that period, then the statute of limitations did not begin to run until the failure on July 7, 1981. Therefore, in this case, when the statute of limitations began to run, as with the warranty, would be a question for the jury. *Smith v. Bell Telephone Company of Pennsylvania,* 397 Pa. 134, 141, 153 A.2d 477, 481 (1959).

It would be incredulous to conclude that where a defect manifests itself during an express warranty period, the statute of limitations could run earlier to bar a suit on the claim under the warranty. The Uniform Commercial Code recognizes this and provides in §2725(b), 13 Pa. C.S.A. §2725(b), that:

> "... where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered."

As indicated earlier, the defect occurred on July 7, 1981, and the plaintiff filed a praecipe for issuance of a writ of summons in trespass and assumpsit on June 21, 1983, within the statute. Pa.R.C.P. 1007; *Benn v. Linden Crane Corp.,* 370 F. Supp. 1269, 1278 (E.D.Pa. 1973).

As to Count V, alleging economic losses caused by negligent design, manufacture and production, plaintiff's position is that this is a simple negligence case. The claim is not one for strict liability. It is not a claim on a warranty. A warranty count is included elsewhere in the complaint.

The issue in Borg-Warner's motion for summary judgment as to Count V is whether a negligence count may stand. In *Industrial Uniform Rental Company, Inc. v. International Harvester,* Pa. Super. , 463 A.2d 1085 (1983), the court held that a case like this is not one for strict liability. The Court discussed the difference in legal theories between strict liability under Section 402A of the Restatement (Second) of Torts and a breach of warranty action under the Uniform Commercial Code, 13 Pa.C.S.A. §2714, and states that the plaintiff's cause of action is in breach of warranty.

We are asked by Borg-Warner to conclude that *Industrial Uniform* and other cases signals a trend in our state's courts to submit all pure economic loss cases to the exclusive realm of the Uniform Commercial Code. If that trend is the law, then a common law negligence count in this action would be inappropriate.

We are immediately confronted by §1103 of the Uniform Commercial Code, 13 Pa.C.S.A. §1103, which declares that unless displaced by the particular provisions of the code, the principles of law and equity shall supplement its provisions. See also *Carpel v. Saget,* 326 F. Supp. 1331, 1333 (E.D.Pa. 1971) and *Skeels v. Universal C.I.T. Credit Corp.* 335 F.2d 846 (3rd Cir. 1964). In the latter case under an earlier version of the Commercial Code, 12A P.S. §1-103, where the finding was that defendant had destroyed plaintiff's business by willful tortious conduct, the court applied equitable and estoppel principles. While the current version of the Commercial Code does not mention the common law tort specifically, it does say that the principles of law, if they are not displaced, apply. We can find nothing in the Commercial Code displacing common law negligence.

Coming to that conclusion, it is difficult for us to conclude that *Industrial Uniform* and the precedents discussed by the court in that case, make it clear that the law of Pennsylvania is that the Commercial Code should apply here to the exclusion of the common law. Since that is so, we are not disposed to grant summary judgment.

ORDER OF COURT

November 2, defendant's, York Division of Borg-Warner Corporation, motions for summary judgment to Count IV and Count V of plaintiff's complaint are denied.

COMMONWEALTH V. SOUDERS, C.P. Fulton County Branch, No. 29 of 1984

Criminal Law - Merger of Offenses - Involuntary Deviate Sexual Intercourse

1. The test of whether one criminal offense merges into another is whether one crime necessarily involves the other.

2. Indecent assault and indecent exposure do not merge where the exposure occurs after the assault.

3. The offenses of indecent assault and corruption of minors merge.

4. Corruption of minors merges with involuntary deviate sexual intercourse where the corruption of a minor is the result of the intercourse.

