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Torts

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TORTS

I. STRICT TORT LIABILITY IN PRODUCTS LIABILITY ACTIONS

In products liability actions, there is a significant modern trend toward acceptance of the doctrine of strict liability in tort.[1] In South Carolina, however, the applicability of strict tort liability in products liability cases is ambiguous because the supreme court has not had occasion to address this issue in recent years.[2] The federal district court in South Carolina has thus found itself in an untenable position: it must either anticipate the supreme court's decision in the area and involve itself in complex problems of federal/state comity,[3] or it must refuse to apply the widely accepted doctrine of strict liability. This dilemma is illustrated by the confusion and conflict among federal court decisions in this jurisdiction during the past year. Before a consideration of these decisions, the position of the South Carolina Supreme Court should be examined.

The attitude of the South Carolina Supreme Court is best

1. The jurisdictions which have adopted the strict liability approach of section 402A of the RESTATEMENT (SECOND) OF TORTS include the following: Alaska, Arizona, California, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Washington, and Wisconsin. For text of section 402A, *see* note 9 *infra*.

2. The relatively few products liability cases which have come before the South Carolina Supreme Court have been actions based upon traditional negligence principles rather than upon implied warranty. None has been brought on the theory of strict tort liability. The cases of Springfield v. Williams Plumbing Supply Co., 249 S.C. 130, 153 S.E.2d 184 (1967), and Rogers v. Scyphers, 251 S.C. 128, 161 S.E.2d 81 (1968), both decided on demurrers, referred to implied warranty.

3. *See, e.g.*, Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Brown v. Goodyear Tire & Rubber Co., Civil No. 72-782 (D.S.C., filed Dec. 13, 1973). Judge Hemphill, in McHugh v. Carlton, Civil No. 73-1567 at 17, n.9 (D.S.C., filed Jan. 31, 1974), stated the problem as follows:

> The question of whether South Carolina *will, eventually*, adopt the doctrine of strict liability as the law of the State has given this court grave concern. Convinced that South Carolina has not done so, and having no desire to preempt South Carolina on the issue, this court has, nevertheless, discussed the question with various members of South Carolina's trial bench, in particularly the scholarly judge of the Second South Carolina Circuit who favors strict liability and whose research has been made available to this court. This court is inclined to agree with his conclusions that strict liability is the fairest doctrine, but until the Supreme Court of South Carolina so proclaims, under the Erie doctrine (cite omitted), this court must accept South Carolina's failure to adopt strict liability as governing this court's decisions on the issue of the doctrine's application to South Carolina cases whether in state or federal court.

But see note 44 *infra* and accompanying text.

indicated by the 1967 decision of *Springfield v. Williams Plumbing Supply Co.*[4] In this case the court recognized the trend toward a more liberal approach with regard to establishing liability for the manufacture and sale of defective products. The issue under consideration, a novel one in this jurisdiction,[5] was whether an action could be maintained on the theory of implied warranty in the absence of privity.[6] The supreme court explicitly confined its holding to the determination that the sufficiency of the plaintiff's allegations of breach of implied warranty were not to be decided on demurrer. The limited nature of the holding should not, however, be taken to minimize the importance of the court's indication of its tentative "leaning" in the area of products liability.[7] In discussing the recent trend toward abandoning the privity requirement in products liability actions, the court acknowledged that various theories have been advanced by courts in support of such abandonment, and "at least some of them"[8] were adopting the strict liability approach of section 402A of the Restatement (Second) of Torts.[9] The court further asserted that many judicial decisions have recognized the need to depart from a strict require-

4. 249 S.C. 130, 153 S.E.2d 184 (1967).

5. The defendants appealed from a refusal of the trial judge to grant a demurrer predicated on lack of privity. They considered Odom v. Ford Motor Co., 230 S.C. 320, 95 S.E.2d 601 (1956), a case requiring privity in an implied warranty action, as dispositive of the issue. The supreme court factually distinguished *Odom* on the ground that only economic losses because of the failure of the tractor to perform adequately were involved, as opposed to serious personal injuries in *Springfield*. This issue is now moot in light of S.C. CODE ANN. § 10.2-318 (Spec. Supp. 1966), which abolished the privity requirement for implied warranty.

6. *See* notes 10 and 20 *infra* and accompanying text.

7. Although distinguishable as being brought under the Pure Food & Drug Act (*see* p. 360 *infra*), the extent to which the supreme court went in assuming a causal connection in Miller v. Atlantic Bottling Corp., 259 S.C. 278, 191 S.E.2d 518 (1972), a case involving a soft drink containing deleterious matter, indicates the degree of accountability to which the court is willing to hold a manufacturer of a "defective" product.

8. 249 S.C. at 136, 153 S.E.2d at 187.

9. RESTATEMENT (SECOND) OF TORTS § 402A (1965) (hereinafter section 402A) 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.

ment of privity[10] in products liability cases, and that many legislatures, including that of South Carolina, have done so through the adoption of various versions of the Uniform Commercial Code.[11] At the time of the *Springfield* decision the UCC had been adopted but was not yet in effect in South Carolina.[12] Thus, the court was understandably unwilling to construe the effect of its applicable provisions. Another reason for its reluctance to say more than absolutely necessary was the recognition that "the whole field of products liability law is still in a state of flux and development."[13] Four years after the *Springfield* decision, the Fourth Circuit in *Gardner v. Q.H.S.*[14] described the law of products liability in South Carolina as an amalgam of negligence and implied warranty. The court found the UCC implied warranty's imposition of liability without fault to be applicable in that case.[15] The court relied on sections 388 and 395 of the Restatement (Second) of Torts in asserting that:

> [T]he law has now reached the stage of development that a supplier and manufacturer of a chattel are liable to all whom they should expect use the chattel or be endangered by its use if (a) they know or have reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, (b) they lack reason to believe the user will realize the potential danger, and (c) they fail to exercise reasonable care to inform of its dangerous condition or of the facts which make it likely to be dangerous.[16]

Both the theory of negligent failure to warn set forth above and

10. Without the requirement of privity, liability based upon implied warranty differs very little from strict tort liability. *See* note 20 *infra* and accompanying text.

11. The particularly applicable UCC provisions are found in S.C. CODE ANN. §§ 10.2-314 and 10.2-318 (Spec. Supp. 1966). Section 10.2-314 provides an implied warranty of merchantability for the ordinary purpose for which goods are used. Section 10.2-318, which abolishes the requirement of privity, states:

> A seller's warranty whether express or implied extends to any natural person who may be expected to use, consume or be affected by the goods and whose person or property is damaged by breach of the warranty. A seller may not exclude or limit the operation of this section.

See note 25 *infra* and accompanying text.

12. The UCC was adopted in Jan. 1966, to be effective Jan. 1, 1968. *See* S.C. CODE ANN. § 10.10-101 (Spec. Supp. 1966).

13. 249 S.C. at 137, 153 S.E.2d at 187.

14. 448 F.2d 238 (4th Cir. 1971).

15. Specifically applicable was S.C. CODE ANN. § 10.2-314 (Spec. Supp. 1966), which provides an implied warranty of merchantability and fitness for the ordinary purpose for which goods are sold.

16. 448 F.2d at 242.

the doctrine of implied warranty and merchantability were considered appropriate causes of action.

