Volume 70
Issue 1 *Dickinson Law Review - Volume 70, 1965-1966*

10-1-1965

Recent Cases

RECENT CASES

PRODUCT LIABILITY — RETAIL PHARMACIST NOT LIABLE FOR INJURIES TO PATIENT CAUSED BY UNADULTERATED DRUG

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

In *McLeod v. W. S. Merrell Co.*[1] a physician prescribed for plaintiff McLeod's use a drug known as "Mer/29."[2] The drug had been manufactured by W. S. Merrell Co. and sold by the manufacturer to the defendant pharmacies to be dispensed only on the prescription of a physician. McLeod presented his prescriptions to the pharmacies and they were compounded strictly in accordance with the instructions of the physician. The drug caused severe injuries to McLeod leading to the formation of cataracts and other eye damage. McLeod brought suit against the manufacturer and the pharmacies alleging breaches of implied warranties, of (1) reasonable fitness for the intended purpose; (2) merchantability; and (3) wholesomeness or reasonable fitness for human consumption. The third count was dropped as to the retail drug stores. The lower court dismissed the complaint against the pharmacies, the trial judge taking the view that the retail pharmacist does not warrant the inherent fitness of drugs he sells on prescription.[3] On appeal, a Florida intermediate appellate court affirmed.[4] Their decision was certified to the Supreme Court of Florida on the ground that "it passes upon a question of great public interest because it affects the law of warranty relating to drugs sold by a druggist pursuant to a doctor's prescription."[5] The supreme court affirmed the decision.[6]

The question before the court was whether a retail pharmacist who properly fills the prescription of a physician with an unadul-

1. McLeod v. W.S. Merrell Co., 174 So.2d 736 (Fla. 1965).
2. Mer/29 (Triparanol) was marketed in 1960 to reduce high cholesterol levels. It was used by about 500,000 persons for a two year period before it was withdrawn from the market by the W.S. Merrell Co. because of its association with the side effects of cataracts, hair loss and dermatitis. Some 300 to 400 suits have been reportedly filed for injuries due to the use of this drug. See *Medical Tribune*, Aug. 26, 1963, p.1; *New York Herald Tribune*, Sept. 3, 1963, p.12.
3. 174 So.2d at 738.
4. McLeod v. W.S. Merrell Co., 167 So.2d 901 (Fla. 1964).
5. McLeod v. W.S. Merrell Co., 174 So.2d at 738.
6. *Ibid.*

terated drug[7] is liable to the patient-purchaser for breach of an implied warranty of fitness or merchantability if the drug produces harmful effects on such person. The purpose of this note is to determine if the court was correct in holding that the pharmacist was not liable for breach of warranty.

Historically, a recovery on a warranty theory did not require proof of defendant's negligence[8] and therefore presented a desirable remedy for the plaintiff. Contributory negligence was of little help as a defense to the seller or manufacturer-defendant.[9] Under either a negligence or warranty theory, product liability depended upon privity of contract.[10]

The landmark case of *MacPherson v. Buick Motor Co.*[11] first eliminated the requirement of privity in recovery on a negligence theory for "[items] reasonably certain to place life and limb in peril when negligently made. . . ."[12] Today a manufacturer has little insulation, by virtue of privity, to protect him against a negligently injured plaintiff.[13] When the product causing the injury is a foodstuff, privity has not been a bar to recovery.[14] Courts in dealing with food products for human consumption have found many ingenious exceptions to the privity requirement.[15]

Following logically, a state which does not require privity with respect to food and beverages would also dispense with the requirement where defective drugs for internal use[16] are concerned. Indeed, in *Gottsdanker v. Cutter Labs.*,[17] a case brought against the manufacturer of poliomyelitis vaccine, the court found

---

7. For a case involving adulterated drugs, see Campbell v. Brown, 85 Kan. 527, 117 Pac. 1010 (1911).

8. Challis v. Hartloff, 136 Kan. 823, 18 P.2d 199 (1933).

9. See Prosser, *The Assault Upon The Citadel*, 69 YALE L.J. 1099, at 1147-48 (1960).

10. For a graphic illustration and exploration of the privity requirement see Ezer, *The Impact of the Uniform Commercial Code on the California Law of Sales Warranties*, 8 U.C.L.A. L. REV. 281, at 323 (1961). See also, Note, 68 DICK L. REV. 444, 445-47 (1964).

11. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

12. *Id.* at 389, 111 N.E. at 1055.

13. Prosser, *supra* note 9, at 1103.

14. Klein v. Duchess Sandwich Co., 14 Cal.2d 272, 93 P.2d 799 (1939). For Pennsylvania food case see Cantani v. Swift & Co., 251 Pa. 52, 95 Atl. 931 (1915), where the court relied on a pure food statute regarded as declaratory of the common law. Later cases have ceased to rely on this statute, Caskie v. Coca-Cola Bottling Co., 373 Pa. 614, 96 A.2d 901 (1953).

15. See Gillam, *Products Liability in a Nutshell*, 37 ORE. L. REV. 119, 152-55 (1957), where there are listed twenty-nine "fictions, subterfuges and bold strokes" attacking the privity requirement.

16. See Dickerson, *The Basis of Strict Products Liability*, 17 BUS. L. REV. 157 (1961) wherein the author poses the question of a possible distinction in liability between an ingested drug and a drug used externally such as a nasal spray, topical lotion or suppository.

17. 182 Cal.App.2d 602, 6 Cal.Rptr. 320 (1960).

"no reason to differentiate the policy considerations requiring pure and wholesome food from those requiring pure and wholesome vaccine."[18] Does it reasonably follow that this liability imposed on drug manufacturers for breach of an implied warranty of fitness or merchantability should be extended to a retail pharmacist who properly fills the prescription of a physician with an unadulterated drug which produces harmful effects on the patient-purchaser?

Today's physician has a broad spectrum of ethical drugs[19] from which to choose in treating a patient. New drugs appear on the market at an unprecedented rate. At the same time, ethical drugs have become one of the most increasingly common products involved in tort litigation against suppliers and manufacturers.[20]

Courts have imposed liability on *retail merchants* for breach of an implied warranty of fitness or merchantability.[21] The policy which imposes liability upon a grocer selling spoiled sardines[22] and wormy spinach[23] cannot be applied to impose liability upon a *retail merchant* of drugs (pharmacist) dispensing an *unadulterated* prescription drug. The *McLeod* court easily distinguishes these cases of adulterated food from the case at bar, because there was no adulteration of the "Mer/29."[24]

An implied warranty of fitness for a particular purpose is conditioned upon the buyer's reliance on the skill and judgment of the seller to supply a commodity suitable for the intended purpose.[25] Such a warranty cannot arise with respect to the retail pharmacist, because the patient-purchaser quite obviously does not rely on the judgment of the retail pharmacist in assuming that the drug would be fit for its intended purpose. The patient puts

---

18. *Id.* at 323. See also, *The Cutter Polio Vaccine Incident: A Case Study of Manufacturer's Liability Without Fault in Tort and Warranty,* 65 YALE L.J. 262 (1955). But *cf.*, Condon, *Restatement or Reformation?*, 17 BUS. L. REV. 167 (1961).

19. Ethical drugs refers to drugs available on prescription only as distinguished from proprietary or patent drugs sold over the counter. The term "drug" is defined to include both ethical and proprietary drugs in § 201 (g) of the Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1041 (1938), 21 U.S.C. § 321 (g) (1958). A "prescription drug" is defined in § 503 (b) of the Act as one which "because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary for its use, is not safe for use except under the supervision of a practitioner. . . ." 52 Stat. 1050 (1938), 21 U.S.C. § 353(b) (1958).

20. See Rheingold, *Products Liability, The Ethical Drug Manufacturer's Liability,* 20 FOOD DRUG COSM. L.J. 328 (1965).

21. Prosser, *supra,* note 9, says that liability has been imposed on retailers in all but two or three states listing as exceptions Mississippi and Virginia.

