

THE PENNSYLVANIA SUPERIOR COURT AUTHORIZES RECOVERY FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN A STRICT PRODUCTS LIABILITY ACTION**By: KIM KOCHER**

In a jurisdiction already known for its liberality in the field of strict products liability, the Pennsylvania Superior Court has just allowed a plaintiff to recover damages for negligent infliction of emotional distress in a strict products liability action. The Court's decision in *Schmidt v. Boardman Company*, 2008 Pa. Super. 203 (Sept. 2, 2008), which the defendant-manufacturer has vowed to appeal, engrafts negligence concepts onto the strict liability doctrine contrary to Pennsylvania Supreme Court precedent. The result is a dramatic expansion of a manufacturer's potential liability for harm caused by a defective product: *Schmidt* effectively exposes manufacturers to strict liability, which was previously limited to claims for physical injury, for purely emotional harm.

The Law of Strict Products Liability Before *Schmidt*

Pennsylvania adopted the strict liability theory set forth in Section 402A of the Restatement (Second) of Torts over forty years ago. See *Webb v. Zern*, 220 A.2d 853 (Pa. 1966). The strict liability theory is founded on the view that the risk of loss from injury caused by a defective product should be borne by the supplier because it is in a better position to absorb the loss. See *Azzarello v. Black Brothers Co., Inc.*, 391 A.2d 1020, 1023 (Pa. 1978). Section 402A, on its face, is limited to claims for physical harm caused by a defective product.

Since its adoption of Section 402A, the Pennsylvania Supreme Court has maintained a rigid division between negligence and strict liability concepts. In negligence, the focus is on the manufacturer's conduct. In strict liability, the focus is not on the manufacturer's conduct, but on the product itself. In contrast to a negligence claim, therefore, the plaintiff in a strict liability action may recover against the manufacturer without regard to fault. In fact, the Supreme Court has unshakably held that negligence concepts, such as foreseeability, have no place in the strict liability doctrine. See *Department of General Services v. U.S. Mineral Products Co.*, 898 A.2d 590, 602 (Pa. 2006).

To establish strict liability against a manufacturer, the plaintiff need only prove that the product, which caused harm, was unsafe for its intended use when it left the manufacturer's control. Because negligence concepts are foreign to the strict liability doctrine, the manufacturer may be held strictly liable even if it exercised all possible care in the preparation and sale of its product.

The Tort of Negligent Infliction of Emotional Distress

Apart from the tort of intentional infliction of emotional distress, which was not at issue in *Schmidt*, the Pennsylvania Supreme Court only recognizes the theory of negligent infliction of emotional distress for the recovery of damages for purely

emotional injury. For emotional injury caused by witnessing harm to another, the Court first adopted the "bystander" theory of negligent infliction of emotional distress in *Sinn v. Burd*, 404 A.2d 672 (Pa. 1979).

In *Sinn v. Burd*, the Court permitted a mother, who witnessed an automobile strike and kill her daughter, to pursue emotional distress damages in the negligence action brought against the driver on behalf of her deceased daughter. As a matter of public policy, the Court recognized that the driver should be held accountable not only for the physical harm, but also the demonstrable emotional injuries, caused by his negligence. The Court explained that it was not creating a new duty, but extending the driver's duty of care, *i.e.*, to drive in a non-negligent manner, to the bystander.

To place a limit on the scope of potential liability to bystanders, the Court applied the traditional negligence concept of foreseeability. The Court adopted parameters, borrowed from California law, for determining whether the plaintiff's emotional injury was reasonably foreseeable to the defendant: (1) whether the plaintiff was at the scene of the accident or some distance from it; (2) whether the shock resulted from a direct emotional impact upon the plaintiff from the contemporaneous observance of the accident; and (3) whether the plaintiff and accident victim were closely related.

As an extension of the tortfeasor's liability for physical harm to the direct victim of his/her negligence, the bystander-plaintiff states a viable cause of action for negligent infliction of emotional distress if, as in *Sinn v. Burd*, the three-part foreseeability test is met.

The *Schmidt* Expansion of Strict Liability to Emotional Distress Damages

Prior to *Schmidt*, no Pennsylvania Court had allowed a plaintiff, who suffers no direct physical injury caused by a defective product, to recover damages for emotional distress in a strict liability action.

Schmidt arose from a horrific accident caused by a loose hose dangling from a fire truck. While the fire company drove off in response to a call, the nozzle of the loose hose became caught under a parked car. The tension on the hose became so great that it actually lifted the car before the nozzle broke free. The hose and nozzle, described as a missile at trial, shot through the air. The nozzle struck and seriously injured two children, one of whom died from her injuries the next day. The sister of the child who died was standing next to her and witnessed the accident, but was not injured herself. The mother and sister of the other child were standing nearby and also witnessed the accident, but were not injured by the nozzle.