The *Gardner* court cited as persuasive *Chestnut v. Ford Motor Co.*,[17] a Fourth Circuit case arising under the law of Virginia. In *Chestnut*, the court found that it is primarily one element which distinguishes negligence liability from implied warranty and strict tort liability[18]—the requirement that a plaintiff prove a defect to be the result of lack of due care by the manufacturer.

> The standard of safety of goods imposed on the seller or manufacturer of a product is essentially the same whether the theory of liability is labelled warranty or negligence or strict tort liability: the product must not be unreasonably dangerous at the time that it leaves the defendant's possession if employed in the manner in which it was intended to be used . . . .[19]

Thus, the *Gardner* court, in relying upon *Chestnut*, implicitly recognized the essentially similar nature of liability predicated on the tort theory of strict liability and liability based on the contractual theory of implied warranty.

The fundamental similarity of the two theories of liability has been repeatedly recognized, especially since the demise of the privity requirement in implied warranty.[20] Justice Traynor, in *Greenman v. Yuba Power Products, Inc.*,[21] observed that:

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17. 445 F.2d 967 (4th Cir. 1971).

18. As stated by the court in *Chestnut*, the other major differences in the theories of liability lie in the defenses available to each.

19. 445 F.2d at 968.

20. Although there are some distinctions in liability under section 402A and under UCC implied warranty, the two theories are becoming increasingly similar as case law develops in the area. Some courts have explicitly considered the two doctrines indistinguishable. *See, e.g.*, Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433, (1972). Others have by implication considered them equivalent. *See, e.g.*, Putnam v. Erie City Mfg. Co., 338 F.2d 911 (5th Cir. 1964).

As one well-known expert in the field of products liability and torts has stated, "the action for breach of warranty (in the non-privity situation) already seems to be fading into the action for strict liability, with the warranty terminology and legal implications being elided." Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 850 (1973). This law review article provides an excellent analysis of the developing law of products liability. For other articles exploring the nature of strict liability and or implied warranty in products liability actions, *see generally, e.g.*, Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 STAN. L. REV. 974 (1966); Kessler, *Products Liability*, 76 YALE L.J. 887 (1967); Speidel, *The Virginia "Anti-Privity" Statute: Strict Products Liability under the Uniform Commercial Code*, 51 VA. L. REV. 804 (1965); Titus, *Restatement (Second) Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713 (1970).

21. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

> Although in [products liability] cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort.[22]

According to Justice Traynor, "[t]he remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales."[23] It was noted in a recent California products liability decision that until *Greenman* the doctrine of strict liability was imposed by extension of the warranty doctrine.[24]

The South Carolina legislature has effectively accomplished imposition of strict liability through its abolition of the privity requirement. In its adoption of the UCC, the legislature of this state elected a version of section 2-318 which closely resembles Alternative C, the most liberal of the alternatives with regard to the privity requirement. According to the drafters of the UCC, this alternative was drawn to reflect the trend of recent decisions as indicated by section 402A of the Restatement (Second) of Torts.[25] The Fourth Circuit has tacitly recognized strict tort liability to be appropriate in *Grayson v. Chrysler Corp.*[26] and *Ussery v. Federal Laboratories, Inc.*[27] Most of the federal district judges have, nevertheless, refused to apply strict tort liability because the South Carolina Supreme Court has not yet affirmatively recognized it to be the law of this state.

The *Ussery* decision provides an excellent illustration of the confused status of strict liability as a basis for recovery in products liability actions in South Carolina.[28] Ussery sued Federal

22. 59 Cal. 2d at 61, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citations omitted).

23. *Id.*

24. Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972).

25. UNIFORM COMMERCIAL CODE § 2-318, Comment 3. It must be noted, however, that the South Carolina version differs from Alternative C in two respects: first, it applies only to natural persons (not to corporations); and second, it extends only to personal and property damage (not to commercial losses). The South Carolina provision combines aspects of Alternative B and Alternative C.

26. Civil No. 73-1099 (4th Cir., filed Sept. 14, 1973) (mem.).

27. Civil Nos. 72-1679 and 72-1680 (4th Cir., filed Dec. 19, 1973) *See* p. 342 *infra.*

28. Another interesting aspect of the case is the Fourth Circuit's reversal of the trial judge's refusal to charge contributory negligence and assumption of risk. Judge Winter's

Laboratories [hereinafter Federal], the manufacturer of a "blast-type tear gas billy," for personal injuries, including complete loss of sight, suffered as a result of a defective tear gas gun. The injuries occurred while the plaintiff was an inmate in the South Carolina Maximum Detention Retraining Center. In an attempt to restrain the plaintiff from wrecking kitchen equipment and scuffling with a prison guard, the warden fired the tear gas billy-gun at him. The complaint asserted causes of action based on negligence, implied warranty, and strict liability, but the parties agreed to try the case under the theory of strict liability.[29] The jury awarded Ussery a total of $600,000, including actual damages of $175,000 and punitive damages in the amount of $425,000. A remittitur of $75,000 was ordered by the court. Federal appealed both the refusal of the trial court to direct a verdict and the denial of its motion to set aside the judgment, while Ussery appealed the remittitur. A majority of the three-judge panel held that the trial court committed reversible error in rejecting seven instructions proposed by Federal.[30]

The theory of strict liability advanced by the plaintiff was that set forth in section 402A.[31] Ussery alleged that Federal was

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dissent is especially convincing in its discussion of the nature of those defenses. As he noted, the majority of the court simply ignored the fact that:

> it is generally recognized that the plaintiff must be negligent with respect to or assume *the risk created by defendant's conduct*. Failure to use care to perceive or avoid *some other risk* will not bar recovery. Civil Nos. 72-1679 and 72-1680 at 30.

In accord with section 496D of the RESTATEMENT (SECOND) OF TORTS, the plaintiff does not assume a risk of harm arising from defendant's conduct unless he knows the existence of and understands the nature of the risk involved. A similar position with regard to contributory negligence is espoused in section 468 of the RESTATEMENT. This section provides that a plaintiff's failure to exercise reasonable care for his own safety is no bar to recovery "unless his harm results from one of the hazards which make [sic] his conduct negligent." In *Ussery*, the plaintiff did, of course, assume a risk of harm from lawful efforts of guards to subdue him by becoming involved in an altercation. He did not, however, assume the risk of being permanently blinded by a defectively designed tear gas gun.

29. Civil Nos. 72-1679 and 72-1680 at 2, n.1.

30. The seven rejected instructions, too lengthy to set out in full in this article, concerned the following: (1) permissible inferences from the fact that the accident occured; (2) defendant's action as proximate cause of the injury; (3) necessity of warning; (4) assumption of risk; (5) contributory negligence; (6) foreseeability by manufacturer of abnormal use of product; and (7) obligation of inmate to obey prison official's disciplinary order.

In his dissent, Judge Winter asserted that four of the proposed instructions (Nos. 1, 2, 3, and 6 above) were substantially incorporated into the district court's charge, that two were improper under the evidence of the case (Nos. 4 and 5 above), and that one (No. 7 above) was irrelevant as a matter of law.