22. Spencer v. Carl's Markets Inc., 45 So.2d 671 (Fla. 1950).

23. Food Fair Stores of Florida v. Macurda, 93 So.2d 860 (Fla. 1957).

24. 174 So.2d at 738.

25. Smith v. Burdines, Inc., 144 Fla. 500, 198 So. 223 (1940). See UNIFORM COMMERCIAL CODE § 2-315.

his reliance upon the physician who prescribes the medicament.

A further distinction between warranty liability imposed on an ordinary retail merchant and that imposed upon a pharmacist dispensing prescription drugs can be made. The furnishing of prescription drugs is not so much of a *sale*, in the usual sense of the word, as it is the rendering of a *service*.[26] In compounding any prescription, it is the service of the pharmacist which predominates in the relationship with the patient, and the transfer of personal property is but an incidental feature of the transaction.[27] The service concept of the dispensing of prescription drugs is perfectly sound when it is considered that such drugs are not offered as goods for public sale. They are not sold "over the counter;" they may only be obtained on the prescription of a physician.

Retail pharmacists should not be converted into insurers of the safety of a manufacturer's unadulterated drug by applying to them the rapidly expanding concept of strict liability without fault in an action in tort.[28] The comments to section 402 A of the *Restatement*[29] note that there is a class of *unavoidably unsafe products* which are, in the present state of human knowledge incapable of being made safe for their ordinary and intended use. Drugs are a common example of such a product.[30] The comment continues:

> The seller of such products [drugs], again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, *is not to be held to strict liability* for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.[31]

The doctrine of strict liability to the consumer upon the warranty theory has grown from considerations of public and social policy. Stronger public policy militates against the imposition of the doctrine on the retail pharmacist who dispenses a prescription

---

26. See, 2 FRUMER & FRIEDMAN, PRODUCTS LIABILITY, § 32.02[1], at 227 (1961).

27. Perlmutter v. Beth David Hospital, 308 N.Y. 100, 123 N.E.2d 792 (1954). Dibblee v. Dr. W.H. Groves Latter-Day Saints Hospital, 12 Utah 2d 241, 364 P.2d 1085 (1961). These cases held that a hospital, in supplying blood for a transfusion, was performing a service rather than selling blood.

28. Prosser, *supra* note 9, at 1112-13, where Dean Prosser lists "seven spectacular decisions" which hold that the seller of any product who sells it in a condition dangerous for use is strictly liable to its ultimate user for injuries resulting from such use, although the seller has exercised all possible care. See generally, RESTATEMENT (SECOND), TORTS § 402 A (1964).

29. RESTATEMENT (SECOND), TORTS § 402 A, comment k (1964).

30. *Ibid.*

31. *Id.* (Emphasis added.)

drug which causes side effects to a patient placed on the drug by his physician.

The best interests of society demand the continuing development of new drugs and their prescription and marketing, subject to approval by the Federal Food and Drug Administration.[32] Occasionally the scientists are wrong and their mistakes escape detection by the F.D.A., the agency established to catch such mistakes. Society and justice cannot reasonably demand that the pharmacist, who dispenses such a drug on the prescription of a physician, should be liabile to the patient injured as a result of taking this medication.

> [T]he rights of the consumer can be preserved, and the responsibilities of the retail prescription druggist can be imposed, under the concept that a druggist who sells a prescription warrants that (1) he will compound the drug prescribed; (2) he has used due and proper care in filling the prescription (failure of which might also give rise to action in negligence); (3) the proper methods were used in the compounding process; (4) the drug has not been infected with some adulterating foreign substance.[33]

LEWIS F. GOULD, JR.

32. See Rheingold, *supra* note 20, at 36 for an extensive discussion of the Federal regulations imposed upon the development and marketing of new drugs.

