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Products Liability

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PRODUCTS LIABILITY

I. Breach of Warranty

A. *Privity*

In *Gasque v. Eagle Machine Co., Ltd.*,[1] the South Carolina Supreme Court, in an opinion by Chief Justice Lewis, held that sellers' express and implied warranties extend third-party beneficiary protection to natural persons who might be expected to use, consume, or be affected by the sellers' product.[2] Interpreting South Carolina Code section 36-2-318,[3] the court dispensed with the need for contractual privity between a component part manufacturer and plaintiff for "injury and damage to person or property."[4]

Plaintiff Gasque brought an action for breach of warranty against Eagle Machine Company, which sold him an automatic tobacco picker, and Sperry Rand, Inc., which manufactured a hydraulic pump that was incorporated into the picker. The trial court granted Sperry Rand an involuntary nonsuit because of the lack of privity between Sperry Rand and plaintiff.[5] In granting the nonsuit, the trial court relied primarily on *Odom v. Ford Motor Co.*,[6] which was decided before the enactment of section 36-2-318.[7]

In *Odom,* plaintiff consumer brought an action for breach of warranty against the manufacturer of a tractor. The tractor was sold first to a distributor and then to a retailer before it reached plaintiff.[8] The court, concluding that privity was required in an action for breach of implied warranty, stated that "the warranty of a chattel does not run with the property but is personal to the purchaser to whom the warranty is made."[9] Because there was no privity between plaintiff and defendant, the court in *Odom* held that the action could not be maintained.[10]

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1. 270 S.C. 499, 243 S.E.2d 831 (1978).
2. *Id.* at 502, 243 S.E.2d at 832.
3. S.C. Code Ann. § 36-2-318 (1976).
4. 270 S.C. at 502, 243 S.E.2d at 832.
5. *Id.* at 501-02, 243 S.E.2d at 831.
6. 230 S.C. 320, 95 S.E.2d 601 (1956).
7. Section 36-2-318, part of the Uniform Commercial Code, became effective on January 1, 1968. S.C. Code Ann. § 36-10-101 (1976).
8. 230 S.C. at 322-23, 95 S.E.2d at 602.
9. *Id.* at 326, 95 S.E.2d at 604.
10. *Id.* at 328, 95 S.E.2d at 605.

Although a large exception to *Odom* was carved by *Springfield v. Williams Plumbing Supply*,[11] *Odom* has been recognized as authority in South Carolina cases.[12] In *Springfield*, the supreme court allowed suit by the purchasers of a hot water heater against the wholesaler and the manufacturer of the heater, despite the absence of privity.[13] The court distinguished *Odom* on the ground that there the claim was based only on economic loss, whereas in *Springfield* there was personal injury and property damage "caused by an appliance which was either inherently or imminently dangerous."[14]

Rather than seeking to fall within the *Springfield* exception,[15] appellant Gasque argued that the intent of the legislature in passing section 36-2-318 was to abolish the requirement of privity in actions such as his own.[16] Section 36-2-318 provides, "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."[17] Appellee Sperry Rand countered by arguing that section 36-2-318 was intended to eliminate the requirement of horizontal privity only, and not vertical privity.[18]

Commentators distinguish between horizontal and vertical privity to characterize two types of relationships that can exist.[19] "Vertical privity" refers to the relationship existing between the

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11. 249 S.C. 130, 153 S.E.2d 184 (1967).

12. *E.g.*, Cooley v. Salopian Industries, Ltd., 383 F. Supp. 1114, 1116 (D.S.C. 1974); Nelson v. Coleman, 41 F.R.D. 7, 10 (D.S.C. 1966); Salladin v. Tellis, 247 S.C. 267, 271, 146 S.E.2d 875, 877 (1966).

13. 249 S.C. at 138, 153 S.E.2d at 187. The trial court overruled motions for dismissal; the supreme court affirmed, stating that because of the importance of the questions involved, they should not be decided on demurrer. *Id.*

14. *Id.* at 135, 153 S.E.2d at 186.

15. At the trial level in *Gasque*, the court stated, "At this time the court does not comment upon the matter of damages other than to say that there was no testimony of any damage to property or testimony of personal injury." Record at 24 (Written Order of Court Granting Involuntary Nonsuit as to Defendant Sperry Rand). This language suggests that the trial court was distinguishing the facts of *Gasque* from those of *Springfield*.