31. *See* note 9 *supra*.

engaged in the business of making and selling tear gas guns, that he was a "user," and that his injury was a result of a defective product. He also asserted, using the language of implied warranty, "that the defect consisted of an unreasonable danger in the gun for the purpose for which the defendant knew it was purchased."[32] The defendant set forth two defenses to the plaintiff's cause of action: first, that the injury was not the result of a defective product, but was in fact the result of misuse of the product; and, secondly, that by his own conduct, the plaintiff had contributed to the altercation and had thereby assumed the risk of bodily injury.

Although the case was tried on the theory of strict liability, Judge Blatt's charge was not clearly based upon that doctrine, but rather upon the theory of South Carolina products liability law as interpreted in *Gardner v. Q.H.S.*[33] This writer is in agreement with Judge Winter's conclusion in his dissenting opinion that the case was submitted by the district court to the jury upon "an ambiguous theory of defendant's liability."[34] Judge Winter, the author of the *Gardner* opinion, explained in his dissent that under the *Gardner* test, the "theories of negligence and implied warranty coalesce."[35] Nevertheless, the majority of the court in *Ussery* implicitly assumed throughout the opinion that the doctrine of strict liability in tort[36] as set forth in section 402A is appropriate in South Carolina. In his dissent, Judge Winter noted that both parties agreed that strict liability will be adopted by the South Carolina Supreme Court when it has the opportunity to do so.

Even though the *Ussery* decision might initially appear to signify a recognition of the application of strict tort liability for defective products in South Carolina, the issue is not by any means settled. A petition for rehearing en banc has been filed with the Fourth Circuit. Also, prior to *Ussery*, the Fourth Circuit in *Grayson v. Chrysler Corp.*[37] had rather summarily affirmed per curiam a district judge's[38] decision allowing a cause of action

32. Civil Nos. 72-1679 and 72-1680 at 4.

33. *See* p. 338 *supra*; *see also* Civil Nos. 72-1679 and 72-1680 at 7-8.

34. Civil Nos. 72-1679 and 72-1680 at 27 (dissenting opinion).

35. *Id.* at 28.

36. *Id.* at 2, n.1, 3, 4, 12, 13. The majority stated that "[w]ithout objection the case was tried on the theory of strict liability" as set forth in the RESTATEMENT (SECOND) OF TORTS § 402A.

37. Civil No. 73-1099 (4th Cir., filed Sept. 14, 1973) (mem.).

38. *Id.* (Judge Blatt).

based on what appears to have been the theory of strict liability in tort. Even after that affirmance, at least two other district judges[39] refused to recognize the doctrine as applicable in South Carolina. In *Brown v. Goodyear Tire & Rubber Co.*,[40] Judge Simons noted the Fourth Circuit's affirmance of *Grayson*, but stated that "[t]he reasoning of the Court of Appeals cannot be determined from the short decision, and nothing therein indicated that the Fourth Circuit held that South Carolina has adopted the doctrine of strict liability."[41] Just as the *Grayson* case was not dispositive of the issue, neither is *Ussery*. The reasoning of the majority opinion is rather ambiguous, leaving much room for interpretation by the district judges. The fact that the question of strict liability remains unresolved is evidenced in the January, 1974, decision of *McHugh v. Carlton*.[42] In that opinion, Judge Hemphill stated unequivocally that "[u]ntil the South Carolina Supreme Court speaks affirmatively on the subject of strict liability, this court will continue to follow its decision . . . that such a rule is not applicable in [South Carolina]."[43]

The approach the Fifth Circuit adopted under similar circumstances appears more logical. In *Putnam v. Erie City Manufacturing Co.*,[44] the court anticipated the Texas Supreme Court position in the area of products liability. In considering the "Erie problem," the court adopted the following policy:

> The court is forced . . . to look to "all available data," for example, "to such sources as the Restatements of Law, treatises and law review commentary, and the majority rule," keeping in mind that it must "choose the rule which it believes the state court, from all that is known about its methods of reaching decisions is likely in the future to adopt (citations omitted)."[45]

The *Putnam* court, although concerned with the abolition of the privity requirement, considered that issue determinative of the application of strict tort liability. In view of the *Springfield* decision and the legislative abolition of privity through the adoption of a liberal version of section 2-318 of the UCC, the *Putnam*

39. Bass v. Harbor Light Marina, Inc., Civil No. 73-1301 (D.S.C., filed Dec. 17, 1973) (Judge Hemphill) and Brown v. Goodyear Tire & Rubber Co., Civil No. 72-782 (D.S.C., filed Dec. 13, 1973) (Judge Simons).

40. Civil No. 72-782 (D.S.C., filed Dec. 13, 1973).

41. *Id.* at 11.

42. Civil No. 73-1567 (D.S.C., filed Jan. 31, 1974).

43. *Id.* at 17.

44. 338 F.2d 911 (5th Cir. 1964).

45. *Id.* at 917.

approach should be definitively adopted by the Fourth Circuit in order to eliminate any question as to the applicability of the doctrine of strict tort liability in South Carolina.†

II. NEGLIGENCE, PROXIMATE CAUSE AND CONTRIBUTORY NEGLIGENCE

The South Carolina Supreme Court during 1973 considered and came to opposite conclusions in two very similar cases involving the jury's function as it relates to negligence, proximate cause and contributory negligence. *Wilson v. Marshall*[46] and *Odom v. Steigerwald*[47] involved actions to recover the damages for personal injuries sustained in intersectional automobile collisions. According to the uncontradicted evidence, the defendant's testate in *Wilson* failed to stop her automobile at an intersection, driving directly into the path of the plaintiff's automobile, which was traveling on the dominant highway. Similarly, in *Odom* the defendant allegedly failed to yield the right of way as he drove his automobile from a side street into the street on which the plaintiff was traveling. In both instances, the defendants asserted contributory negligence as a bar to plaintiffs' recovery, such assertions being based primarily on allegations that plaintiffs were driving at excessive rates of speed and that they failed to keep a proper lookout.

In *Wilson*, the supreme court found the existence of a viable jury issue and thus reversed the trial court's grant of plaintiff's motion for directed verdict. Conversely, the court in *Odom* reversed the trial court's refusal to grant plaintiff's motion for directed verdict.[48] An examination of the facts in *Wilson* and *Odom* is not particularly helpful in reconciling the two cases, but a review of the decisions in light of *Horton v. Greyhound Corp.*[49] is valuable in analyzing the court's approach. In *Horton*, the supreme court affirmed the grant of a directed verdict for the defendant on the issue of liability. In that case, a collision occurred when a truck in which the plaintiff was a passenger drove around a vehicle which was stopped to make a left turn, and crossed the

† See page 361 for note on 1974 legislative adoption of section 402A strict liability.

46. 260 S.C. 271, 195 S.E.2d 610 (1973).

47. 260 S.C. 422, 196 S.E.2d 635 (1973).

48. It is an elementary proposition of law that, in ruling on plaintiff's motion for directed verdict, the court must view the evidence and all its reasonable inferences in the light most favorable to the defendant. 260 S.C. at 274, 195 S.E.2d at 611.