33. McLeod v. W.S. Merrell Co., 174 So.2d at 739.

MAGISTRATES, ALDERMEN, JUSTICES OF THE PEACE — JURISDICTION OVER ACTION OF TRESPASS ON THE CASE

McCullough v. Stanton Constr. Co.,
35 Pa. D. & C. 2d 421 (C.P. 1964).

Whether magistrates and justices of the peace have jurisdiction over actions of trespass on the case was disputed again in the recent Pennsylvania lower court case of *McCullough v. Stanton Constr. Co.*[1] when it, following the lead of a prior common pleas decision,[2] held that a plaintiff cannot bring a civil action arising from the operation and use of a motor vehicle before a magistrate, alderman or justice of the peace under section 1303 of the Motor Vehicle Code[3] when the action is one of trespass on the case. That Act reads in part:

> All civil actions for damages, arising from the use and operation of any vehicle, may, at the discretion of the plaintiff, be brought before any magistrate, alderman, or justice of the peace, in the county wherein the alleged damages were sustained.[4]

It cannot be denied that this decision is consistent with the overwhelming majority of prior cases declaring that justices of the peace have no jurisdiction over actions on the case.[5] What may be questioned, however, is whether this result accurately reflects the legislative intent behind the Motor Vehicle Code and whether the authority relied on for this decision was correct in its statutory interpretation. Obviously, the phrase "all civil actions" is broad enough to include trespass on the case as well as trespass vi et armis.[6] It would seem that compelling cause must exist for a court to find in this language a legislative intent to exclude actions of trespass on the case from the justices' jurisdiction.

Clearly, the civil jurisdiction of justices of the peace, aldermen and magistrates is limited to that extended to them by the legislature.[7] The *McCullough* case is the latest in a series of judicial explications which have interpreted these legislative grants.[8] Seen in the prespective of these preceding cases and the development of the applicable statutes, the *McCullough* decision, it is suggested,

---

1. 35 Pa. D. & C.2d 421 (C.P. 1964).
2. See Ghezzi v. Price, 26 Pa. D. & C.2d 321 (C.P. 1961).
3. PA. STAT. ANN. tit. 75, § 1303 (1960).
4. *Ibid.*
5. *E.g.*, Murphy v. Thall, 17 Pa. Super. 500 (1901); Weaver v. Kleahn, 26 Pa. County Ct. 117 (1902).
6. McClellan v. Powers, 22 Pa. D. & C. 447 (C.P. 1935).
7. Murdy v. McCutcheon, 95 Pa. 435 (1880).
8. See Comment, *Pa. J. P. Courts—Jurisdiction—Constitutional Problems*, 64 DICK. L. R. 157 (1959-60).

is questionable authority for future courts attempting to determine whether the legislature has granted justices of the peace jurisdiction where actions on the case are involved.

The Act of 1814[9] gave justices of the peace and aldermen jurisdiction of "actions of trover and conversion, and of actions of trespass" when the damage did not exceed one-hundred dollars.[10] The term "trespass" in that statute was construed to mean trespass vi et armis but not trespass on the case.[11] When the Act of 1879[12] raised the jurisdictional amount to three-hundred dollars the courts continued to find that justices of the peace could not entertain actions on the case although apparently no legislative reason for excluding such actions from the justices' realm was suggested.[13] These results rested on the procedural distinction retained in Pennsylvania practice between trespass and trespass on the case. As a form of action the term trespass had a clearly established meaning which plainly excluded actions on the case. There could, therefore, be little question of the legislature's intent when it used the word trespass in a statute referring to forms of action.