16. Brief of Appellant at 4, 6-7.

17. S.C. CODE ANN. § 36-2-318 (1976).

18. Brief of Appellee at 6.

19. *E.g.*, R. NORDSTROM, LAW OF SALES 282 (1970); J. WHITE AND R. SUMMERS, UNIFORM COMMERCIAL CODE 327 (1972); Donovan, *The Emerging Confrontation Between the Expanding Law of Torts and the Uniform Commercial Code*, 19 MAINE L. REV. 181, 218 (1967); Rapson, *Products Liability Under Parallel Doctrines: Contrasts Between the Uniform Commercial Code and Strict Liability in Tort*, 19 RUTGERS L. REV. 692, 697-98 (1965).

parties to each of the several sales that occur as a product is passed down the distributive chain.[20] "Horizontal privity" refers to the relationships between the ultimate purchaser of a product and those persons harmed by it.[21] Perhaps the strongest support for appellee Sperry Rand's position that section 36-2-318 was intended to eliminate the requirement of horizontal but not vertical privity lies in one of the comments made by the Official Reporter to the U.C.C.:

> 3. This section expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.[22]

This comment has often been interpreted to mean that the intent of the U.C.C. drafters was not to alter the vertical privity requirement wherever it existed in the laws of the states, but instead to eliminate only the bar of horizontal privity, and even then only for a specified class of beneficiaries.[23] The comment, however, is not directly applicable to section 36-2-318, even though it appears in the South Carolina Code directly following the section.[24] South Carolina's non-uniform section 36-2-318 was developed by

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20. R. NORDSTROM, *supra* note 19, at 282; Donovan, *supra* note 19, at 218. For example, *A* sells to *B*, who then sells to *C*. *A* is in vertical privity with *B*, who is also in vertical privity with *C*. *A* and *C*, however, are not in vertical privity.

21. R. NORDSTROM, *supra* note 19, at 282; Donovan, *supra* note 19, at 218. For example, *A* sells to *B*, who gives to *C*. *B* and *C* are in horizontal privity, but *A* is in horizontal privity with no one.

22. U.C.C. § 2-318 (1962). Also in reference to the neutrality of § 2-318 on the issue of privity is the following portion of the South Carolina Reporter's Comments:

> The Commercial Code generally takes a neutral position on the issue of privity leaving the matter as stated in the official comments to Section 2-318 to "the developing case law." The one factual situation which the Commercial Code section deals with is where a member of a family buys defective goods which are consumed by other members of the family or guests in the home resulting in personal injury. In such case the warranty runs with the goods, thus eliminating the privity requirement.

S.C. CODE ANN. § 36-2-318, South Carolina Reporter's Comments (1976).

23. *E.g.*, Omaha Pollution Control Corp. v. Carver-Greenfield, 413 F. Supp. 1069, 1088 (D. Neb. 1969); R. NORDSTROM, *supra* note 19, at 284; Rapson, *supra* note 19, at 697-98. In Cooley v. Salopian Industries, Ltd., 383 F. Supp. 1114 (D.S.C. 1974), however, the court interpreted the comment as making it clear that in contract actions, the requirement of privity (impliedly both vertical and horizontal) was unaffected by § 36-2-318.

24. S.C. CODE § 36-2-318, Official Comment 3 (1976).

amendment[25] of the uniform version of section 36-2-318 that was proposed to the states in 1962.[26] Both the Official Comment and the South Carolina Reporter's Comment apply to the 1962 uniform version rather than South Carolina's amended version.[27]

The supreme court, however, did not rely on the comments to section 36-2-318; instead, it applied the following rule of statutory interpretation: when the words of a statute, given their ordinary meaning, are unambiguous, then there is no room for construction, and the court is required to apply the words according

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25. The first amendment, on May 27, 1965, deleted the phrase "who is in the family or household of his buyer or who is a guest in his home." S.C. SEN. J. 133 (1965). The second amendment, on March 29, 1966, changed the phrase "extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person" to "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." S.C. SEN. J. 918 (1966).

26. The uniform version provides:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

U.C.C. § 2-318 (1962).

27. Montgomery and Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products,* 27 S.C.L. REV. 803, 807 n.5 (1976).

Because of the nature of the amendments to the uniform version, the third comment of the official reporter arguably should retain some applicability. The first amendment, deleting the phrase "who is in the family or household of his buyer or who is a guest in his home," seems simply to broaden the class of third-party beneficiaries. The second amendment seems only to broaden the category of damages to which warranty protection is extended. These changes arguably do not negate interpretation of the comment that the section was intended to extend warranty protection horizontally, but not affect the case law on vertical privity. *But see* Bishop v. Sales, 336 So. 2d 1340 (Ala. 1976). In *Bishop,* the Alabama Supreme Court answered in the affirmative a certified question from the District Court of the Northern District of Georgia, whether Alabama's nonuniform version of § 2-318, ALA. CODE tit. 7A, § 2-318 (1965), eliminated the vertical privity requirement in personal injury actions based on breach of warranty. The court found the comment to be "inappropriate to the section as enacted in view of Alabama's modified version." 336 So. 2d at 1343. The court reached this conclusion even though Alabama made fewer changes than did South Carolina. "Aside from immaterial matters of punctuation, its only change was to drop the limiting language, 'who is in the family or household of the buyer or who is a guest in his house.'" McDonnell, *The New Privity Puzzle: Products Liability under Alabama's Uniform Commercial Code,* 22 ALA. L. REV. 455, 482 (1970). This seemingly slight change, however, may justify a different interpretation, based on the words "of *his* buyer." *"His"* apparently refers to "seller," and thus the official proposed version of § 2-318, which contained the language "of his buyer," arguably intended to extend the warranties of the immediate seller only. The amendment process, by deleting the language which raises this inference, thereby demonstrates an intent to change the statute—arguably to eliminate the requirement of vertical privity.