49. 241 S.C. 430, 128 S.E.2d 776 (1963).

centerline into the path of a bus owned by defendant. Even though the evidence presented a jury issue as to the excessive speed of the defendant's bus, the court found no evidence from which a reasonable inference could be drawn that such excessive speed was a proximate cause of the collision. The efficient cause of the collision was found to be the truck driver's turning his vehicle into the lane in which the bus was traveling. The court held that "[t]he concurrence of excessive speed with this primary, efficient cause of the collision does not impose liability unless, without it, the collision would not have occurred."[50]

Because the bus had a right to occupy the lane in which it was traveling, there was no legal significance in the fact that "speed was a contributing factor in placing the bus at a particular location on the highway when the emergency arose . . . ."[51] The bus driver was required to operate the bus at a reasonably prudent speed, but he was not required to drive at such a speed as to avoid a collision in the event of the unlawful act of the truck driver. The court thus held that liability of the defendant was contingent upon the existence of a causal connection between the excessive speed of the bus and the collision. "*Some evidence* that if the bus had been operated at a reasonable speed it could have been stopped at *some distance* short of the collision point is required to support . . . an inference [of causal connection.]"[52] In *Horton* the court found no such evidence and required a directed verdict for the defendant.

The court in *Wilson*, confronted with a similar situation, reversed the trial court's grant of a directed verdict for the plaintiff. According to the court, the evidence left absolutely no doubt as to the negligence of the defendant and, furthermore, indicated that the defendant might be guilty of willful and reckless conduct. Nevertheless, it concluded that there was also a reasonable inference of contributory negligence in plaintiff's failure to exercise due care in keeping a proper lookout and in driving at an appropriate speed. Although the court in *Wilson* stated without explanation that *Horton* was distinguishable on its facts, the dis-

50. *Id.* at 439, 128 S.E.2d at 781.

51. *Id.* The court considered the *Horton* case a very unusual set of circumstances. It stated that "[t]his is simply one of those rare cases in which the evidence, although sufficient to support an inference of concurrent negligence by the defendants, is insufficient to support a reasonable inference that without such negligence the collision would not have occurred." *Id.* at 441, 128 S.E.2d at 782.

52. *Id.* at 440, 128 S.E.2d at 782.

tinction appears to be only one of degree. While the court in *Horton* determined that the evidence was susceptible of a reasonable inference of negligence but not of proximate cause, it held in *Wilson* that there existed sufficient evidence to warrant the inference that plaintiff's speed was not only negligently excessive but also a contributing proximate cause of the collision. The court found evidence to suggest that but for plaintiff's failure to keep a proper lookout and drive at an appropriate speed, the collision might have been avoided.

Dismissed rather summarily by the *Wilson* court was the right of the plaintiff to assume that the defendant would stop at the intersection in compliance with the law.[53] Certainly one cannot take issue with the court's statement that "one has the right, in the absence of anything to reasonably put one on notice to the contrary, to assume that others will proceed with due care in accordance with the law."[54] The problem arises in determining when one should be charged with "notice to the contrary." The court imposed on the plaintiff a rather demanding standard of anticipation in finding that, by looking, the plaintiff would have been put on notice that the defendant's testate "was most probably not going to stop."[55] The court thus found evidence to support a finding of contributory negligence by finding that the plaintiff could possibly have avoided the collision. Had the plaintiff not been held to such an exacting standard, the court might have found, as in *Horton*, the absence of evidence to indicate that plaintiff's negligence was a contributing proximate cause.

In *Odom*, the defendant asserted that plaintiff's excessive speed was the "proximate concurring cause of the collision."[56] In examining the nature of the relationship between negligence, proximate cause and contributory negligence, the court explained, consistently with *Horton* and *Clyde v. Southern Public Utilities Co.*,[57] that " . . . before the negligence of a plaintiff will defeat recovery, it must be made to appear that such negligence contributed to the injury as a proximate cause."[58]

53. The proposition that one has the right to proceed on the assumption that others will act lawfully was discussed with no apparent resolution in Still v. Blake, 255 S.C. 95, 177 S.E.2d 469 (1970). It is simply one factor to be weighed by the jury.

54. 260 S.C. at 276, 195 S.E.2d at 612.

55. *Id.* at 277, 195 S.E.2d at 613.

56. 260 S.C. at 426, 196 S.E.2d at 637.

57. 109 S.C. 290, 96 S.E. 116 (1918).

58. 260 S.C. at 426, 427, 196 S.E.2d at 637.

In clarification of its view of the nature of proximate cause, the court quoted with approval from the 1909 case of *Bodie v. Railway Co.*:[59]

> A want of ordinary care may be said to contribute proximately to an injury when it is an active and efficient cause of the injury in any degree, however slight, and not the mere condition or occasion of it. But it is not a proximate cause of injury when the negligence of the person inflicting it is a more immediate, efficient cause.[60]

The court in *Bodie* asserted that the distinction must be recognized "between contributory negligence and negligence which contributes remotely or merely furnishes a condition for its infliction."[61] However, the court further explained that the negligence of an injured party will not be considered contributory negligence if the one inflicting the injury could have avoided the accident by the exercise of ordinary care. Conversely, if the negligence of the one inflicting the injury precedes the negligence of the injured party and the latter might have avoided the injury by the exercise of ordinary care, the conduct of the person injured is considered a direct and proximate cause of the injury.

The court in *Odom*, even assuming excessive speed and negligence on the part of the plaintiff, determined as a matter of law that the plaintiff's conduct was not a contributing proximate cause. To the contrary, it found that "[t]he real cause, the more immediate and efficient cause, was the improper driving conduct of [the defendant]."[62] To reach such a conclusion in light of *Horton*, *Wilson*, and *Bodie*, the court must have found the existence of evidence from which it could be inferred that the defendant's negligence would have resulted in the collision regardless of the plaintiff's conduct. Although there exists in the decisions a thread of logical consistency, it is extremely difficult to reconcile the results reached in *Odom* and *Wilson*. As Justice Bussey indicates in his dissent in *Odom*, it is a rather interesting exercise of imagination to fathom how the court in *Wilson* found sufficient evidence to require submission of the issue of contributory negligence to the jury without doing so in *Odom*. The latter case appears to be the more compelling fact situation for such a

59. 61 S.C. 468, 39 S.E. 715 (1901).
60. 260 S.C. at 427, 196 S.E.2d at 637.
61. 61 S.C. at 484, 39 S.E. at 720.
62. 260 S.C. at 428, 196 S.E.2d at 639.

conclusion. Justice Bussey, who wrote the majority opinion in *Wilson*, asserted in his dissent that the court in *Odom* reversed the trial judge for doing what in *Wilson* the court held the trial judge should have done.[63] *Horton*, an often-cited case, would seem to allow submission to the jury only if some evidence were presented to indicate that the collisions could have been avoided had the plaintiffs exercised due care. Such evidence appears to have been present both in *Wilson* and in *Odom*.