The Act of 1887[14] abolished the distinction between trespass and case *as to procedure only* according to the draftsmen of the statute.[15] Henceforth, the action of trespass was to include trespass on the case as well as trover and conversion. This abolition of the procedural distinction made it at least questionable whether justices could, by virtue of the merger, decide actions on the case. The courts held, however, that this act refers to procedure only and as such does not indicate an intent of the legislature to extend justices' jurisdiction to an area theretofore excluded.[16]

Cases construing the foregoing acts providing for the general jurisdiction of justices of the peace and the act abolishing the procedural distinction between trespass and trespass on the case, stood until 1923 as solid authority for the proposition that justices of the peace had no jurisdiction over actions on the case. In that year, however, the predecessor of the Motor Vehicle Code section construed by the *McCullough* court was enacted.[17] That statute read the same as the present Code except for jurisdictional amount and gave justices of the peace special jurisdiction over all civil actions involving the operation and use of motor vehicles wherein the damages sought did not exceed three hundred dollars. The jurisdiction granted by this act was in addition to the general

9. PA. STAT. ANN. tit. 42, § 331 (1930).
10. *Ibid.*
11. Paff v. Slack, 7 Pa. 254 (1847).
12. PA. STAT. ANN. tit. 42, § 241 (1930).
13. Moreland Twp. v. Gordner, 109 Pa. 116 (1885).
14. PA. STAT. ANN. tit. 12, § 2 (1953).
15. *Ibid.*
16. Burkhead v. Ward, 35 Pa. Super 235 (1908).
17. Pa. Laws 1923, Act 718, § 30.

grant contained in the Act of 1814 as amended. A number of courts held that the broad phrase "all civil actions" included actions formerly known as trespass on the case and thus indicated a legislative intent to expand the jurisdiction of justices of the peace to include actions on the case arising from the operation and use of a motor vehicle.[18] In the well reasoned opinion of *Campbell v. Krautheim*[19] the court said:

> [W]e find no difficulty in holding that when the legislature said 'all civil actions for damages arising from the use and operation of any motor vehicle', it meant all civil actions. . . . The considerations of convenience and of justice which may have moved the legislature to abolish the technical distinctions in suits before magistrates or justices of the peace, and which have long since outlived their value, are not far to seek. In many cases when damage is caused by a motor-car, an action before a magistrate may and should recommend itself to the injured party as the most expeditious method of obtaining compensation for his damages, when the amount involved is less than a hundred dollars.[20]

Another Pennsylvania lower court[21] found the plain meaning of the statute to extend justices' jurisdiction to trespass on the case:

> The constant tendency is to make litigation less cumbersome and to make legal remedies more readily available, and the instant court feels that the jurisdiction conferred by the plain language of the code . . . should not be changed by judicial interpretation.[22]

In 1938 the Superior Court examined this statute for the first time in *Paulson v. Eisenberg*[23] and held that any construction of the act that would confer jurisdiction on the case to justices of the peace in automobile cases only would cause the statute to violate the Pennsylvania Constitution[24] which prohibits the legislature from passing any "local" or "special" law regulating the jurisdiction of courts, aldermen, justices of the peace or other tribunals. Favoring a constitutional construction of the act, the court reasoned that a grant of jurisdiction over case solely in automobile cases would be a "special" law within the meaning of the constitution because plaintiffs in other civil actions could not, under the statute conferring general jurisdiction, bring an action on the case before a justice of the peace.[25]

---

18. Walsh v. Martin, 21 Pa. D. & C. 98 (C.P. 1934); Campbell v. Krautheim, 4 Pa. D. & C. 577 (C.P. 1924).
19. 4 Pa. D. & C. 577 (C.P. 1924).
20. *Id.* at 579.
21. Walsh v. Martin, 21 Pa. D. & C. 98 (C.P. 1934).
22. *Id.* at 100.
23. 134 Pa. Super 503, 4 A.2d 585 (1938).
24. PA. CONST. art. III, § 7.
25. 134 Pa. Super. at 508.

Much can be said in favor of the *Eisenberg* reasoning, particularly since the interpretation of the act granting general jurisdiction at the time of this decision clearly indicated that justices had no jurisdiction over case in other civil actions. It is important to remember, however, that the constitutional issue raised in *Eisenberg* hinges entirely upon a determination that the general statute conferring jurisdiction on justices of the peace denies them jurisdiction over trespass on the case. If justices have jurisdiction generally over actions on the case, the *Eisenberg* decision does nothing to disestablish their jurisdiction over vehicle actions on the case under the Act of 1923.