to their literal meaning.[28] The court concluded that "[i]n view of the plain language of the statute and its controlling effect, no profit can be gained by a long dissertation upon prior decisions or alleged Reporter's comments as to the statute's meaning."[29] By holding that the "plain language" of section 36-2-318 allowed plaintiff's warranty action, notwithstanding the lack of privity,[30] the court circumvented the difficult problem of determining the extent of the comments' applicability.[31]

B. Damages Recoverable by Third-Party Beneficiaries

Plaintiff in *Gasque* sought damages only for economic loss, specifically including increased expenses and lost profits.[32] The issue before the supreme court was whether section 36-2-318, which extends warranty protection when "person or property is damaged by breach of the warranty,"[33] was intended to apply in an action solely for economic loss.[34] The court viewed the question as one requiring statutory interpretation of "property," and applied the definition it had set forth in *Gibbes v. National Hospital Services, Inc.*[35] There the South Carolina Supreme Court stated that "'property' is not confined to tangible or corporeal objects, but is a word of unusually broad meaning,"[36] including "any valuable right or interest considered primarily as a source or element of wealth, or any civil right of a pecuniary nature."[37] Relying on

28. McMillen Feed Mills, Inc. of S.C. v. Mayer, 265 S.C. 500, 510-11, 220 S.E.2d 221, 226 (1975). A corollary rule of statutory construction, which suggests that the court perhaps should have looked to the comments, is that "[a]ll rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used and *that language must be construed in the light of the intended purpose." Id.* at 510-11, 220 S.E.2d at 226 (emphasis added).

29. 270 S.C. at 504, 243 S.E.2d at 832.

30. *Id.* at 502-03, 243 S.E.2d at 832.

31. Had the court, in reliance upon the comments to § 36-2-318, found that the statute affected only horizontal privity, Odom v. Ford Motor Company, 230 S.C. 320, 95 S.E.2d 601 (1956), would have remained authority for the necessity of vertical privity. This interpretation would not have bound the court to the rule of vertical privity, however, for the court could have followed the approach of Picker X-Ray Corp. v. General Motors Corp., 185 A.2d 919 (D.C. 1962), and Kassab v. Central Soya, 432 Pa. 217, 246 A.2d 848 (1968), and judicially abolished the judge-made rule.

32. Record at 5 (Amended Complaint of L.B. Gasque).

33. S.C. CODE ANN. § 36-2-318 (1976).

34. 270 S.C. at 503, 243 S.E.2d at 832.

35. 202 S.C. 304, 24 S.E.2d 513 (1943).

36. *Id.* at 308, 24 S.E.2d at 514.

37. *Id.*, 24 S.E.2d at 515.

this very broad definition, the court in *Gasque* held that "property damage" included both "diminution in value of the subject product"[38] (the difference in value of the product as warranted and as it actually performed), and "consequential loss of profits occasioned by its defective performance."[39]

Justice Littlejohn, in a brief dissent, rejected the inclusion of economic loss within the meaning of "property damage." He concluded that the extension of warranty protection by section 36-2-318 did not eliminate the common-law requirement of contractual privity in actions for economic loss based on breach of implied warranty.[40]

The distinction between "economic loss" and "property damage" made by Justice Littlejohn is consistent with the view of commentators,[41] who view economic loss to include inadequate value of the product itself, repair costs, incidental expenses, and lost profits; they view property damage, however, to mean *physical* harm to property.[42] Policy reasons suggest that the two forms of damages be treated differently. Once a seller's product is resold, he loses his ability to foresee where and how his product will be used. Liability for economic loss, especially lost profits, might very well make liability exposure inestimable, and thus render uninsurable the seller who is uncertain who will ultimately use, consume, or be affected by his product.[43] Component parts manufacturers are in a particularly untenable position not only because they are unable to determine for what purposes and for whom their products *will* be used, but also because they are unable to ascertain the purposes for which their products *could* be used. The component parts manufacturer is faced with an unenviable choice. He must either take commercially unreasonable risks, make attempts to prevent entry of his products into a jurisdiction with such a broad rule of liability, or curtail a very important form of production. None of the alternatives are individually or socially desirable.

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38. 270 S.C. at 503, 243 S.E.2d at 832.

39. *Id.*

40. *Id.* at 504-05, 243 S.E.2d at 833.

41. *E.g.*, J. WHITE AND R. SUMMERS, *supra* note 19, at 332; Note, *Economic Loss in Products Liability Jurisprudence*, 66 COLUM. L. REV. 917, 918 (1966); *see* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 820-23 (1966); Comment, *Manufacturer's Liability to Remote Purchasers for "Economic Loss" Damage—Tort or Contract?*, 114 U. PA. L. REV. 539 (1966).