III. MISCELLANEOUS

A. *Charitable Immunity*

The doctrine of charitable immunity, which was once adhered to consistently throughout the United States, has now been totally rejected by the vast majority of the states.[64] Even in the jurisdictions which purport to retain the doctrine in varying degrees, many exceptions and limitations have generally been recognized.[65] In South Carolina, the initial judicial recognition of charitable immunity appeared in *Lindler v. Columbia Hospital*,[66] a case involving the negligence of a nurse employed by an eleemosynary hospital. The court explained the basis of its decision in the following manner: "The true ground upon which to rest the exemption of liability is that it would be against public policy to hold a charitable institution responsible for the negligence of its servants, selected with due care."[67] The court carefully indicated the limited nature of its holding by asserting that the liability of a charitable institution for negligence in selecting servants was not an issue before the court. The position that eleemosynary institutions are exempt from liability for the negligent conduct of their agents was subsequently reaffirmed in

63. Justice Bussey's dissent rests largely on the conviction that the facts could reasonably be interpreted by a jury in such a manner as to find the plaintiff's speeding a proximate cause of the collision, and thus, of her injuries.

64. *See* W. PROSSER, THE LAW OF TORTS § 133 nn. 68 & 69 (4th ed. 1971) (hereinafter PROSSER). As of the date of publication of PROSSER the doctrine was rapidly being abrogated in the jurisdictions in which the issue arose, but the list of jurisdictions which had completely abolished the doctrine included: Alaska, Arizona, California, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada (statute), New Hampshire, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

65. *See generally* PROSSER § 133 at 995.

66. 98 S.C. 25, 81 S.E. 512 (1912).

67. *Id.* at 28, 81 S.E. at 513. *See generally* PROSSER § 133 at 993.

Vermillion v. Woman's College of Due West;[68] and the rule adopted in *Lindler* and *Vermillion* was applied in *Decker v. Bishop of Charleston*.[69] However, the South Carolina Supreme Court denied to charitable institutions exemptions from liability in two other cases because of the nature of the activity from which the conduct arose. The first of these was *Peden v. Furman University*,[70] in which the court refused to extend immunity to a charitable institution in an action involving trespass and nuisance. In *Eiserhardt v. State Agricultural & Mechanical Society*,[71] the court determined that immunity from liability would not be extended in a situation where the activity giving rise to the liability was primarily commercial in nature and unrelated to the charitable purpose of the institution.

In the recent case of *Jeffcoat v. Caine*,[72] the South Carolina Supreme Court took another step in enervating the now-outmoded doctrine of charitable immunity. The court in *Jeffcoat* acknowledged the decisions in the previous charitable immunity cases and explained that the broad references to generally complete exemption from tort liability was "unnecessary to a decision in those cases, and the rule of charitable immunity has never been extended beyond the facts in *Lindler*, *Vermillion*, and *Decker*."[73] The *Jeffcoat* case involved an allegation of false imprisonment by employees of the South Carolina Baptist Hospital. The plaintiff appealed the order of the lower court granting summary judgment on the basis of charitable immunity. In a decision which recognized the increasing criticism of the doctrine,[74] the court asserted that neither "reason and justice" nor precedent required the application of the doctrine in the case of an intentional tort.[75] Given the facts in *Jeffcoat*, the court was compelled to go no further in order to effect denial of charitable immunity to the hospital. It did, nonetheless, indicate the skepticism with

68. 104 S.C. 197, 88 S.E. 649 (1916). The court found, however, that charitable immunity applied regardless of whether agents were selected with due care. The case was remanded for a new trial, and upon appeal after a re-trial, judgment for the defendant was affirmed.

69. 247 S.C. 317, 147 S.E.2d 264 (1966).

70. 155 S.C. 1, 151 S.E. 907 (1930).

71. 235 S.C. 305, 111 S.E.2d 568 (1959).

72. 261 S.C. 75, 198 S.E.2d 258 (1973).

73. *Id.*

74. The modern trend in many areas of the law is toward equitable risk distribution, which can now readily be accomplished through the purchase of liability insurance.

75. 261 S.C. at 80, 198 S.E.2d at 260.

which it views the continued vitality of the doctrine in South Carolina, even when involving mere negligence. The generally negative attitude of the court toward charitable immunity is illustrated by the following quote from its opinion:

> Regardless of the public policy support, *if there now be such*, for a rule exempting a charity from liability for simple negligence, we know of no public policy. . . . which would require the exemption . . . from liability for an intentional tort . . . .[76]

It appears that, given the appropriate factual situation, the South Carolina Supreme Court will follow the overwhelming majority of jurisdictions and completely abolish the doctrine of charitable immunity.

B. Unfair Competition and Service Mark Infringement

The case of *Holiday Inns, Inc. v. Holiday Inn*[77] was an action in equity instituted by the Holiday Inns of America [hereinafter called the Chain] claiming unfair competition and service mark infringement. The defendant counter-claimed alleging, *inter alia*, unfair competition and service mark infringement by the plaintiff.[78] The defendant, a locally-owned Myrtle Beach motel, acquired the name "Holiday Inn" in 1949 and was incorporated in 1960. The plaintiff Chain was incorporated in 1952 and is now the largest motel chain in the United States. In 1956, a chain franchisee who was constructing a motel in Myrtle Beach received objections from the defendant to the proposed use of the name "Holiday Inn" within the area. In response the plaintiff's franchisee obtained permission from the Chain to operate within its system under the name "Holiday Lodge". A subsequently constructed facility was also franchised, under the name "Holiday Downtown."[79]

The court determined that the defendant was guilty of both unfair competition and service mark infringement. It found that

76. *Id.* (emphasis added).

77. 364 F. Supp. 775 (D.S.C. 1973). Federal diversity jurisdiction was invoked because the plaintiff is a Tennessee corporation and the defendant is a South Carolina corporation.

78. In addition, the defendant alleged false representation and designation of origin by the plaintiff and sought cancellation of certain trademark registrations. Since the court considered these issues of minimal importance, they will not be discussed in this article.

79. Discussion is omitted of the aspect of the case relating to the Holiday Inn North Myrtle Beach, considered by the court to be in a different geographic area, and the Holiday Inn Trav-L-Park, a different type facility.

the defendant willfully and deliberately[80] attempted to capitalize on the goodwill of the nationally-recognized chain by the following acts: erecting a sign that was almost indistinguishable from that employed by the Chain, utilizing a script to present its name which was essentially identical to that which had been registered by the plaintiff, and adopting a slogan very similar to that of the Chain.[81] As the court recognized, the defendant by his actions was violating important property rights of the plaintiff which are entitled to broad protection.[82]

Relying on the traditional doctrine that one seeking relief in equity may not do so with "unclean hands," the court refused to grant the defendant's counterclaim for relief, which was based on the fact that he was the prior user of the name "Holiday Inn" in Myrtle Beach.[83] The court also determined that the plaintiff was not estopped from bringing suit because it had remained silent even though it had knowledge of defendant's conduct. A Fourth Circuit decision was cited by the court in which it had been unequivocally stated that:

> It is settled that mere delay in seeking relief is no bar to an injunction when the infringer has had knowledge of the fact that he is infringing and has deliberately set out to capitalize on the goodwill of the owner.[84]

According to the district court, the test for trademark infringement is whether the use of the alleged copy or close approximation of the registered mark is likely to cause confusion or mistake and to deceive the public.[85] "The test is to be applied with regard to the effect of the marks on an ordinary purchaser having an indefinite recollection of the mark to which he has been ex-

80. It was noted by the court, however, that intent is not a requisite element of these causes of action.

81. The Chain's slogan is "Your host from coast to coast." The defendants' slogans were "Your host on the coast" and "Your host while at Myrtle Beach." The court noted that these slogans alone would not have constituted an infringement, but they did when taken in conjunction with the other acts of the defendant.

