring opinion he stated: "I submit the majority should have awaited a 'better opportunity' to completely change the traditional doctrine of privity of contract in the breach of warranty area," (432 Pa. at 240 and 246 A.2d at 859) thereby expressing no opinion on the privity question. It was his contention that one may not appeal from a refusal to grant a nonsuit. The necessary procedural steps must be taken before the close of the lower court trial to insure that all issues are viable on appeal.

6. See n.3, at 226-27 of 432 Pa. 217 and at 852 of 246 A.2d 848.

7. 432 Pa. at 226, 246 A.2d at 852.

8. 422 Pa. 383, 221 A.2d 320 (1966).

9. The court here noted that it was concerned with vertical privity as opposed to horizontal privity, since the issue of horizontal privity was not before the court.

10. 432 Pa. at 233, 246 A.2d at 855.

11. PA. STAT. ANN. tit. 12A, § 2-318 (Supp. 1969) states:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his *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

The relationship may be visualized as an inverted "T" where the manufacturer is at the top of the stem and the buyer directly below at the base. The final purchaser, then, is concerned as to whether or not he can sue the manufacturer for a breach of implied warranty despite the lack of a contractual relationship.

Horizontal privity, on the other hand, concerns the relationship between the purchaser and a consumer.[12] The latter is visualized in the analogy as somewhere on the base of the inverted "T." He is not a buyer, but only the consumer or user. He has not purchased the product, but perhaps he may have borrowed or rented it. It is this consumer's objective to move himself horizontally along the base of the inverted "T" until he is in the purchaser's position at the base of the stem, from which he can then hope to sue the manufacturer.

Prior to the instant case, the law on privity in Pennsylvania was exemplified by *Miller v. Preitz.*[13] There, decedent's aunt was attempting to relieve a congested condition in decedent's nose, when the vaporizer-humidifier which she was using exploded, shooting boiling water on decedent's body and causing his death. Decedent's aunt had purchased the machine from defendant, which was distributed by a second defendant, and manufactured by a third defendant. Even at this time (two years ago) the vertical privity question in Pennsylvania was in doubt. While all the justices agreed on the question of horizontal privity (a nephew who lived next door to the purchaser was part of the meaning of "family"),[14] a majority held that the action was barred due to a lack of vertical privity. Three justices[15] vigorously dissented from this latter question, indicating that it was time to eliminate such a requirement.

In dispensing with vertical privity in *Kassab,* the court relied on

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and who is injured in person by breach of the warranty. . . . (Emphasis added.)
Comment 3 to § 2-318 (not enacted into law by the Pennsylvania Legislature) states:
This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to the *buyer* who resells, extend to other persons in the distributive chain. (Emphasis added.)

12. 432 Pa. at 232, 246 A.2d at 855.

13. 422 Pa. 383, 221 A.2d 320 (1966).

14. In Hochgertel v. Canada Dry Corp., 409 Pa. 610, 613, 187 A.2d 575, 577 (1963), the court stated:
It is clear from the language used [in § 2-318 of the UCC and quoted comments thereto] 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.

15. Justices Jones and Roberts wrote dissenting opinions on the question of vertical privity, with Justice Musmanno concurring in the latter's opinion.

two arguments. Prior to Pennsylvania's adoption of section 402A of the *Restatement (Second) of Torts*,[16] an argument existed for the retention of the vertical privity requirement. At that time, in order to recover in tort for damage (as in the products liability case) negligence had to be shown. In contrast, however, under the Uniform Commercial Code, once a breach of warranty was shown suing in contract (negligence notwithstanding), the defendant was absolutely liable.[17] The *Miller* court reasoned that if vertical privity were to be dispensed with, then in any breach of warranty the manufacturer could be held liable despite a lack of negligence, while a showing of negligence would still be necessary in a tort action. Thus the rationale behind the retention of the vertical privity requirement was the prevention of this anomaly. But when Pennsylvania adopted the *Restatement* section, this situation was reversed, and the very reasoning of the *Miller* case, the desirability of achieving legal symmetry, compelled the decision in the instant case. Under section 402A,[18] the manufacturer is liable even though he is not negligent. Hence, one who sued in tort would not be bound by the vertical privity requirement.[19] The *Kassab* court has stated that "appellants' complaint . . . would have been sufficient to state a valid cause of action had it been captioned 'Complaint in Trespass.' "[20] But since the complaint has been labelled as one in assumpsit for breach of warranty, the requirement of privity would compel judgment for appellee in the present case.[21] Therefore, to prevent the mere labelling

16. Adopted in Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). See 5 DUQUESNE L. REV. 215 (1966).

17. PA. STAT. ANN. tit. 12A, § 2-715(2)(b) (Supp. 1969), states that "[c]onsequential damages resulting from the seller's breach include injury to the person or property proximately resulting from any breach of warranty."