42. J. WHITE AND R. SUMMERS, *supra* note 19, at 332; *see* Note, *supra* note 41, at 918.

43. J. WHITE AND R. SUMMERS, *supra* note 19, at 334.

II. STRICT TORT LIABILITY

A. *Liability for Products Deemed Defective for Lack of Safety Feature*

In *Marchant v. Mitchell Distributing Co.*,[44] *Young v. Tide Craft, Inc.*,[45] and *Kennedy v. Custom Ice Equipment Co.*,[46] the South Carolina Supreme Court focused on whether the absence of a safety feature or device constituted an unreasonably dangerous defect in a product under section 15-73-10 of the South Carolina Code.[47] This section is the statutory enactment of strict tort liability expressed in section 402A of the Second Restatement of Torts.[48]

In *Marchant,* the operator of a crane had failed to release enough cable to compensate for the distance that he had extended the crane's boom; consequently, the crane "double-blocked," causing the fall of a "bucket" that the crane was lifting and in which plaintiff was riding. Plaintiff brought an action to recover for personal injuries suffered in the fall. He argued that had a safety feature called an "anti-blocking device" been attached to the crane, the accident would not have occurred and that therefore the absence of the device constituted an unreasonably dangerous defect.[49]

In an unanimous opinion the court held that the crane was not defective.[50] Justice Littlejohn's opinion relied on a New Mexico case, *Skyhook Corp. v. Jasper.*[51] In *Skyhook,* plaintiff argued

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44. 270 S.C. 29, 240 S.E.2d 511 (1977).
45. 270 S.C. 453, 242 S.E.2d 671 (1978).
46. 271 S.C. 171, 246 S.E.2d 176 (1978).
47. S.C. CODE ANN. § 15-73-10 (1976). The section provides:

Liability of seller for defective product.

(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 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) shall apply 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.

48. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
49. 270 S.C. at 32-34, 240 S.E.2d at 511-12.
50. *Id.* at 36, 240 S.E.2d at 514.
51. 90 N.M. 143, 560 P.2d 934 (1977).

that the failure of defendant to supply a crane with an "insulated link" or a "proximity warning device" was an unreasonably dangerous defect that resulted in the electrocution of plaintiff's decedent when the crane contacted an overhead power line.[52] The test applied by the court in *Skyhook* was whether the product, absent such a feature or device, was unreasonably dangerous to the user or consumer or to his property.[53] Comment *i* to section 402A defines an "unreasonably dangerous" product as one which is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[54] Citing this comment, the court in *Skyhook* concluded that the crane was not unreasonably dangerous within the contemplation of "the ordinary consumer or user of such a rig."[55]

Although the court in *Marchant* reached the conclusion that the crane was not unreasonably dangerous, it did so without examining the knowledge of the ordinary user of such a crane. The court, finding that plaintiff had failed to meet his burden of going forward, stated that

> [b]y bringing the action under § 15-73-10, Marchant has assumed the burden of presenting evidence which tends to prove that the crane was in a defective condition unreasonably dangerous, which proximately caused his injury. The fact that the injury occurred and the fact that the crane could have been more safe is not sufficient to support a finding that the crane was unreasonably dangerous.[56]

Plaintiff's fatal mistake apparently was neglecting to present evidence that defendant's failure to supply an anti-blocking device resulted, under the definition of "unreasonably dangerous" stated in Comment *i* to section 402A, in a danger beyond the contemplation of the ordinary user.[57]

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52. *Id.* at 145, 560 P.2d at 936.

53. *Id.* at 147, 560 P.2d at 938.

54. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *i* (1965). The court in *Skyhook* further relied on the fact that defendant had placed on the crane's boom a clearly visible warning against coming within ten feet of high voltage lines. Comment *j* to § 402A, cited by the court, supports its finding that defendant could reasonably assume that the warning would be read and heeded, and that since there would have been no danger had the warning been heeded, the crane was neither in a defective condition nor unreasonably dangerous.

55. 90 N.M. at 147, 560 P.2d at 938.

56. 270 S.C. at 36, 240 S.E.2d at 514.

57. In Marchant v. Lorain Div. of Koering, ___ S.C. ___, 251 S.E.2d 189 (1979),

The supreme court again applied the *Skyhook* test in *Young v. Tide Craft, Inc.*[58] *Tide Craft* involved actions against the manufacturer of a fishing boat for the wrongful death and conscious pain and suffering of the boat's purchaser. When the boat developed problems in its steering mechanism, the decedent owner, Young, took it to a dealer for repairs. The steering cable had begun to bind, necessitating a rewiring of the system. Unable to obtain enough wire before Young wanted to use the boat, the dealer used clamps to splice the cable temporarily. While Young was operating the boat the cable separated, the boat jerked into a turn, and Young was ejected. Instead of being thrown clear of the boat, however, Young caught one of his feet in the lines of the boat's trolling motor. He was suspended from the side of the boat in such a position that his head was below the level of the passing water. Before a nearby boat could swing close enough for a rescuer to jump on board and stop the motor, Young drowned.[59] At trial

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the supreme court decided a second case arising from the same facts as *Marchant v. Mitchell,* the second suit being against the crane's manufacturer. The court found additional evidence presented in the second suit, lacking in the first, which created a jury issue on whether the crane was defective.