JAMES M. SCHALL, District Attorney, Counsel for Commonwealth

JILL A. McCRACKEN, ESQ., Counsel for Defendant

OPINION AND ORDER

EPPINGER, P.J., November 21, 1984:

Larry Souders, defendant, was found guilty by a jury of involuntary deviate sexual intercourse, corruption of a minor, indecent assault and indecent exposure, all involving one 15-year-old boy. In general motions for a new trial and in arrest of judgment, he argues that the evidence was insufficient to sustain the verdicts of guilty and that they were against the weight of the evidence. He also contends that all three lesser offenses, corruption of minors, indecent assault and indecent exposure merge with involuntary deviate sexual intercourse and that he can only be sentenced on the last.

As to the second argument, we agree. See *Commonwealth v. Rhodes,* Pa. Super. , 481 A.2d 610, 611 (1984). It is clear that the offenses of indecent assault and corruption of minors merge. *Commonwealth v. Watson,* Pa. Super. , 457 A.2d 127, 128 (1983). The reasoning of *Commonwealth v. Stafford,* 307 Pa. Super. 287, 283, 453 A.2d 351, 353 (1983) which holds that corruption of a minor is a lesser included offense of statutory rape and therefore merged into a statutory rape conviction supports a conclusion that corruption of minors merges with involuntary deviate sexual intercourse where the corruption of a minor is the result of the intercourse.

Our courts have pointed out that indecent assault and indecent exposure do not merge where the exposure occurs after the assault. *Commonwealth v. Sayko,* 14 D&C3d 411, 414-415 (Montg. 1978). However, that is not our case. As a review of the facts that follow will show, the defendant here had anal intercourse with the victim. A part of that act involved the defendant exposing himself and occurred as a part of the deviate sexual intercourse. The second act could not have occurred without the first, and this constitutes one crime. The test of whether one criminal offense merges into another is whether one crime necessarily involves the other. *Commonwealth v. Clark,* 238 Pa. Super. 444, 449, 357 A.2d 648, 651 (1976), citing *Commonwealth ex rel. Mosczyaski v. Ashe,* 343 Pa. 102, 21 A.2d 920 (1941).

As we indicated, defendant's post trial motions were boiler plate. In *Commonwealth v. Holmes,* Pa. Super. , 461 A.2d 1268, 1270 (1983) a majority of the court held that effective sixty days from the date the opinion was filed (June 10, 1983) such post-trial motions would preserve no issues for appellate review unless they go on to specify in what respect the evidence was insufficient or why the verdict was against the weight of the evidence. [1]

However, in *Commonwealth v. Santana,* Pa. Super. , 468, A.2d 488, 491 (1983), the Superior Court modified *Holmes,* stating that boiler plate motions preserve issues if a memorandum raising the issues is filed and the trial court accepts and considers the merit of the assignments of error without objection, citing *Commonwealth v. Grace,* 473 Pa. 542, 375 A.2d 721, (1977). Here counself for the defendant has filed a thorough memorandum in support of the motions, stating in what manner the evidence was deemed to be insufficient and how the verdict was construed as against the weight of the evidence. We will consider the motions.[2]

After reviewing the record and the transcribed notes of testimony in the light most favorable to the Commonwealth, *Commonwealth v. Meadows,* 471 Pa. 201, 205, 369 A.2d 1266, 1268 (1977), we are convinced that the evidence supports the verdict of guilty of involuntary deviate sexual intercourse.

On the evening of October 28, 1983, the boy and his 15-year-old cousin made plans with Souders, the defendant, to go to Souder's home the next day to cut firewood.

That Saturday morning the boy went to his cousin's house shortly before 9:00 o'clock a.m. They watched television for a time and then went to Souder's trailer. At that time Souders was

[1] The opinion in *Holmes* was referred to by the Supreme Court criminal procedure rules committee in the publication of its proposal to amend Pa.R.Crim.P. 1123 to add that such motions must state specifically and with particularity the grounds relied upon, 478 A.2d XLVII and that the effect of the proposed rule would be to codify *Holmes.*

[2] To do otherwise would invite a Post Conviction Hearing Act proceeding by the defendant which would only prolong the matter of the review of the defendant's contentions.

preparing to go to town, and the boys went with him, returning about 11:00 o'clock a.m. For the next hour the three of them watched wrestling on television in the living room of Souder's trailer. Around noon, Souders called the boy into the back bedroom, and had him take off his clothes and lie face down on the bed, whereupon Souders had anal intercourse with the boy. About half an hour later, the boy returned to the living room where his cousin, who had remained, was still watching television. In the living room, Souders gave the boy five dollars.