18. RESTATEMENT (SECOND) OF TORTS § 402A (1966) states:

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

19. Plaintiff filed his complaint in assumpsit on August 28, 1963, well before the *Webb* decision.

20. 432 Pa. at 230, 246 A.2d at 854.

21. A clear example of this dichotomy is readily seen by contrasting Miller v. Preitz, 422 Pa. 383, 221 A.2d 320 (1966), with Webb v. Zern, 422 Pa. 424, 220 A.2d 853 (1966). In *Miller*, an infant killed by an exploding vaporizer was prevented from reaching the manufacturer in assumpsit for breach of warranty because of the lack of privity. In

of the complaint from changing the verdict, the court abolished vertical privity.

The court conditioned its second argument on the fact that to continue with vertical privity would be to promote the number of law suits:[22]

> No one denied the *existence* of absolute liability under the code for breach of implied warranty. But this warranty ran not to the injured party, but rather to the middleman who merely sold to the injured party, thus ignoring commercial reality and encouraging multiplicity of litigation.[23] (Emphasis in original.)

The court in *Miller* had already dealt with the instant court's first argument.[24] Although their reasoning was in agreement with the *Kassab* rationale, *Miller* refused the argument because of their belief that section 2-318[25] of the Uniform Commercial Code required privity in suits against a remote manufacturer. Since the rules governing horizontal privity are restrictive, then any question of vertical privity should be dealt with in the same manner. The instant court, however, took the view that, since section 2-318 of the Code says nothing at all with regard to vertical privity, then the general developing principles of law control. There is support from comment 3 to section 2-318,[26] even though the Pennsylvania Legislature has never enacted the comments into law.

Having reached their conclusion on the privity question, the court

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Webb, decided the same day as *Miller*, the plaintiff injured by an exploding keg of beer was allowed recovery against the manufacturer in trespass.

22. It is submitted that while the removal of the requirement of privity would seem to decrease the multiplicity of litigation, there may also be an increase. Prior to this decision, people injured under a breach of implied warranty may have refrained from suing *anyone* because (1) the seller could be reached, but he was not financially able to satisfy a large judgment against himself, (2) the manufacturer through the vertical privity requirement could not be reached, or (3) the seller has guaranteed *less* than the manufacturer had originally warranted. But since the manufacturer may now be reached, there is a possibility that litigation may in fact increase.

23. 432 Pa. at 228, 246 A.2d at 853.

24. 422 Pa. at 393, 221 A.2d at 325, where Justice Cohen, speaking for the majority, stated:

> Furthermore, we recognize the social policy considerations behind imposing strict liability in tort upon all those who make or market any kind of defective product. . . . A similar result would follow from abandoning the requirement of "privity of contract" in warranty actions.
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> However, the latter course . . . is not freely open to us. We are circumscribed by the limitations on strict liability in assumpsit set forth in the Uniform Commercial Code. The comment to the Code . . . which is the basis for the argument that the language of § 2-318 is precatory only was never enacted by the Pennsylvania Legislature.

25. See text at note 10, *supra*.

26. 432 Pa. at 232-33, 246 A.2d at 855-56.

addressed itself to the question of recoverable damages. The court below had erroneously held that there was no breach of warranty, and, therefore, had refused to hear testimony on the question of damages. However, appellants were now entitled to at least nominal damages, and the case was remanded to the lower court for further proceedings to determine whether or not the dimunition in the value of their cattle with respect to community knowledge proximately resulted from appellees' breach of warranty.