The crucial evidence was an affidavit from a design engineer, which stated that the crane's design made double-blocking predictable and that it was foreseeable that men would be in a bucket carried by the crane when the double-blocking occurred. This evidence was apparently sufficient to meet plaintiff's "burden of presenting evidence which tends to prove that the crane was in a defective condition unreasonably dangerous," *Marchant v. Mitchell,* 270 S.C. at 36, 240 S.E.2d at 514. This burden had not been met in the earlier case.

By relying on evidence of foreseeability to demonstrate that a product is in a defective condition unreasonably dangerous, the court followed its approach in Kennedy v. Custom Ice Equip. Co., 271 S.C. 171, 246 S.E.2d 146 (1978) (see text accompanying notes 76-93 *infra*) and is therefore subject to the criticism advanced against *Custom Ice.* Reliance on foreseeability tends to emphasize the level of awareness of the *particular* user in determining the existence of a defect in a product rather than measuring the danger by the extent contemplated by the *ordinary* consumer, as stated in comment *i* to § 420A. Restatement (Second) of Torts § 402A, Comment *i* (1965). Thus, the court in *Custom Ice* and *Lorain* has substituted a subjective test for what properly should be an objective one.

Lorain also reaffirmed the court's position in *Marchant v. Mitchell* that a distributor could not be held liable for negligent design. In *Marchant v. Mitchell* the court held that the distributor could not be liable for negligent design because he "had nothing to do with designing or assembling the crane." 270 S.C. 37, 240 S.E.2d 514. The court in *Lorain,* noting the distinction between distributor and manufacturer, held that the manufacturer's awareness of the risk of double-blocking raised a jury issue on whether its design of the crane had been negligent. ___ S.C. ___, 251 S.E.2d 191.

58. 270 S.C. at 471, 242 S.E.2d at 679.

59. *Id.* at 458-61, 242 S.E.2d at 673-75.

defendant manufacturer was held liable on theories of negligent design and strict tort.[60]

The supreme court, with Justice Rhodes writing for the majority, rejected plaintiff's argument that two features of the boat's design constituted unreasonably dangerous defects. The first, an alleged propensity of the boat to eject its occupant, was rejected on the ground that the evidence was insufficient to show that the ejection propensity proximately caused death.[61] Plaintiff's second basis for the application of strict tort theory was defendant's failure to install a kill switch, a safety device designed to stop the boat's motor if the driver is ejected. The court here applied the *Skyhook* test to determine whether the absence of this device constituted an unreasonably dangerous defect. The court cited Comment *i* to section 402A and stated that the test for a defect "is an objective one and knowledge common to the community must be attributed to Young."[62]

The court strayed from this objective standard, however, by examining Young's particular awareness of the risk posed by the lack of a kill switch. Finding that Young was experienced with boats, the court concluded that he had to be aware of the risk; moreover, because he was aware, the lack of a kill switch did not constitute an unreasonably dangerous defect.[63] Young's special awareness of the danger of the lack of a kill switch, although relevant to the issue of assumption of the risk,[64] properly had no bearing on the existence of a defect. According to Comment *i* to section 402A, which the South Carolina legislature incorporated as its intent when it adopted strict tort liability,[65] the existence of a defect should be determined in terms of the danger "contemplated by the *ordinary* consumer who purchases it, with the *ordinary* knowledge common to the community as its characteristics."[66] Although the court might nevertheless have found

60. *Id.* at 461, 242 S.E.2d at 675. For discussion of the negligent design issue, see text accompanying n.106 *infra*.

61. 270 S.C. at 470, 242 S.E.2d at 679. For discussion of this issue, see *Evidence, Annual Survey of South Carolina Law*, 31 S.C.L. REV. 73, 79-82 (1979).

62. 270 S.C. at 470-71, 242 S.E.2d at 679-80.

63. *Id.* at 472, 242 S.E.2d at 680.

64. Assumption of the risk is a statutory defense in South Carolina. S.C. CODE ANN. § 15-73-20 (1976). The statute provides that "[i]f 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."

65. S.C. CODE ANN. § 15-73-30 (1976).

66. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *i* (1965) (emphasis added).

that the ordinary purchaser of the fishing boat was aware of the risk presented by its lack of a kill switch, the court should distinguish in future cases between determinations of the existence of a defect and determinations of plaintiff's assumption of the risk.[67] The legislature, by adopting strict tort liability, including the comments to section 402A, made sellers liable for sales of products that are unreasonably dangerous according to an objective, community standard; lowering the standard because of the special knowledge of injured individuals would defeat the legislative intent.