After this, Souders drove the boys to his father's house where they picked up some wood to repair a bridge on his lane. They returned to work on the bridge for about twenty minutes, then Souders took the two boys to the Valley Treat Restaurant and finally, around 3:00 o'clock p.m., drove them to the boy's grandmother's apartment at the Fulton Terrace Apartments.

Souders had another version of the events. That Saturday morning, according to his evidence, he got up between 9:30 and 10:30, then his son Brian arrived. Relatives, including his children, brother, and sister-in-law, came in and out of the home until noon. The defendant and his brother worked on the bridge for about fifteen minutes. Then after getting mail in McConnellsburg, he, his brother and sister-in-law went to the Chambersburg Hospital to visit Souder's father, arriving about 1:00 o'clock p.m. Witnesses to support defendant's version testified that neither the boy nor his cousin were present at defendant's trailer that day.

Souder's contention is that since his evidence exonerates him, he cannot be convicted. A conflict of testimony, as is presented in this case, does not render the evidence insufficient. *Commonwealth v. Stephany,* 228 Pa. Super. 184, 187, 323 A.2d 368, 369. Rather it creates an issue of credibility properly left to the jury, which is free to believe all, part or none of the evidence it hears, *Commonwealth v. Arms,* 489 Pa. 35, 39, 413 A.2d 684, 686 (1980), and the court will not disturb these findings absent manifest error. *Id.*

Souders further argues that the crime of involuntary deviate sexual intercourse, 18 P.S. §3123, involves coercion as an essential element and the evidence is not sufficient to find that the boy did not consent to defendant's acts. This is not a correct statement of the law because §3123(d) makes it a crime to engage in deviate sexual intercourse with another person who is less than sixteen

years of age. In addition, Richard testified he did not resist or call for help because he was afraid. See *Commonwealth v. Tuck,* 169 Pa. Super. 35, 38, 82 A.2d 288, 290 (1951); *Commonwealth v. Doyle,* 275 Pa. Super. 373, 379, 418 A.2d 1336, 1339 (1979).

Whether a verdict is against the weight of the evidence sufficiently to warrant an arrest of judgment or a new trial is addressed to the sound discretion of the trial court. *Commonwealth v. Fields,* Pa. Super. , 464 A.2d 375, 380 (1983). Here, after a review of the entire record, *Commonwealth v. Meadows,* supra, we conclude the evidence is sufficient to sustain the verdict.

ORDER OF COURT

November 21, 1984, the motions for a new trial and in arrest of judgment are denied, and defendant will be sentenced only on the crime of involuntary deviate sexual intercourse, the other charges having merged into that crime. A presentence investigation report shall be prepared and filed by the Probation Office of Fulton County, and the defendant shall appear before the Court for sentencing on December 4, 1984, at 9:30 a.m. in the Fulton County Court House, McConnellsburg, Pennsylvania. A copy of this Order shall be a sufficient warrant for the Sheriff of Fulton County to remove the defendant from the Bedford County Prison to be brought before the Court for sentencing.

ARMSTRONG V. SHEARER, C.P. Franklin County Branch, A.D. 1984 - 87

Real Property - Sale - Failure to Disclose Defect - Measure of Damages

1. Pennsylvania law distinguishes between those injuries to property which are permanent and those which are remedial.

2. Where injury is permanent, depreciation in value is the measure of damage.

3. Where injury can be easily remedied, the cost of repair is the measure of damages.

4. The measure of damages for failing to disclose an inadequate well is the cost of drilling a new well, the pump and necessary piping.

Gregory L. Kiersz, Esq., Counsel for Plaintiffs