South Carolina Law Review

Volume 32 | Issue 2 Article 3

Winter 12-1-1980

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THE CASE FOR JUDICIAL ADOPTION OF COMPARATIVE FAULT IN SOUTH CAROLINA

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I. INTRODUCTION

A review of the reasons why a comparative-fault doctrine should be adopted in South Carolina has been ably done elsewhere.[1] The pressing issue in South Carolina is whether this doctrine should be adopted judicially or legislatively. It is clear that the judiciary, as well as the legislature, has the power to adopt a comparative-fault rule.[2] The real question is whether, as a matter of policy, the courts should defer to the legislature in this area. The thesis of this article is that the courts should take the initiative in view of the complexity of the problems associated with such a change in the law. These problems call for the kind of fine-tuning that is more a characteristic of judicial decision making than of legislative enactment.

Moreover, prior holdings of the South Carolina Supreme Court mandate that some action be taken in this area. This court has held that a comparative-fault doctrine that applies to only one class of individuals is unconstitutional as violative of

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This article is an outgrowth of a CLE speech the author delivered to the bench and bar of South Carolina at Columbia in March of this year under the joint auspices of the South Carolina Bar and University of South Carolina School of Law. The author gratefully acknowledges the helpful suggestions of Professor David G. Owen of the University of South Carolina School of Law.

1. *See generally Symposium: Comparative Negligence in Louisiana*, 40 LA. L. REV. 289 (1980); Commentary, *A Call for the Adoption of Comparative Negligence in South Carolina*, 31 S.C.L. REV. 757 (1980).

2. Several states have adopted judicially a comparative-fault doctrine. *See, e.g.*, Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1974); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979); Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979). *See generally Comments on* Maki v. Frelk—*Comparative v. Contributory Negligence: Should the Court or Legislature Decide?* 21 VAND. L. REV. 889 (1968).

equal protection of the law.[3] Yet, South Carolina has some comparative-fault rules that apply to only a part of the field of torts law. Under the South Carolina court's interpretation of equal protection, these rules either should be struck down as unconstitutional or extended to the entire field of tort law. Since these rules are longstanding and fundamental to tort law, their extension rather than expungement is the desirable alternative.

II. THE SCOPE OF THE DOCTRINE

A. Forms of the Doctrine

Numerous decisions must be made about the scope of the comparative-fault doctrine. Among the most important is the appropriate form to adopt, "partial" (or "modified") and "pure" being the usual choices.[4] Under a partial system, a plaintiff may recover only as long as his fault is not as great as—or, some courts say, not greater than—that of the defendant. The pure system allows a plaintiff to recover against a defendant who is proximately at fault to any degree. A minority of jurisdictions, mostly by judicial decision, have adopted the pure form as the most equitable.[5] The majority, however, have adopted one of the partial forms in the belief that it is unfair to allow a plaintiff to recover when he is either equally at fault, or more at fault, than the defendant.[6]

The partial form has some unfortunate attributes. For ex-

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3. Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978). *See* text accompanying notes 44-46 *infra*.

4. *See* Commentary, *supra* note 1, at 776-77.

In a recent article the proposition is persuasively advanced that, under a state constitutional "intermediate" (as opposed to either a "strict" or a "rational-basis") standard of review, a "modified" comparative-fault system is unconstitutional under the equal protection clause. *See* Sowle & Conkle, *Comparative Negligence Versus the Constitutional Guaranty of Equal Protection: A Hypothetical Judicial Decision*, 1979 DUKE L.J. 1083. The constitutional reasoning is the same as that of the South Carolina Supreme Court in Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978), and indicates that South Carolina is constitutionally required to adopt a "pure" rather than a "modified" form of comparative fault. The article also presents a thorough and well-reasoned analysis of the disadvantages of modified comparative fault and the superior features of a pure system of comparison. *See* Sowle & Conkle, *supra*.

5. *See* Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1974); Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979).