The Act of 1923 was amended by the Act of 1959,[26] the statute construed by the *McCullough* court. Had the situation been the same as in 1938 the *McCullough* court could have quickly made a determination based entirely on the *Eisenberg* precedent. In the intervening years, however, the statute conferring general jurisdiction on justices of the peace was amended. The Act of 1955,[27] entitled "an Act . . . enlarging the jurisdiction of aldermen, magistrates, and justices of the peace," confers jurisdiction over "all actions arising from contract, either express or implied, and of all actions of trespass [and of trover and conversion], wherein the sum demanded does not exceed [three hundred] five hundred ($500) dollars . . . ."[28]

To date only one court has directly decided whether the Act of 1955 extends the general jurisdiction of justices of the peace, aldermen and magistrates to include trespass on the case. In *Ghezzi v. Price*[29] a common pleas court held that the intent of the draftsmen of the Act of 1955 was only to increase the jurisdictional amount from three hundred to five hundred dollars and not to enlarge the jurisdiction to include actions on the case. By way of dicta the *McCullough* court echoed this result. Both courts reasoned that justices of the peace still have no jurisdiction over trespass on the case because the Act of 1955 uses essentially the same language as the Act of 1879 which had been construed many times to exclude actions on the case.[30] Yet one searches through these two decisions in vain to find a rule of construction which justifies their conclusion. The *McCullough* decision suggested that section 551 of the Statutory Construction Act,[31] authorizing past statutory and case law to be utilized in determining legislative intent, might be helpful but the court failed to elaborate.[32]

---

26. PA. STAT. ANN. tit. 75, § 1303 (1960).
27. PA. STAT. ANN. tit. 42, § 241 (Supp. 1964).
28. The Statutory Construction Act provides that the language in brackets has been deleted. PA. STAT. ANN. tit. 46, § 571 (1952).
29. Ghezzi v. Price, 26 Pa. D. & C.2d 321 (C.P. 1961).
30. McCullough v. Stanton Constr. Co., 35 Pa. D. & C.2d at 429; Ghezzi v. Price, 26 Pa. D. & C.2d at 326.
31. PA. STAT. ANN. tit. 46, § 551 (1952).
32. McCullough v. Stanton Constr. Co., 35 Pa. D. & C.2d at 428.

How persuasive is the argument that "trespass" in the Act of 1955 means the same as in the Act of 1879 because the wording in the new act is the same used in the old? The Statutory Construction Act provides that titles, headings and preambles of a law may be considered in the construction of the act, although they should not be considered to control.[33] It is to be remembered that the title to the Act of 1955 states that its purpose is to *enlarge* the jurisdiction granted justices of the peace under the Act of 1879. The marginal note reiterates this motive with the words "jurisdiction enlarged."[34] What must the legislature say that could more clearly indicate their intent to enlarge the justices' jurisdiction? The act's direct effect is to enlarge the justices' jurisdiction. Its indirect effect is to make the distinction between trespass and trespass on the case no longer applicable to justices of the peace, giving trespass and case the same merged meaning they have had before other tribunals since 1887. There is no need for the legislature to state all of the indirect effects of a statute in its preamble as the Supreme Court has said:

> There is no constitutional requirement that acts of general legislation shall give notice of all their indirect effects on existing law. . . . The Constitution requires that the title of an act shall clearly express its subject. That is notice to some extent of its direct effect, and that is as far as it is practicable to go.[35]

A judicial rule of statutory construction is that a change in language in an amendatory law indicates a change in legislative intent.[36] Both *Ghezzi* and *McCullough* note that the Act of 1955 deletes the words "trover and conversion" following the word trespass. Neither, however, commented on the significance of this exclusion.[37] There are at least two possible reasons the legislature deleted those words: either the draftsmen intended to reduce the jurisdiction of justices of the peace by excluding these actions from their realm or they were aware that the words were no longer necessary because the action of trespass, by virtue of the Act of 1887, now embodies the action formerly called trover and conversion. The first construction runs into conflict with the avowed purpose of the statute which is to "enlarge" the justices' jurisdiction. Furthermore, justices of the peace have continued unquestioned to hear trover actions since 1955.