A strict products liability action was brought against the fire truck manufacturer. The mother and children who were not physically injured but witnessed the accident sought damages for emotional distress in the strict liability action. The jury returned a \$4.5 million verdict. The jury awarded \$1 million to the mother, \$250,000 to one child, and \$100,000 to the other child who sustained only emotional injuries.

On appeal, the truck manufacturer argued that the plaintiffs pleaded only a strict liability action and that the strict liability theory does not permit recovery for emotional distress absent a direct physical injury from a defective product. A three-judge panel of the Superior Court, with one judge concurring and dissenting, upheld the verdict because the bystanders met the *Sinn v. Burd* test. In the majority opinion, authored by the Honorable Cheryl Lynn Allen and joined by the Honorable John T. Bender, the Court rejected the manufacturer's argument by simply finding "no reason why the bystander Plaintiffs should be denied recovery on the ground that the Plaintiffs who suffered physical injury asserted a claim for products liability." The Court reasoned that the injuries complained of were a foreseeable consequence of a defect in the design and manufacture of the truck. In a dissent, the Honorable Joan Orié Melvin stated that Section 402A limits recovery to claims for physical injury caused by a defective product and that it was error for the majority to rely on negligence principles in support of the plaintiffs' claims. In response to the dissent, the majority stated that its decision reinforces the tort of "infliction of emotional distress" as a distinct and separate cause of action from the underlying strict products liability action in Pennsylvania. The Court did not expressly address the manufacturer's argument that the plaintiffs did not plead a cause of action for emotional distress.

Conclusion

By curiously avoiding the term "negligent" in describing the emotional distress cause of action, the Superior Court appears to believe that it has averted any conflict with Pennsylvania Supreme Court jurisprudence that bars the introduction of negligence concepts into strict liability actions. Regardless, however, of the Superior Court's use of neutral labels, e.g., "infliction of emotional distress" or "tortious infliction of emotional distress," there is no question that the emotional distress claim sanctioned by the Court in *Schmidt* is a claim for **negligent** infliction of emotional distress. The Court, in fact, defended the imposition of liability for emotional distress against the manufacturer on the basis that the injuries were the **foreseeable** consequence of the defect in the design of the truck.

There is also no question that the tort of negligent infliction of emotional distress is separate from the underlying cause of action for physical injury in that it is founded upon the additional elements set forth in *Sinn v. Burd*. However, contrary

to the Court's suggestion in *Schmidt*, the tort of negligent infliction of emotional distress is not an independent or free-standing cause of action. Rather, it is dependent upon or derivative of the underlying claim. In other words, if the underlying claim for physical injury fails, there can be no recovery for emotional distress damages.

In failing to discuss the argument that the plaintiffs did not plead an emotional distress cause of action, the *Schmidt* Court appeared to treat the claim as a mere element of damages, which is inconsistent with its holding that emotional distress is a separate and distinct claim from the underlying cause of action. Assuming that the plaintiffs adequately pleaded the *Sinn v. Burd* elements, the real question raised by *Schmidt* is whether an underlying cause of action based on strict liability serves as an appropriate foundation for a negligent infliction of emotional distress claim.

Where the underlying claim is based on negligence, the duty owed to the emotionally-injured bystander is a mere extension of the duty of care that the defendant owed to the physically-injured victim. Where the underlying claim is based on strict liability, however, the emotionally injured bystander obtains the benefit of the imposition of strict liability against the manufacturer regardless of fault. By allowing a strict liability claim to serve as the foundation for a negligent infliction of emotional distress claim, *Schmidt* has effectively commingled strict liability and negligence concepts.

The result is unworkable: The manufacturer, who would normally have the right to defend against a negligent infliction of emotional distress claim by, for example, showing it exercised due care, is forbidden from relying on the defense of due care in the strict liability action. The manufacturer would, in essence, be held strictly liable for the emotional harm.

The *Schmidt* Court piggybacked the emotional distress claim onto the strict liability action simply because it saw no reason why it could not. The horrific nature of the accident may have influenced the Court, but does not justify the Court's departure from settled precedent. The Superior Court is not free to enunciate new precepts of law or expand existing legal doctrines. See *Moses v. T.N.T. Red Star Express*, 725 A.2d 792 (Pa. Super. 1999).

If the Pennsylvania Supreme Court decides to review the appeal, it cannot let the Superior Court's decision stand unless it decides, for the first time as a matter of public policy, to extend the strict liability doctrine – which is limited to physical harm in the Restatement Section 402A – to the plaintiff who suffers only emotional injury. Absent such a dramatic and unprecedented expansion of the strict liability doctrine, the Supreme Court should, instead, take the opportunity to again enforce the separation between strict liability and negligence doctrines that it has steadfastly maintained for over forty years of precedent.

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