It seems that the court was anxious to review its holding in *Miller*. The privity question, as pointed out by Justice Cohen, received little attention from the litigants.[27] Only the defendants made any argument concerning the privity question at all. It seems also that an unusual procedural step was involved in allowing the question of privity to be raised on appeal.[28] This would seem to emphasize the fact that Pennsylvania has unconditionally abolished vertical privity in cases of breach of implied warranty. A review of the history of Pennsylvania law in this field shows it to have been leaning toward this result in recent years.[29]

It should be pointed out that the *Kassab* court has used primarily the same arguments in overturning vertical privity as have other jurisdictions.[30] In addition, other arguments have been advanced by the courts. In *Rogers v. Toni Home Permanent*,[31] where plaintiff's hair was injured by defendant's hair product, the Ohio Supreme Court reasoned:

> Surely under modern merchandising practices the manufacturer owes a very real obligation toward those who consume or use his products. The warranties made by the manufacturer in his advertisements and by the labels on his products are inducements to the ultimate consumers, and the manufacturer ought to be held to strict accountability to any consumer who buys the product in reliance on such representations and later suffers injury because the product proves to be defective or deleterious.[32]

27. See n.2, at 225-26 of 432 Pa. 217 and at 852 of 246 A.2d 848.
28. See note 5, *supra*.
29. For an excellent background of Pennsylvania law in this field, see Jaeger, *Privity of Warranty: Has the Tocsin Sounded?*, 1 DUQUESNE L. REV. 1 (1963).
30. Randy Knitwear v. American Cyanimid Co., 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962); Carter v. Yardley, 310 Mass. 92, 64 N.E.2d 693 (1946); Beck v. Spindler, 256 Minn. 543, 99 N.W.2d 670 (1959); Spence v. Three Rivers Builders & Masonry Supply, 353 Mich. 120, 90 N.W.2d 873 (1958).
31. 167 Ohio St. 244, 147 N.E.2d 612 (1958).
32. 167 Ohio St. at 249, 147 N.E.2d at 615-16. Prior to *Kassab*, Pennsylvania had abolished vertical privity in tainted food, drug, and cigarette cases.

Courts have been aware of the unfairness of the situation. The New York Court of Appeals has stated, in a case where a manufacturer's resin, used in the making of some clothes, rendered these clothes below their guaranteed quality:[33]

> In concluding that the old court-made rule should be modified to dispense with the requirement of privity, we are doing nothing more or less than carrying out an historic and necessary function of the court to bring the law into harmony "with modern-day needs and with concepts of justice and fair dealing."[34]

Scores of scholars have assaulted privity. Professor Walter Jaeger has concluded that:

> [T]he possibility of discovering concealed or latent defects [in manufactured products] became increasingly difficult if not virtually impossible [by the purchaser] as processing and packaging became ever more complex and the possibility of inspection dwindled to the vanishing point.[35]

Dean Prosser has commented:

> The public interest in human life, health and safety demands the maximum possible protection that the law can give against dangerous defects in products which consumers must buy, and against which they are helpless to protect themselves; and it justifies the imposition, upon all suppliers of such products, of full responsibility for the harm they cause, even though the supplier has not been negligent.[36]

The *Kassab* ruling, however, has implications other than the abolishment of vertical privity. A strong part of the court's rationale is that it wished to rid itself of the tort-contract dichotomy. However, it must be pointed out that this dichotomy still exists, at least insofar as horizontal privity is concerned. As an example, in *Hochgertel v. Canada Dry Corp.*,[37] a bartender was injured by an exploding bottle of soda water. The court held that there was no horizontal privity between the bartender-employee and his employer, who had purchased the soda

33. Randy Knitwear v. American Cyanimid Co., 11 N.Y.2d 5, 226 N.Y.S.2d 363, 181 N.E.2d 399 (1962).
34. 226 N.Y.S.2d at 370, 181 N.E.2d at 404.
35. Jaeger, *supra* note 29, at 55.
36. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1122 (1960).
37. 409 Pa. 610, 187 A.2d 575 (1963).

from the manufacturer, and thus held Canada Dry not liable in the assumpit action. If the plaintiff could sue now in tort, he would recover under the adopted section 402A of the *Restatement (Second) of Torts*, since it does not matter if "the user or consumer has not bought the product from or entered into any contractual relation with the seller."[38]