6. *See, e.g.*, Bradley v. Appalachian Power Co., 256 S.E.2d 879 (W. Va. 1979).

ample, while the doctrine of last clear chance is usually abolished under a system of comparative fault, it would presumably become applicable again under the partial form once the plaintiff's fault equaled or was greater than that of the defendant.[7] This application could result in a plaintiff, barred from partial recovery because of the degree of his fault, nevertheless recovering his entire damages by virtue of the last clear chance doctrine. This doctrine is widely recognized as unsound and merely an intermediate step between the harsh common-law rule of contributory negligence and the more equitable rule of comparative fault.[8]

The better view is that under a partial system the jury should be instructed on the effect of its verdict, *i.e.*, that a finding of 50% fault—or 51% under some systems—of plaintiff will bar his recovery entirely.[9] The need for this practical instruction indicates another deficiency of the partial system: the jury's opportunity to twist or bend its basic factual determinations in order to achieve the result it desires. It seems better to allow the jury to reach its factual determination untrammeled by such considerations. In addition, it is difficult to see why a single degree change in the middle range of fault should have the drastic effect of barring recovery.

B. Areas of Application

Comparative fault reduces rather than precludes recovery when plaintiff is contributorily negligent. Courts also usually apply the doctrine when plaintiff is charged with impliedly assum-

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7. "Of course, when a state has modified comparative negligence a strong argument could be made that last clear chance should still apply when negligence is not compared." V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 7.2, at 139 (1974). Last clear chance may be retained as an exception to comparative fault, but the trend is to abolish it as a general exception. *Id.*

8. *See* James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938). The doctrine does, however, serve the useful purpose of mitigating the harshness of the all-or-nothing rule in a contributory negligence jurisdiction.

9. Thomas v. Salem Township Bd. of Trustees, 224 Kan. 539, 548-52, 582 P.2d 271, 278-80 (1978).

The 51%-49% rule is preferable to a 50%-50% bar if the jury is not instructed on the effect of its verdict, "because a 50-50 apportionment is a very comfortable one for juries." W. PROSSER, J. WADE, & V. SCHWARTZ, TORTS CASES AND MATERIALS 610 (6th ed. 1976). The jury's intent to so apportion would be frustrated by a 50%-50% cutoff rule of which it was unaware.

ing a known risk in a voluntary and unreasonable manner[10] and when plaintiff is charged with foreseeable misuse of a product.[11] There may be some areas when plaintiff's fault will not be used to reduce recovery even under a comparative-fault rule. Traditionally, contributory negligence has been no defense to a charge of willful misconduct[12] and the same rule may apply to comparative fault.[13] Similarly, contributory negligence (and perhaps comparative fault) is inapplicable when defendant has violated a statute enacted to protect the plaintiff against his own fault.[14] If plaintiff were injured because of the failure of defendant to provide a safety device whose purpose is to guard against the very conduct of plaintiff that caused the injury, contributory negligence (and arguably comparative fault) may not be applied.[15] Similarly, contributory negligence (and perhaps comparative fault) may not be applied to workplace injuries when plaintiff is required to work near a dangerous condition created by defendant.[16]

All of these no-contributory-fault rules should probably be eliminated under comparative fault, however, since they are in conflict with the basic policies underlying its adoption. The rules probably originated in part to alleviate the harshness of the contributory negligence rule and, with the adoption of comparative fault, this reason for the rules disappears. Also, leaving arguably arbitrary exceptions to the basic doctrine of comparative fault

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10. *See, e.g.*, Sunday v. Stratton Corp., 136 Vt. 293, 390 A.2d 398 (1978).

11. *See, e.g.*, Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977). *Hopkins* has been overruled with respect to its definition of an "unreasonably dangerous" product in strict liability design defect cases. Turner v. General Motors Corp., 584 S.W.2d 844, 847 (Tex. 1979). *Hopkins* still stands for the proposition that comparative fault applies in products liability "foreseeable misuse" cases. *See also* Fischer, *Products Liability—Applicability of Comparative Negligence to Misuse and Assumption of the Risk,* 43 MO. L. REV. 431 (1978).

12. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 426 (4th ed. 1971).

13. *See generally* Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions,* 10 IND. L. REV. 769 (1977).

14. *See* W. PROSSER, *supra* note 12, at 425-26.

15. Bexiga v. Havir Mfg. Co., 60 N.J. 402, 412, 290 A.2d 281, 285 (1972). The defense of contributory negligence is especially weak when defendant has represented his product to be safe and plaintiff relies, perhaps imprudently, on the representation. *See* Twerski, *The Use and Abuse of Comparative Negligence in Products Liability,* 10 IND. L. REV. 797, 802-04 (1977).

16. D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 242-43 (1974)(charge of assumption of the risk).

may well conflict with the South Carolina Supreme Court's conceptual view of equal protection.[17] There is, however, no reason why the policy underlying these various rules may not be taken into consideration as a relevant factor in assessing comparative fault.