82. 364 F. Supp. at 783.

83. The court in reaching this conclusion also relied on the RESTATEMENT OF TORTS § 749 (1938). This section provides that one is barred from recovery against another who would otherwise be liable to him if "in his trade-mark or trade name . . . [he] . . . habitually makes misrepresentations about himself or his goods, services or business on matters of substantial importance . . . ."

84. 364 F. Supp. at 784, *quoting* Rothman v. Greyhound Corp., 175 F.2d 893, 895 (4th Cir. 1949).

85. This test is enunciated in 15 U.S.C. § 1114(1) (1970).

86. 364 F. Supp. at 782.

posed on a previous occasion."[86] The court concluded that the defendant's actions had quite clearly resulted in such confusion, mistake or deception in the minds of the general public, and that the situation would be further aggravated if the Chain franchisee were allowed to adopt the name "Holiday Inn" in the immediate area. Asserting its responsibility to protect the rights of the traveling public, the court determined that equity required that the defendant be enjoined from its acts of unfair competition and trademark infringement, but that it should be allowed to continue using the name "Holiday Inn" in the Myrtle Beach area. It further concluded that protection of the public also required the plaintiff's franchisee to continue to operate his facilities under the names Holiday Lodge and Holiday Downtown.[87]

C. *Negligent Entrustment of Dangerous Instrumentality*

The plaintiffs in *Howell v. Hairston*[88] instituted an action to recover medical expenses incurred by their son as a result of his being shot in the eye by the son of the defendants. The primary issue under consideration was whether the trial judge erred in granting defendant's motion for nonsuit. The South Carolina Supreme Court decided that its affirmative answer to that question required it to resolve other issues[89] which might arise during the new trial, including the correctness of the trial court's striking from the complaint the allegation that an air rifle is a dangerous instrumentality.

In considering whether the defendant was entitled to a nonsuit, the court examined the facts to ascertain whether a jury issue as to negligence of the defendants had been presented. It is the generally accepted rule that, in the absence of a statute providing to the contrary,[90] a parent is not vicariously liable for the conduct of this child.[91] Liability may, however, be established in appropriate circumstances on the basis of negligent entrustment. As the *Howell* court stated, "[l]iability for injuries inflicted by a minor with a gun may be predicated on the fact that the parents permitted the minor to have the gun, knowing the minor was of

87. Prior to trial all parties waived monetary damages.

88. 199 S.E.2d 776 (S.C. 1973).

89. The other issue under consideration was an evidential problem involving the admissibility of plaintiff's testimony that the defendants paid them $100 in partial payment of their son's medical expenses.

90. There is apparently no South Carolina statute on this point.

91. *See* PROSSER § 123 at 871.

a reckless or malignant disposition."[92] In this initial judicial consideration of the question in South Carolina, the court concluded that specific proof of the parents' knowledge of their child's malicious disposition was not required; but that they were chargeable with notice of such disposition if it was part of his general reputation. The court found a reasonable inference that the defendants "failed to act as reasonably prudent parents under the circumstances,"[93] and thus granted the plaintiff a new trial.

The next issue considered was the correctness of the trial judge's action in striking the plaintiff's allegation that the air rifle was a dangerous instrumentality. Whether the air rifle is classified as a dangerous instrumentality, though not determinative, is clearly relevant on the issue of entrustment. The lack of judicial authority in South Carolina concerning the characterization of an air rifle as a dangerous instrumentality imposed upon the court the necessity of forging a rule applicable in this state.[94] In doing so, it adopted a logical, commonsensical approach. The court refused to categorically classify an air rifle as a dangerous instrumentality, but instead stated that "[m]any instrumentalities are dangerous or not dangerous because of their use or potential use under the circumstances."[95] It held that since "a jury could reasonably conclude that an air rifle was a dangerous instrumentality under the conditions alleged,"[96] the trial judge erred in striking the allegation from the complaint.

Significantly, the court emphasized that its holding was based on the theory that an air rifle is not *per se* a dangerous instrumentality, but is *potentially* so, and that it was negligently entrusted to one incapable of appreciating the danger. It explicitly held that one is liable for damages resulting from negligently entrusting a dangerous instrumentality to another, while he is not ordinarily considered negligent for entrustment of a non-dangerous instrumentality.

D. Tort Liability Through Agency Relationship

The South Carolina Supreme Court was faced with an interesting question of liability based upon traditional agency princi-

92. 199 S.E.2d at 768; *see also* Annot., 68 A.L.R.2d 793 (1959).
93. 199 S.E.2d at 769.
94. The court found the decisions in other jurisdictions to be conflicting.
95. 199 S.E.2d at 770.
96. *Id.*

ples in *Collins v. Smith*.[97] The court reversed and remanded the case, in which a verdict of $125,000 actual damages for the death of plaintiff's intestate had been rendered in the lower court. The accident causing the death occurred when the automobile in which plaintiff's intestate was riding collided with a truck owned by the defendant, Collins Brothers Grain Company, and driven by the defendant farmer. The farmer had sold the corn to the grain company and was in the process of delivering it to them. Collins, who was in the business of buying and selling grain, customarily furnished trucks for customers to use in transporting the grain to their places of business.

In considering the liability of Collins,[98] the court stated that a prima facie case of master and servant was established by the proof that the truck was being used in accord with the agreement between the farmer and Collins.[99] The denial by both defendants of the existence of an agency relationship, even when not contradicted by direct evidence, was not sufficient to rebut the presumption of agency. Accordingly, the supreme court upheld the trial court's refusal to grant a directed verdict for defendants as to that issue.

The supreme court determined, however, that prejudicial error was committed by the trial judge's failure to give the jury a "legal yardstick"[100] to determine what constitutes the relationship of "principal and agent" or "master and servant." An essential element of agency which should have been explained to the jury by an appropriate charge was that of control. The court held that the specific elements of the particular relationship must be charged to the jury; a verdict will not be allowed to stand when the jury's conception of agency rests solely upon a presumption arising from one's use of another's vehicle, as in this case.

97. 200 S.E.2d 71 (S.C. 1973).

98. The liability of the defendant farmer was not considered on appeal. However, the supreme court reversed and remanded as to him on the basis that it could not allow such a large verdict to stand against one of the defendants while reversing as to the other. For the rationale of the court, see 200 S.E.2d at 73-74.

99. In support of this proposition, the court cited: Keen v. Army Cycle Mfg. Co., 124 S.C. 342, 117 S.E. 53 (1923); Watson v. Kennedy, 180 S.C. 543, 186 S.E. 549 (1936); Norris v. Bryant, 217 S.C. 389, 60 S.E.2d 844 (1950). 200 S.E.2d at 73.

100. 200 S.E.2d at 73.