In *Barker v. Lull Engineering,*[68] the California Supreme Court concluded that determining the existence of a defect solely on the expectations of the ordinary consumer would provide inadequate protection for the consumer.[69] The court adopted a second test for liability, to be applied even when the product's design satisfied the ordinary consumer's expectations. A product may alternatively be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish that the benefits of the challenged design outweigh its inherent risks.[70]

A New York case, *Micallef v. Miehle Co.,*[71] is also illustrative of the national trend[72] toward allowing recovery even though the risk of a product is no greater than that perceived by the ordinary consumer. Taking note of the increasingly complex and technological nature of society, the court concluded that "[a] casting of increased responsibility upon the manufacturer, who stands in a superior position to recognize and cure defects, for improper conduct in the placement of finished products into the channels of commerce furthers the public interest."[73] The court held that

67. *See* Brown v. North Am. Mfg. Co., 576 P.2d 711, 717 (Mont. 1978); Olson v. A.W. Chesterton Co., 256 N.W.2d 530, 537-38 (N.D. 1977).

68. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

69. The court stated that it "refus[ed] to permit the low esteem in which the public might hold a dangerous product to diminish the manufacturer's responsibility for injuries caused by that product." *Id.* at 425, 573 P.2d at 451, 143 Cal. Rptr. at 233.

70. *Id.* at 432, 573 P.2d at 456, 143 Cal. Rptr. at 238.

71. 39 N.Y.2d 376, 348 N.E.2d 571, 384 N.Y.S.2d 115 (1976).

72. *E.g.,* Byrns v. Riddell, Inc., 113 Ariz. 264, 550 P.2d 1065 (1976); Pust v. Union Supply Co., 561 P.2d 355 (Colo. App. 1976); Blaw-Knox Food & Chemical Equip. Corp. v. Holmes, 348 So. 2d 604 (Fla. Dist. Ct. App. 1977); Casey v. Gifford Wood Co., 61 Mich. App. 208, 232 N.W.2d 360 (1975); Brown v. North Am. Mfg. Co., 576 P.2d 711 (Mont. 1978); Olson v. Chesterton Co., 256 N.W.2d 530 (N.D. 1977); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970).

73. 39 N.Y.2d at 385, 348 N.E.2d at 577, 384 N.Y.S.2d at 121.

a manufacturer could be liable for a product designed with an unreasonable risk of harm, even though the product's defect was latent.[74] The court thereby reversed the bar to recovery for latent defects which it had enunciated in *Campo v. Scofield.*[75]

The South Carolina Supreme Court decisions in *Marchant* and *Tide Craft* are contrary to the trend exemplified by *Barker* and *Micallef.* By reversing judgments on the basis of the factual issue of whether a product is unreasonably dangerous according to the expectations of the ordinary consumer, the supreme court may be applying such a low level of consumer expectation as to undermine the policies behind the creation of strict tort liability.

In *Kennedy v. Custom Ice Equipment Co.,*[76] the supreme court was faced with allegations similar to those in *Marchant* and *Tide Craft* that the failure to install a safety device caused a product to be in a defective condition unreasonably dangerous when sold. Defendant designed and sold commercial ice makers. Plaintiff was instructed by his employer, Georgetown Ice Co., to us a garden hoe to dislodge jammed ice from the machinery. When the hoe caught on a conveyor, plaintiff was drawn into the conveyor and severely injured. Plaintiff brought suit on theories of negligent design and strict tort, alleging that the failure to install a protective shield caused the injury. The supreme court affirmed a verdict for plaintiff on both theories.[77]

Justice Gregory, writing for a unanimous court, stated that the test to determine whether a product is defective when sold is "whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that will foreseeably attend the use of the product."[78] Defendant had argued that the conveyor was not defective when installed, but had been rendered defective by the construction of a catwalk which enabled workers to reach high enough to dislodge jammed ice. The court held, however, that because of evidence submitted at trial that defendant had actual knowledge of the construction and use of similar catwalks in other ice plants, the jury could have found that the use of a catwalk by plaintiff was "a foreseeable circumstance that required the incorporation of protective shields in the

74. *Id.*
75. 301 N.Y. 468, 95 N.E.2d 802 (1950).
76. 271 S.C. 171, 246 S.E.2d 176 (1978).
77. *Id.* at 174-77, 246 S.E.2d at 177-79.
78. *Id.* at 176, 246 S.E.2d at 178.

design of the conveyor."[79]

The court's foreseeability approach was derived from *Mickle v. Blackmon,*[80] perhaps the leading products liability case in South Carolina. In *Mickle,* plaintiff was injured in an automobile collision when the protective knob on the gearshift lever shattered and plaintiff was impaled on the lever. Defendant argued that its only duty was to manufacture a product reasonably fit for its intended use, and that the intended use of its automobile did not include colliding with other vehicles.[81] The court in *Mickle,* drawing on the approach of the Fourth Circuit in *Spruill v. Boyle-Midway, Inc.,*[82] found that "intended use" is but an adaptation of foreseeability and held that the seller or manufacturer must anticipate the environment which is normal for the use of his product.[83]