A growing number of jurisdictions have applied comparative-fault principles to strict products liability litigation.[18] Some courts have been unwilling to do so because of the conceptual difficulty of comparing fault with no-fault and because of a belief that the policies underlying strict liability militate against considering plaintiff's misconduct as being relevant to liability.[19] The policy argument seems weak. Plaintiff's fault in the form of assumption of the risk and unforeseeable misuse is treated as a bar to recovery in strict liability. If some types of plaintiff misconduct are relevant to strict liability, it is difficult to see why contributory negligence is not also relevant—particularly in view of the fact that the defenses of contributory negligence, assumption of risk, and misuse often overlap.[20]

The doctrinal problem in comparing fault with no-fault is more difficult. Some courts treat the issue as one of comparing degrees of causation[21] rather than of fault, although the results may be very different if a cause rather than fault comparison is used.[22] The Uniform Comparative Fault Act allows considera-

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17. *See* Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978). *See* text accompanying notes 45-51 *infra.*

18. *See* Fischer, *supra* note 11, at 431; Case Comment, *Comparative Negligence and Strict Products Liability,* 38 OHIO ST. L.J. 883 (1977). Some courts compare assumption of the risk, but not contributory negligence, in strict products liability actions. *See, e.g.,* Holdsclaw v. Warren & Brewster, ___ Or. App. ___, 607 P.2d 1208 (1980).

19. *See, e.g.,* Kinard v. The Coats Co., 37 Colo. App. 555, 557, 553 P.2d 835, 837 (1976); Seay v. Chrysler Corp., ___ Wash. 2d ___, 609 P.2d 1382 (1980). *But see* Comment, *Comparative Contribution and Strict Tort Liability: A Proposed Reconciliation,* 13 CREIGHTON L. REV. 889 (1980)(suggesting equal division of liability, between or among at-fault and strictly liable cotortfeasors, as the most equitable system).

20. *See* D. NOEL & J. PHILLIPS, *supra* note 16, at 219-22.

21. *See, e.g.,* Murray v. Fairbanks Morse, Beloit Power Syss., Inc., 610 F.2d 149 (3d Cir. 1979). The California Supreme Court recently held that any manufacturer of a "substantial percentage" of the market of the drug DES could be held liable to an injured plaintiff "for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries." Sindell v. Abbott Laboratories, ___ Cal. 3d ___, ___, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145 (1980).

22. *See* Twerski, *supra* note 15, at 821-22.

tion of both fault and causation in apportioning liability.[23] Others have urged that marketing a defective product may be viewed as blameworthy for purposes of fault comparison even though the defective condition was latent and not reasonably discoverable.[24]

South Carolina has a special problem in judicially adopting comparative fault for strict tort liability since the General Assembly has adopted the Restatement (Second) of Torts Section 402A,[25] including the comment that makes assumption of the risk a complete defense and abolishes contributory negligence as a defense.[26] In order to integrate strict tort liability into comparative fault, certain portions of these enactments would have to be repealed. Alternatively, they may be declared unconstitutional under the equal protection rationale discussed below.[27] In any event, there is no legislation to prevent the South Carolina judiciary from applying comparative fault to all negligence actions and to strict liability actions based on breach of express or implied warranties.[28]

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23. UNIFORM COMPARATIVE FAULT ACT § 2(b), *reprinted in* 40 LA. L. REV. 403, 419 (1980).

24. *See* Twerski, *From Defect to Cause to Comparative Fault—Rethinking Some Product Liability Concepts*, 60 MARQ. L. REV. 297, 331 (1977); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 377 (1978).

25. *See* S.C. CODE ANN. § 15-73-10 (1976). *See generally* Montgomery & Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L. REV. 803 (1976).

26. *See* S.C. CODE ANN. § 15-73-20 (codifying the last sentence of RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965)). The legislature has incorporated by reference all comments to § 402A as the legislative intent. *See* S.C. CODE ANN. § 15-73-30 (1976).

27. *See* text accompanying notes 45-47 *infra*.

28. An action for breach of express or implied warranty is a form of strict liability. D. NOEL & J. PHILLIPS, *supra* note 16, at 13. Privity of contract is not required in an action for breach of express or implied warranty in South Carolina. JKT Co. v. Hardwick, ___ S.C. ___, 265 S.E.2d 510 (1980); Gasque v. Eagle Mach. Co., 270 S.C. 499, 502-03, 243 S.E.2d 831, 832 (1978).