E. Guest Statute[101]

In the case of *Edens v. Cole*,[102] the South Carolina Supreme Court was given the opportunity to examine the application of the guest statute,[103] and the appropriateness of a directed verdict for the plaintiff in the absence of contradictory testimony by the defendant. The decision of the court appears in both respects to have been logically sound as well as necessary in order to avoid potentially collusive lawsuits. At the time of the incident giving rise to plaintiff's alleged injuries, she, her husband and children were traveling with defendant in his automobile to visit relatives of plaintiff's husband. The injuries allegedly occurred as a result of the plaintiff's being thrown to the floor of the automobile when the defendant swerved to avoid striking a dog. At the trial, as well as in a prior deposition, the plaintiff testified that the defendant was driving at an excessive and reckless rate of speed and had refused to heed her cautionary remarks.[104]

The plaintiff contended that she was entitled to a directed verdict because the defendant placed no witnesses on the stand and the appellant's testimony was thus uncontradicted. The court, however, concluded that the lack of direct contradictory evidence did not place a "stamp of verity"[105] upon plaintiff's testimony. The court asserted that it was the function of the jury to determine the credibility of her testimony, "taking into consideration her interest in the result, the accuracy of her recollection, and all of the circumstances tending to impeach her as a witness and discredit her testimony."[106]

Error was also asserted by the appellant in the charging of the guest statute[107] by the trial judge. It was the decision of the

101. It is interesting to note that in California a challenge to the constitutionality of the guest statute was upheld. Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

102. 201 S.E.2d 382 (S.C. 1973).

103. S.C. CODE ANN. § 46-801 (1962). The pertinent text reads as follows:

> No person transported by an owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause of action for damages against such motor vehicle or its owner or operator for injury, death or loss in case of an accident unless such accident shall have been intentional on the part of such owner or operator or caused by his heedlessness or his reckless disregard of the rights of others.

104. This testimony appears inconsistent with a written statement signed by appellant, in which there was no mention of respondent's driving at an excessive rate of speed or of appellant's cautioning him.

105. 201 S.E.2d at 386.

106. 201 S.E.2d at 386, *citing* Jackson v. Jackson, 234 S.C. 291, 108 S.E.2d 86 (1959).

107. *See* note 102 *supra*.

court, in accord with the generally accepted rule in such cases,[108] that the guest statute was appropriate. The fact that the plaintiff's husband paid for having the automobile serviced before leaving on the trip did not alter his guest status. This is so because "the primary purpose of the trip was social in nature,"[109] and the invitation was not "motivated by, or conditioned on,"[110] the sharing of costs by the appellant's husband. Nevertheless, it appears implicit in the court's decision that evidence of some express prearrangement between two parties for sharing expenses might, in some situations, be an important factor in relieving an individual of his or her status as a guest within the meaning of the statute.

F. Civil Rights Act: "Under Color of State Law"

In the case of *Scott v. Vandiver*,[112] a county sheriff and county supervisor appealed from a decision holding them personally liable for injuries resulting from an assault against Scott by two county employees. The Circuit Court of Appeals affirmed as to the sheriff but reversed as to the supervisor on the basis of common agency principles. The determination was made that the supervisor was no longer responsible for the employees' conduct because they were performing tasks outside the normal scope of their employment and the sheriff alone had assumed the responsibility of supervising the men.

The facts of this case present an interesting but appalling situation. A shooting was reported to the sheriff, who, pursuant to custom, enlisted the assistance of two county employees in the investigation. The two men stopped Scott near the scene of the reported shooting and, without identifying themselves, ordered him to get into their truck to be taken to the sheriff. Seeing a gun on the seat of the truck, Scott fled. One of the men fired his gun

108. *See generally* 60A C.J.S. *Motor Vehicles* § 399.11(b) (1969); Annot., 39 A.L.R.3d 1224 (1971).

109. 201 S.E.2d at 387.

110. *Id.*

111. 42 U.S.C. § 1983 (1970) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

112. 476 F.2d 238 (4th Cir. 1973).

toward the respondent, who fell while fleeing and severely injured his shoulder.

Scott instituted a section 1983 action against the sheriff and county supervisor as the individuals responsible for the behavior of the two county employees. The Circuit Court of Appeals recognized that the record negated the defenses of good faith and probable cause which may, if appropriate, be asserted in section 1983 actions.[113] The main issue involved was whether the actions of the two assailants could be classified as being "under color of state law." The court experienced little difficulty in coming to the conclusion that either under section 53-199 of the 1962 South Carolina Code[114] as it supplements the common law, or under the theory that "custom may support a section 1983 claim if it has 'the force of law,' " the assault was made "under color of state law." "Here the sheriff's common law powers to summon bystanders infused his custom of using county employees in manhunts with the force of law."[115]

Once the determination had been made that a section 1983 action was appropriate, the second problem to be considered was the liability in South Carolina of a sheriff for the acts of his subordinates.[116] The supreme court of this state has imposed liability upon a sheriff for the acts of a deputy committed in his capacity as a representative of the sheriff.[117] A sheriff is responsible not only for the acts and errors of his deputies, but also for the acts of "all persons acting under him in every subordinate capacity."[118] The court in *Scott* determined that the two county employees acting temporarily as law enforcement officers would be included within the above category. The imposition of such liability for actions of subordinates may encourage sheriffs and other officials to select discriminately and train carefully those to whom they delegate authority.

113. In support of this assertion, the court cited: Pierson v. Ray, 386 U.S. 547 (1967); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973).

114. This statute authorizes a deputy sheriff to summon a *posse comitatus* to aid in the arrest of those suspected of violating the law. 476 F.2d at 241.

115. 476 F.2d at 241.

116. *See* 42 U.S.C. § 1988 (1970); *see also* 476 F.2d at 242 for collection of cases illustrating application of state law in section 1983 actions.

117. *See* Rutledge v. Small, 192 S.C. 254, 63 S.E.2d 260 (1939).

118. Teasdale v. Hart, 2 Bay 173, 175 (S.C. 1798). The holding of this case was reaffirmed in *Rutledge*.

G. *Federal Tort Claims Act*[119]

S. Schonfeld Co., Inc. v. S.S. Akra Tenaron[120] involved an action against the United States and a Pure Food and Drug Administration inspector for the alleged negligent handling of a cargo of canned tomatoes after its lawful detention. The United States moved for dismissal or summary judgment, asserting that recovery for damages resulting from the negligent action of the government agent was barred by two exceptions to the Federal Tort Claims Act.[121] The government's first contention was based on section 2680(a), a provision which precludes government liability resulting from the performance of discretionary duties by a government agency or employee, even if the discretion is abused.[122] The district court summarily rejected this government defense, noting that "once the government has exercised its discretion and has decided to proceed in a matter, then [it] is liable for negligent acts done in the course of such proceedings."[123]

The government prevailed with its second contention—that this action was barred by section 2680(c), the exception to the Act for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law enforcement officer."[124] The plaintiff relies primarily upon *Alliance Assurance Co. v. United States*,[125] a Second Circuit case involving a cargo of goods which disappeared from the "Public Stores" where it had been placed for inspection by customs officials. The *Alliance* court held that section 2680(c) was designed to prevent liability for unlawful seizures, and it does not preclude government liability when goods which have been detained disappear entirely. Although the result reached seems equitable, it does not appear to be an accurate interpretation of the legislative intent as expressed in the Federal Tort Claims Act. The fact that

119. 28 U.S.C. §§ 2671-80 (1970). This act is a limited waiver of sovereign immunity.

120. 363 F. Supp. 1220 (D.S.C. 1973).