The *Custom Ice* decision fell well within the *Mickle* rule when it held that defendant should have anticipated the risk of injury because of its knowledge of the use of catwalks; however, the decision did not follow the analysis of *Skyhook Corp. v. Jasper,*[84] on which the court had relied in both *Marchant v. Mitchell Distributing Co.*[85] and *Young v. Tide Craft, Inc.*[86] *Skyhook* stated that to be defective a product lacking a safety feature or device must be unreasonably dangerous to the user or consumer.[87] The user or consumer to be considered is the ordinary one who would purchase the product, and who is deemed to have the ordinary knowledge common to the community regarding the product's characteristics.[88] As the court recognized in *Tide Craft,* this test is objective.[89] In *Custom Ice* the court did not expressly apply the *Skyhook* test but it may have assumed from several facts that because of plaintiff's lack of knowledge, the conveyor absent a protective shield was unreasonably dangerous. In its statement of the facts, the court noted that this was plaintiff's

79. *Id.*

80. 252 S.C. 202, 166 S.E.2d 173, *appealed after remand* 255 S.C. 136, 177 S.E.2d 548 (1969).

81. 252 S.C. at 228-29, 166 S.E.2d at 184.

82. 308 F.2d 79 (4th Cir. 1962).

83. 252 S.C. at 233, 166 S.E.2d at 187.

84. 90 N.M. 143, 560 P.2d 934 (1977).

85. 270 S.C. 29, 240 S.E.2d 511 (1977).

86. 270 S.C. 453, 242 S.E.2d 671 (1978).

87. 90 N.M. at 147, 560 P.2d at 938.

88. RESTATEMENT (SECOND) OF TORTS § 402A, Comment *i* (1965).

89. 270 S.C. at 471, 242 S.E.2d at 680.

first job, that he was fifteen-years old, and that the injury occurred on his third day on the job and his first day on the catwalk.[90] Although the court did not mention the issue, it may have relied, as it did in *Tide Craft,* on plaintiff's level of awareness of the risk in determining whether the conveyor was unreasonably dangerous.[91] In *Custom Ice* the court noted testimony that it was a common practice at other ice plants to dislodge ice with a garden hoe;[92] this fact raised the possibility that most users of the product were aware of its risk, but avoided the risk by exercise of caution. Despite the fact that it based its conclusion on the special awareness of the risk by the plaintiff, the court found in *Tide Craft* that as a matter of law there was no defect.[93] If in *Custom Ice* the court had examined the extent of danger contemplated by the ordinary user of the ice machine and conveyor and concluded that the actual danger was not beyond the contemplated danger, then the same result as in *Tide Craft* would have been warranted.

B. Retrospective Application of Strict Tort Liability

The supreme court continued to refuse to rule on the applicability of strict tort liability to causes of action arising before the legislative enactment of section 402A[94] in 1974. In 1976, in *Lane v. Trenholm Bldg. Co.,*[95] the court stated in a footnote that "the General Assembly also recognized the clear drift of the common law in this State when it codified Restatement of Torts (2) Section 402A."[96] Subsequent to *Lane,* however, the court has refused to state definitively whether strict tort liability is applicable to causes of action arising prior to its legislative enactment.[97] In

90. 271 S.C. at 173-74, 246 S.E.2d at 177.
91. See text at notes 63-67 *supra.*
92. 271 S.C. at 175, 246 S.E.2d at 178.
93. 270 S.C. at 472, 242 S.E.2d at 680.
94. S.C. CODE ANN. § 15-73-10 (1976).
95. 267 S.C. 497, 229 S.E.2d 728 (1976).
96. *Id.* at 504 n.3, 229 S.E.2d at 731 n.3.
97. Three theories exist for retroactive application of strict tort liability. First, as the court intimated in *Lane,* strict tort may have already been a part of the state's common law by the time it was statutorily enacted. A second possibility is that the enactment of § 402A was remedial and therefore can be applied retrospectively. This conclusion was reached in dicta by a federal court in Cooley v. Salopian Industries, Ltd., 383 F. Supp. 1114, 1118 (D.S.C. 1974). For an analysis of this issue in *Cooley,* see *Torts, Annual Survey of South Carolina Law,* 27 S.C.L. REV. 616-19 (1975). A third possibility, which the supreme court alluded to in Marchant v. Mitchell Distributing Co., 270 S.C. 29, 38, 240

Marchant v. Mitchell Distributing Co.[98] the court had before it a cause of action which had occurred prior to the 1974 enactment. By ruling that the product was not defective[99] the court circumvented the question whether strict tort was applicable.