The inspection language of U.C.C. § 2-316(3)(b) and the proximate cause language of U.C.C. § 2-715(2)(b) can be read as introducing to some extent a contributory negligence defense into warranty law. *See also* U.C.C. § 2-314, Comment 13; *id.* § 2-715, Comment 5. These Code sections may, however, be glossed to allow application of a comparative fault standard and the comments are not binding on the courts.

C. *Multiple Defendants*

When there is more than one defendant, a number of problems arise in applying comparative fault. Of fundamental importance is the issue of whether the concept of joint and several liability should be retained. A number of jurisdictions retain the concept,[29] while a few provide for apportionment of liability between or among defendants.[30] Under the apportionment approach, if plaintiff were 20% at fault and each of two defendants were 40% at fault, plaintiff could recover only 40% of his damages from any one of the defendants. Under traditional principles of joint and several liability, he could obtain a judgment for 80% of his damages against either or both defendants, although he could only collect the 80% once—in whole from one defendant or in part from each.

Apportioning liability between or among defendants when all parties are at fault seems more sensible than joint and several liability. There is no good reason why one at-fault defendant should be responsible for the fault of another solvent defendant. Let the burden of seeking recovery from the other defendant lie with the culpable plaintiff who invokes the court's aid. If plaintiff is without fault, a culpable defendant should probably bear the loss of another defendant who is unable to pay. If plaintiff is not at fault and all defendants are solvent and before the court, the question of whether or not to apportion seems academic. If a solvent defendant is not before the court, however, the innocent plaintiff probably should have a joint and several judgment and the culpable defendant or defendants should then have the burden of seeking contribution. An innocent plaintiff should not be penalized to the advantage of an at-fault defendant.

When a claim cannot be collected against one of the defendants and plaintiff is partly at fault, the approach of the Uniform Comparative Fault Act is to apportion the uncollectible liability between the at-fault plaintiff and the other defendant or defendants who can pay, on the basis of their relative degrees of

29. *See* Butaud v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

30. *See* Wilson v. Probst, 224 Kan. 459, 581 P.2d 380 (1978); Ohio River Pipeline Corp. v. Landrum, 580 S.W.2d 713 (Ky. 1979)(permissive several liability).

fault. Thus, if plaintiff *A* is 20% at fault and defendants *B* and *C* are each 40% at fault, but *C* is unable to pay, *A* will bear two-sixths of *C*'s responsibility and *B* the remaining four-sixths. If *A* is without fault, then *B* would bear the entire responsibility for *C*'s fault.[31]

A related problem arises when one defendant settles with the plaintiff, who then sues a cotortfeasor. The cotortfeasor should receive a credit against his liability at least equal to the settlement amount. The approach of the Uniform Act is to grant a credit equal to the full amount for which the settlor would have been liable had the plaintiff taken judgment against him.[32] This approach will tend to discourage settlements, but its virtue is that the remaining defendant is not prejudiced by the conduct of others over whom he has no control. It may be necessary to retain the settlor as a party in the litigation between plaintiff and the nonsettling defendant in order to get a fair determination of the degrees of fault.

A final major issue is how to determine relative degrees of fault when a partial comparative-fault rule is applied. Specifically, should plaintiff's fault be compared with all defendants together or with each defendant separately for purposes of determining the apportionment cutoff point? Plaintiff may be able to recover under the former approach even though he could not under the latter. For example, suppose plaintiff *A* is 30% at fault, defendant *B* is 50% at fault, and defendant *C* is 20% at fault. In a partial comparative-fault jurisdiction, *A* would be un-

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31. *See* UNIFORM COMPARATIVE FAULT ACT § 2(d). This Act thus partially dispenses with joint liability when plaintiff is at fault and his claim against another defendant is uncollectable. The author's proposal would go further and place the onus on the culpable plaintiff, rather than on the culpable defendant, to seek contribution from another defendant; if this contribution is not available, that liability should then be shared among the remaining parties at fault as described in the Uniform Act. On the other hand, the burden of establishing the proper apportionment of damages should be placed on the defendants. *See* text accompanying notes 84-86 *infra*. If this burden is not carried, either liability would remain joint and several or the factfinder would be permitted to make a rough apportionment. *See* Phillips, *An Analysis of Proposed Reform of Products Liability Statutes of Limitations*, 56 N.C.L. REV. 663, 667-68 (1978).