121. The exceptions to the act are found in 28 U.S.C. § 2680 (1970).

122. According to 28 U.S.C. § 2680(a) (1970), the provisions of the Federal Tort Claims Act are inapplicable to "[a]ny claim based upon the performance, or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

123. 363 F. Supp. at 1221. A good discussion of this doctrine may be found in Hernandez v. United States, 112 F. Supp. 369 (D. Hawaii 1953).

124. 28 U.S.C. § 2680(c) (1970).

125. 252 F.2d 529 (2d Cir. 1958).

the language of the statute specifically bars "*any claim*" arising out of the detention of goods was a major reason that the *Schonfeld* court could not accept the logic of the *Alliance* decision. The court could find "nothing in the language of the statute to indicate that erroneous seizure in the inception should be distinguished from improper retention or negligent handling of goods properly seized at the outset."[126] In addition, the *Schonfeld* court noted that the *Alliance* decision appears to be unique in allowing government liability in a case involving the detention of goods by customs officials.[127] The court cited with approval a Seventh Circuit decision[128] which held that section 2680(c) prohibited a suit based on the negligent storage of merchandise by an FDA agent, and found that case to be factually indistinguishable from the present case.

Perhaps the most significant aspect of *Schonfeld* is the court's indication in a footnote that there might have been a cause of action against the government or its agent under the Tucker Act[129] for breach of an implied contract of bailment. The court noted that the Tucker Act had been an alternative basis for liability in *Alliance,* and then stated further that "[t]he plaintiff here makes no reference to the act, apparently willing for its cause to stand or fall on the Tort Claims theory."[130]

H. Malfunctioning Traffic Light—Waiver of Sovereign Immunity[131]

The question of a city's liability for injuries arising from a

126. 363 F. Supp. at 1223. The *Alliance* court avoided the provisions of the Act by stating that § 2680(c) applied only to actions or omissions during the process of detention, but not to such acts or omissions after a lawful seizure had been made.

127. *Id.*

128. United States v. 1500 Cases, 249 F.2d 382 (7th Cir. 1957).

129. 28 U.S.C. § 1346(a)(2) (1970).

130. 363 F. Supp. at 1222, n.2.

131. The doctrine of sovereign immunity, although still intact in this state with the exception of a few specific statutory waivers, is being abolished in a rapidly increasing number of jurisdictions. For an excellent and comprehensive analysis of the development of governmental immunity, the current status of the doctrine throughout the United States, and the policy reasons for abolishing it, see Ayala v. Philadelphia Board of Public Education, 305 A.2d 877 (Pa. 1973). The *Ayala* court compiled a list illustrating the status of sovereign immunity in various jurisdictions from material presented in the RESTATEMENT OF TORTS § 895A at 12-20 (Tentative Draft, Mar. 30, 1973).

Among the jurisdictions which have judicially abolished governmental immunity are the following: Alaska, Arizona, California, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New Jersey, Pennsylvania, Rhode Island, Wisconsin, and District of Columbia.

collision which occurred as a result of a malfunctioning traffic light was considered by the South Carolina Supreme Court in two 1973 cases.[132] The court determined that a malfunctioning traffic light constitutes a defect within the meaning of section 47-70 of the 1962 South Carolina Code.[133] This provision waives sovereign immunity and allows recovery against a municipality for injuries resulting from a defect in a street. The well-established general rule was cited that:

> A defect in a highway, within the meaning of the statute, is any physical condition of the improved portion thereof, or the existence of such condition on or overhanging the right of way, which makes the use of the improved portion of the highway unsafe and dangerous to a traveler exercising due care.[134]

I. *Statutory Violation as Negligence per se*

A violation of the Pure Food and Drug Act[135] was at issue in the case of *Cummins v. Dorchester Coca-Cola Bottling Co.*[136] Sufficient evidence existed to show that a Coca-Cola contained deleterious matter upon leaving defendant's hands and that the swallowing of this adulterated material was the proximate cause of plaintiff's illness. Nevertheless, the trial court verdict was for the defendant. The supreme court reversed. The court held that the trial judge had properly instructed the jury that violation of the Act was negligence per se. He erred, however, in also instructing them that in order to find for the plaintiff, the jury must find that the deleterious matter was in the Coca-Cola due to the actual negligence and carelessness of the defendant. These two charges are inherently contradictory. In *Cummins*, the supreme court of

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The following states have statutorily abolished the doctrine: Hawaii, Iowa, New York, Oklahoma, Oregon, Utah, and Washington.

Other states have adopted a theory that immunity is waived to the extent of insurance coverage. Included in this list are: Georgia, Kansas, Maine, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Tennessee, Vermont, West Virginia, and Wyoming.

132. Fox v. City of Columbia, 260 S.C. 367, 196 S.E.2d 105 (1973); Gazoo v. City of Columbia, 260 S.C. 371, 196 S.E.2d 106 (1973).

133. This section provides that:

> [a]ny person who shall receive bodily injury or damages in his person or property through a defect in any street, causeway, bridge or public way or by reason of a defect or mismanagement of anything under the control of the corporation . . . may recover in an action against such city or town . . . .

134. 260 S.C. at 370, 371, 196 S.E.2d at 105, *quoting* Stanley v. South Carolina Highway Dep't, 249 S.C. 230, 235, 153 S.E.2d 687, 689 (1967).

135. S.C. CODE ANN. § 32-1511 *et. seq.* (1962).

136. 260 S.C. 51, 194 S.E.2d 185 (1973).

this state adopted the majority view that a violation of the Act constitutes negligence per se,[137] entitling the plaintiff to recover if such violation is the proximate cause of his injury.[138]

J. Recovery Under Unidentified Motorist Provision

Under the provisions of sections 46-750.34 and 46-750.35 of the 1962 South Carolina Code, as amended, a plaintiff may recover for damages sustained in an accident with an unidentified driver of a motor vehicle. An action for recovery under those provisions was considered by the South Carolina Supreme Court in the case of *Hart v. Doe*,[139] an appeal from a judgment *non obstante veredicto* against the plaintiff. The court affirmed the trial judge's determination that, because the evidence was susceptible of only one reasonable inference, no jury issue was presented. It was apparent from the evidence that the plaintiff made no effort to ascertain the identity of the other driver, although she was able and had the opportunity to do so. As a prerequisite to a right of recovery under section 46-750.34, the plaintiff must "prove by a preponderance of evidence that her injury was caused by a physical contact with the unknown vehicle and that she was not negligent in failing to determine the identity of the other vehicle and the driver thereof."[140]

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137. For a discussion of statutory violations constituting negligence per se *see* W. PROSSER, THE LAW OF TORTS § 36 at 200 (4th ed. 1971).

138. Accordingly, a plaintiff in such an action is not required to prove negligence in fact by the defendant.

139. 198 S.E.2d 526 (S.C. 1973).

140. *Id.* at 528.

Addendum

The discussion on the status of strict liability in this state has been rendered moot by the recent South Carolina legislative adoption of section 402A strict liability, which became effective on July 9, 1974 (Rat. no. 1338). The legislature adopted the language of Restatement (Second) Section 402A (see note 9 *supra*) and added the following two sections:

(1) If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

(2) Comments to Section 402 A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this act.