In *Young v. Tide Craft, Inc.*,[100] the court again relegated its comments to a footnote, stating that "we do not decide, nor do we intimate, whether strict liability has any applicability prior to enactment of § 15-73-10."[101] In his dissent,[102] however, Justice Ness indicated that he would apply strict tort liability to a cause of action which arose before section 402A was enacted. Justice Ness stated that he would affirm the result of the trial court,[103] which was based in the alternative on strict tort.[104] He cited *Lane*, an opinion he authored, and echoed its language: "[L]egislative enactment [of section 402A] was consonant with the clear draft [sic] of the common law of this State as reflected in the decisions of this Court."[105]

III. INTERVENING CAUSES

In *Young v. Tide Craft, Inc.*,[106] plaintiff brought an action in negligence[107] for wrongful death and conscious pain and suffering.[108] Plaintiff alleged that defendant-manufacturer Tide Craft, Inc., negligently designed the boat's steering system, negligently allowed installation of the system by dealers, and negligently failed to warn against improper repair methods.[109] Defendant re-

S.E.2d 511, 514 (1977), is that the statute might be retroactive, and therefore have retrospective application. Although the court did not answer the question, if forced to do so it might rely on the test it stated in Hyder v. Jones, 271 S.C. 85, 245 S.E.2d 123 (1978). There the court noted that in "the construction of statutes there is a presumption that statutory enactments are to be considered prospective rather than retroactive in operation unless there is a specific provision or clear legislative intent to the contrary." *Id.* at 87-88, 245 S.E.2d at 125.

98. 270 S.C. 29, 240 S.E.2d 511 (1977).

99. *Id.* at 33, 38, 240 S.E.2d at 512, 514.

100. 270 S.C. 453, 242 S.E.2d 671 (1978).

101. *Id.* at 472 n.1, 242 S.E.2d at 680 n.1.

102. *Id.* at 472, 242 S.E.2d at 680.

103. *Id.* at 477, 242 S.E.2d at 682.

104. *Id.* at 461, 242 S.E.2d at 675.

105. *Id.* at 477, 242 S.E.2d at 682.

106. 270 S.C. 453, 242 S.E.2d at 671 (1978).

107. *Id.* at 461, 242 S.E.2d at 675. There were also causes of action in strict tort and breach of implied warranty. For discussion of strict tort in *Tide Craft*, see text accompanying notes 58-67 *supra*.

108. 270 S.C. at 458, 242 S.E.2d at 673.

109. *Id.* at 462, 242 S.E.2d at 675.

sponded that the act of the dealer who spliced the steering cable of Young's boat was an intervening cause terminating defendant's liability.[110]

The supreme court applied a two-part test in determining whether the act of the dealer broke the causal chain. The first determination was whether the dealer's act was a probable consequence of the defendant's negligence. After reviewing evidence that the practice of splicing steering cables was known both commonly and by the particular dealer to be dangerous, the court concluded that the only reasonable inference was that the choice of a dangerous repair method was unforeseeable. Because the dealer's act was unforeseeable, the court reached the second portion of the test, which was whether the injury would have occurred in natural course absent the act of the dealer.[111] The evidence indicated that although the boat's steering system could bind and prevent steering, without the splicing it was highly improbable that the cable would snap and cause a sudden change in course. The court concluded that the only reasonable inference was that the injury would not have occurred absent the intervening act of the dealer.[112]

A similar issue arose in *Kennedy v. Custom Ice Equipment Co.*[113] Defendant Ice Company argued that the construction of a catwalk by plaintiff's employer constituted an intervening cause because without it the height of the conveyor made it unforeseeable that anyone could come close enough to be injured. In response, the court noted that plaintiff presented evidence at trial that indicated defendant was aware that the construction and use of catwalks was common. The court concluded that since there was conflicting evidence about whether defendant could foresee the subsequent act of construction of the catwalk, the issue of proximate cause was properly submitted to the jury.[114] Although the court in *Custom Ice* did not rely on the two-part analysis it applied in *Tide Craft,* it certainly could have for its approach was entirely consistent.

The first of the two steps, determining whether the subsequent act of another was a probable consequence of defendant's

110. *Id.* at 463, 242 S.E.2d at 676.
111. *Id.* at 465, 242 S.E.2d at 677.
112. *Id.* at 466, 242 S.E.2d at 677.
113. 271 S.C. 171, 246 S.E.2d 176 (1978).
114. 271 S.C. at 175, 246 S.E.2d at 178.

negligence, is consistent with the view of Prosser. Prosser's expression of the test is whether "the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances . . . ."[115] Application of either expression of the test to the facts of *Custom Ice* yields an affirmative response—that defendant, knowing of other catwalks, should have anticipated the negligence of plaintiff's employer in building his catwalk.[116] Thus, *Custom Ice* is a classic case for imposition of continued responsibility on an actor who sets a force in motion, knowing of the reasonable likelihood that an independent agency will subsequently operate to actualize the risk created by the actor.[117]

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115. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 272 (4th ed. 1971).

116. Because this first step of the analysis is answered affirmatively, there is no need to reach the second step. *See Tide Craft,* 270 S.C. at 463-64, 242 S.E.2d at 676.

117. *See* W. PROSSER, *supra* note 115, at 272-75. Prosser's leading example is of an actor who starts a fire; the actor "may be required to foresee that an ordinary, usual, and customary wind will spread" the fire. *Id.* at 272.