32. UNIFORM COMPARATIVE FAULT ACT § 6. The two possibilities discussed in the text contemplate releasing the settlor from liability for contribution. A third possibility is to allow the nonsettling tortfeasor to seek contribution against the settlor. This was the solution of the 1939 UNIFORM CONTRIBUTION ACT and it has a substantial deterrent effect on settlements. The three methods of treating settlements are discussed in the comment to § 6 of the Uniform Comparative Fault Act.

able to recover anything against *C* if *A*'s fault is compared solely with *C*'s, since *A*'s fault is greater than that of *C*. If the fault of *B* and *C* are combined for purposes of comparison, *A* can recover against both *B* and *C* (either jointly and severally or 50% and 20% of the damages respectively), since 30% is less than 70%.[33]

The better rule seems to be to combine the defendants' fault for purposes of comparison. To do otherwise may result in a culpable defendant not being liable to plaintiff at all. Moreover, in the event of such nonliability, thorny questions arise concerning how that liability should be allocated between or among plaintiff and the remaining defendant or defendants. If a remaining defendant bears any portion of that liability, further complications arise regarding possible claims for contribution by that defendant against the defendant who is not liable to plaintiff.[34] There is also the undesirable possibility that in the contribution action the degrees of fault would be determined in differing proportions than they were in the original suit.

Combining the defendants' fault for purposes of comparison in a partial comparative-fault system normally will avoid the problems discussed in the preceding paragraph, since either all guilty defendants in a single suit should be liable or none should be.[35] This combining of fault argues for a pure rather than a partial comparative negligence approach, since the combination may result in a plaintiff recovering against a defendant who is less at fault than plaintiff. Under a pure comparative-fault ap-

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33. *Compare* Graci v. Damon, ___ Mass. ___, 383 N.E.2d 842 (1978)(plaintiff's fault measured against all defendants' combined liability) *with* Cartel Capital Corp. v. Fireco, 161 N.J. Super. 301, 391 A.2d 928 (1978)(plaintiff's fault measured against that of each defendant).

34. That one tortfeasor is immune from liability to plaintiff does not mean that he is immune from a claim for contribution by a cotortfeasor. The authorities are divided. *Compare* Chamberlain v. McCleary, 217 F. Supp. 591 (E.D. Tenn. 1963) (no contribution) *with* Nolechek v. Gesaule, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978)(contribution allowed).

35. If several suits are involved, however, there may be conflicting results as to percentages of fault. As Dean Wade observes, "[b]oth plaintiffs and defendants have sufficient incentives to join other negligent persons, since this will have the effect of reducing their percentages of responsibility." Wade, *Comparative Negligence—Its Development in the United States and its Present Status in Louisiana*, 40 LA. L. REV. 299, 311 (1980). Not all parties may be suable in a single jurisdiction, however, if they lack minimal contacts with that jurisdiction. After World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559 (1980), the mere occurrence of a tort within a jurisdiction is not a sufficient basis for asserting long-arm jurisdiction over a tortfeasor.

proach, it makes no difference whether the defendants' degrees of fault are combined or not for purposes of relative comparison, since plaintiff's relative degree of fault will not bar recovery as long as any defendant is also at fault in any degree.

D. Setoff

A limited but important problem exists for jurisdictions that adopt either a pure comparative-fault rule or one that allows partial recovery as long as plaintiff's fault is not greater than that of defendant. The problem is whether or not setoff should be allowed when both parties have a claim against each other.[36] Suppose, for example, under a "not-greater-than" rule, that *A* and *B* are both injured in an accident in which each is equally at fault and that each suffers $10,000 damages. Shall each be required to pay the other $10,000 or shall the claims be set off against each other with no actual payment at all?

If either *A* or *B* is insured, the insurer benefits from a setoff to the detriment of the insured or the claimant, probably contrary to the expectations of the insured. If the attorney for *A* or *B* is hired on a contingency fee basis, he or she may also suffer by setoff through diminution of the *res* out of which his or her fee is to be paid. Both of these considerations militate against the use of setoff.