It is submitted that, although the issue of horizontal privity was not before the court in *Kassab*, it is time for the court to consider abolishing horizontal privity when the opportunity arises if they wish to entirely abolish the tort-contract dichotomy. It seems unlikely, however, that the instant court will go this far, feeling bound as they are by section 2-318 of the Uniform Commercial Code.[39] A thorough search of other jurisdictions reveals that horizontal privity has not been appreciably extended outside section 2-318. The protection under the warranty provisions has been limited to the purchaser, members of his family, and guests in his home. Scant authority extends coverage to a guest in an automobile,[40] an employee,[41] or an agent.[42]

Although the court in *Kassab* has abolished vertical privity, several problems remain. For instance, must there be a chain from the manufacturer through one or more sellers to the ultimate buyer, or can there be a break in the link? Suppose *A* manufactures a product and sells it to *B*, another seller. *B* loses it, and *C* finds it and sells it to *D*, a buyer who is injured by the defective product. Is *D* in privity with *A*? Under the rationale in the *Kassab* case, it appears likely that *D* would not recover, since there probably should be a contractual relationship in a direct chain with *A*. But following the same argument given above, if *D*, as a user or consumer of the product in our present problem, may sue in tort, it is more likely that he should be able to recover here.[43]

38. RESTATEMENT (SECOND) OF TORTS § 402A(2)(b) (1966). See note 18, *supra*, where the entire section appears.

39. See note 11, *supra*, where § 2-318 appears. It is interesting to note, as further support, the case of Marcus v. Spada Bros. Auto Service, 41 Pa. D. & C.2d 794 (1967). A passenger in a car was denied recovery in assumpsit against the seller for injuries sustained in an accident due to a blowout of a defective tire, since the Uniform Commercial Code § 2-318 does not include "guest in a car" as one entitled to privity. However, after the filing of the complaint in assumpsit, but before the trial, *Webb v. Zern* appeared in the advance reports. Plaintiff was given leave to file an amended complaint in trespass within twenty days, since it was realized that recovery may have been had under authority of *Webb v. Zern*.

40. Miles v. Chrysler Corporation, 238 Ala. 359, 191 So. 245 (1939).

41. Peterson v. Lamb Rubber Co., 54 Cal. 2d 339, 353 P.2d 575 (1960).

42. Freeman v. Navaree, 47 Wash. 2d 760, 289 P.2d 1015 (1955).

43. The Supreme Court of Pennsylvania reaffirmed the *Webb* holding in Ferraro v.

In summary, it seems that there are compelling reasons for abolishing all forms of privity unconditionally. If a manufacturer makes a defective product, he should not escape liability simply because the "proper" relationship is lacking. This would be no burden on the manufacturer in this age of insurance and general economic affluence, and it would insure a market filled with merchantable commodities.

Stephen G. Walker

CRIMINAL LAW—ARRESTS—USE OF DEADLY FORCE—The Pennsylvania Supreme Court established a rule that a private person may use deadly force to effectuate an arrest only when certain enumerated felonies have been committed, and approved the rule that an arresting party will always be criminally responsible if deadly force is used against anyone but an escaping felon.

Commonwealth v. Chermansky, 430 Pa. 170, 242 A.2d 237 (1968).

Petitioner was convicted of second degree murder as a result of a fatal shooting in front of his home. He testified that on the night in question he was awakened by a noise at about three a.m. He found a set of doors to the outside pushed open but still secured by an attached chain. He then saw an unidentified person run out of an adjacent alleyway, across a street and to a neighbor's house, where, petitioner said, "he started fixing around the windows." A car then passed and the unidentified person darted into an alleyway. Later petitioner saw the same person "monkeying around" windows of another neighbor's house. Because his own home lacked a telephone, petitioner sent his son to notify police. He then secured a rifle and stepped outside onto the doorstep. The unidentified man began to run and petitioner shouted, "Halt or I'll shoot." The man continued running and petitioner fired one shot, which was fatal. Petitioner testified that he had fired at a tree.

The instant case marks the first time a Pennsylvania appellate court has placed a limitation on the felonies for which deadly force may be used in preventing a fleeing felon's escape. It is also the first ratification by the Supreme Court of a twenty-three year old Superior Court rule

Ford Motor Co., 423 Pa. 324, 223 A.2d 746 (1966). No Pennsylvania cases have considered the exact problem above, but see RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 402A, comment *l* at 354, illustration 1 at 355 (1965).