The second construction gives recognition to the stated purpose of the act and logically follows because the act conferring

33. PA. STAT. ANN. tit. 46, § 554 (1952).
34. Pa. Laws 1955, act 817, § 1.
35. Commonwealth v. Keystone Benefits Ass'n, 171 Pa. 465, 473, 32 Atl. 1027, 1032 (1895).
36. Vince v. Allegheny Pittsburgh Coal Co., 153 Pa. Super. 333, 33 A.2d 788 (1943).
37. McCullough v. Stanton Constr. Co., 35 Pa. D. & C.2d at 428; Ghezzi v. Price, 26 Pa. D. & C.2d at 326.

general jurisdiction had not been amended since the Act of 1887. It follows, then, that if the draftsmen consciously and meticulously removed the words "trover and conversion" from the act with the understanding that these forms of action are included in the action of "trespass," they clearly intended to utilize the definition of trespass arising out of the Act of 1887. They were, therefore, aware that the action of trespass also includes trespass on the case. If they had intended to exclude case from the jurisdiction of the justices of the peace they would have added words to that effect.

The word "trespass" as a form of action is a technical term defined by the Act of 1887. The Statutory Construction Act specifically provides that technical words and phrases *shall* be construed according to their peculiar meaning.[38] In most instances the word "shall" is mandatory, thus requiring the courts to use the technical definition of trespass.[39]

The *McCullough* court seemed to suggest that section 551 of the Statutory Construction Act would apply here because the former law on a subject should be referred to in ascertaining legislative intent.[40] The trouble with applying prior case law here to determine the meaning of "trespass" is that all of the cases up to 1955 were construing an act promulgated before 1887 when the term "trespass" by statute took on a new meaning with reference to forms of action. When the Act of 1879 was enacted the action of trespass clearly did not include trespass on the case and the plethora of cases that followed so held. When the Act of 1955 was enacted, however, the action of trespass, as defined by the Act of 1887, clearly included trespass on the case and the draftsmen indicated their awareness of the new meaning by striking the words "trover and conversion." To apply prior cases here to ascertain the meaning of "trespass" would be to turn one's back on the Act of 1887 and the draftsmen's careful deletion of the words "trover and conversion." Furthermore, section 551 of the Statutory Construction Act is intended to apply "when the words of a law are not explicit."[41] It seems that the definition of trespass contained in the Act of 1887 is quite clear. Finally, even if section 551 were to apply, the former law test is only one of seven tests suggested for determining legislative intent and no one should be viewed as existing in a vacuum.[42]

It would seem, therefore, that a fair effort to reach a conclusion regarding legislative intent in the Act of 1955 must be based on something more substantial than the mere fact that the act repeats words used in the Act of 1879. The application of a few

38. PA. STAT. ANN. tit. 46, § 533 (1952).
39. Kuzman v. Kamien, 139 Pa. Super. 538, 12 A.2d 471 (1939).
40. McCullough v. Stanton Constr. Co., 35 D. & C.2d at 428.
41. PA. STAT. ANN. tit. 46, § 551 (1952).
42. *Ibid.*

established rules of statutory construction indicates that the legislature's intent was to enlarge the justices' jurisdiction to include trespass on the case. The preamble of the act, the exclusion of the words "trover and conversion," and the conscious use of a technical term all support this conclusion. It is suggested, therefore, that the basis of the decision in *McCullough* is incorrect. If, under the Act of 1955, justices of the peace have jurisdiction over actions of trespass on the case, it follows that the constitutional objections of the *Eisenberg* case have no application to section 1303 of the Motor Vehicle Code of 1959.

GEORGE COLE