Other considerations arise if one of the claimants is judgment-proof. Suppose *A* is insured and has a claim for $10,000 against *B*, who is judgment-proof and has a claim for $15,000 against *A*. It would seem equitable that *A*'s claim be satisfied out of his own insurance before any payment is made to *B*. Suppose the same facts, except that *A* is solvent but uninsured. In this situation, equitable considerations favor allowing *A* to set off *B*'s liability against *A*'s own liability.[37] These dispositions

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36. A claim for set-off can arise only in a pure comparative-fault jurisdiction or in a not-greater-than-partial-fault jurisdiction where each party's fault is the same. In all other situations, one party's fault will be greater than that of the other and he, therefore, will be barred from any recovery.

Some jurisdictions allow setoff. *See* V. SCHWARTZ, *supra* note 7, § 19.3. The Rhode Island comparative-fault statute expressly prohibits setoff. R.I. GEN. LAWS § 9-20-4.1 (Cum. Supp. 1979).

37. The Uniform Comparative Fault Act provides:

> A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the

avoid conferring a windfall on less worthy parties who are uninsured or insolvent.

E. Contribution

While adoption of comparative fault does not compel adoption of a rule of contribution among cotortfeasors,[38] logic and sound policy suggest that both be adopted. When fault is divided between cotortfeasors on a degree-of-fault basis,[39] no tortfeasor is immune from contribution because his or her fault is less than that of the other; by analogy, a pure comparative fault standard should be used in determining a plaintiff's claim against a defendant. Adoption of this kind of comparative contribution rule may be particularly necessary in South Carolina as a result of the state's crashworthiness doctrine discussed below.[40]

When joint and several liability is not retained with comparative fault, the need for contribution is eliminated, at least when all parties are joined in a single suit. In that situation, a defendant would never be required to pay more than his equita-

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obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party and any distribution of those funds back to the party making payment had been a payment by him to the other party.

UNIFORM COMPARATIVE FAULT ACT § 3.

38. The Washington Supreme Court refused to adopt contribution merely because the state had a rule of comparative fault. Wenatchee Wenoka Growers Ass'n v. Krack Corp., 89 Wash. 2d 847, 576 P.2d 288 (1978). The Connecticut Supreme Court found that the legislature's adoption of comparative fault did not evidence a legislative intent to abolish that state's no-contribution rule. Gomeau v. Forrest, 176 Conn. 523, 409 A.2d 1006 (1979).

South Carolina presently does not allow a claim for contribution. Adcox v. American Home Assur. Co., 258 S.C. 331, 188 S.E.2d 785 (1972).

39. While some jurisdictions allow contribution on an equal basis, *see, e.g.*, TENN. CODE ANN. § 23-3102(b) (Supp. 1979), others divide liability based on degree of fault. *See* Phillips, *Contribution and Indemnity in Products Liability*, 42 TENN. L. REV. 85 (1974). The latter approach is the one adopted by the Uniform Comparative Fault Act, §§ 2, 4.

Some jurisdictions allow complete recovery by a "passively" negligent tortfeasor against a cotortfeasor who is "actively" negligent, although this rule has been severely criticized and rejected by other jurisdictions. *See* Missouri Pac. R.R. v. Whitehead & Kales Co., 566 S.W.2d 466 (Mo. 1978). The actively negligent tortfeasor under this rule, like the more-at-fault plaintiff in a partial comparative-fault jurisdiction, would be barred from seeking contribution.

40. *See* text accompanying notes 80-82 *infra*.

ble share. If all matters are not litigated in a single lawsuit, difficult problems of loss apportionment arise. The litigant's self-interest normally should be a strong incentive to join all likely parties whenever possible.[41]

F. Recapitulation

Thus, there are a number of difficult problems and policy choices connected with the adoption of comparative fault and the previous discussion highlights rather than exhausts the list of such considerations.[42] It seems eminently appropriate for the South Carolina Supreme Court to adopt comparative fault, instead of treating the subject solely as a matter for the legislature. The nature of the problems and policies to be considered are more suitable to judicial analysis than to a legislative resolution made in response to political concerns and special-interest group pressures. Even if a comparative-fault statute were adopted, it is likely that many major issues would be left open for resolution by the courts.[43] If the judiciary is suited to resolve some of these issues, it is suited to resolve them all. There should be little question of legislative opposition to comparative fault, since the General Assembly has already shown its approval of the doctrine in principle by passing comparative-fault statutes of limited application.[44] Moreover, as indicated in the following section, South Carolina may be required under its interpretation of constitutional law either to extend comparative fault throughout the law of torts, or to strike down those limited comparative-fault doctrines that already exist in the state.

III. THE CONSTITUTIONAL IMPLICATIONS OF APPLYING COMPARATIVE FAULT ON A LIMITED BASIS

A. Equal Protection Under State Law

In 1974, the South Carolina General Assembly passed a

41. *See* note 35 *supra.*

42. For a more extensive catalog of the issues involved, *see generally* V. SCHWARTZ, *supra* note 7; Wade, *supra* note 35.

43. For example, South Carolina's automobile comparative-fault statute seems to address only the issue of partial comparative fault vis-à-vis a single plaintiff and a single defendant. See S.C. CODE ANN. § 15-1-300 (1976).

44. These comparative-fault statutes are the railroad employee statutes, S.C. CODE ANN. §§ 58-17-3730, -3740 (1976) and the automobile statute, *id.* § 15-1-300.

statute providing for the application of comparative fault to automobile accident litigation.[45] The supreme court, in *Marley v. Kirby*,[46] struck down this statute under the equal protection clauses of the state and federal constitutions. While recognizing "the validity of comparative negligence statutes of general application," the court saw "no rational basis for separating injuries from motor vehicle accidents from injuries from other torts."[47] In reaching this result, the *Marley* court relied upon its earlier decision of *Broome v. Truluck*,[48] which struck down as unconstitutional a special tort statute of repose, or outer-cutoff statute of limitations, for architects, engineers, and contractors. There, the court stated as the rationale for its holding: " '[A]rchitects, engineers, and contractors are not the only persons whose negligence in the improvement of real property may cause damage or injury to others.' "[49]

In all probability these decisions are not compelled by federal constitutional law.[50] They are, however, based on state constitutional standards and nothing in federal law prohibits states from imposing a stricter standard of equal protection than that required by the federal constitution.[51] The decisions represent a clear statement of a quite restrictive constitutional review of state statutes on equal protection grounds and, therefore, directly apply to any comparative-fault rules presently in effect in South Carolina.

The Federal Employers' Liability Act, 45 U.S.C. §53 (1976),

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45. 1974 S.C. Acts 2718, No. 1177 (presently codified at S.C. CODE ANN. § 15-1-300 (1976)) provided:

> In any motor vehicle accident, contributory negligence shall not bar recovery in any action by any person or legal representative to recover damages for negligence resulting in death or in injury to person or property, if such contributory negligence was equal to or less than the negligence which must be established in order to recover from the party against whom recovery is sought.

46. 271 S.C. 122, 245 S.E.2d 604 (1978).

47. *Id.* at 124-25, 245 S.E.2d at 606.

48. 270 S.C. 227, 241 S.E.2d 739 (1978).

49. 271 S.C. at 125, 245 S.E.2d at 606 (quoting 270 S.C. at 230-31, 241 S.E.2d at 740).

50. *See* Silver v. Silver, 280 U.S. 117 (1929)(upholding guest statute against constitutional attack). "Contrary to the position of those courts which hold that the repose statutes for architects and builders are based on irrational classifications, a legislature would seem entitled to make such a judgment." 5 Research Group, Inc., Final Report of the Legal Study 10-11 (1977)(prepared for Interagency Task Force on Product Liability).

51. *See* Sowle & Conkle, *supra* note 4, at 1102.

establishes a pure comparative-fault rule for tort claims brought under that Act. That statute cannot be invalidated on state constitutional grounds because of the federal supremacy clause, Article VI of the United States Constitution, and the statute is in all probability constitutional under the relatively lax standards of federal constitutional review. Thus, the FELA comparative-fault rule must be applied in South Carolina, and accordingly that rule must be extended to all areas of tort law in this state in order to comply with the constitutional mandate of *Broome* and *Truluck.*

It is possible that the state supreme court would not consider the *Broome-Truluck* doctrine binding in a situation where the application of that doctrine is triggered by a mandatory federal, as opposed to a state, standard. Avoidance of the state doctrine, however, because of its relation to federal law would seem unduly insular and not logically defensible.

There are other areas of tort law in South Carolina, discussed hereafter, where in reality a comparative-fault rule is now being applied as a matter of state law. In these areas, the supreme court of the state has a choice. It can either strike down the application of a comparative-fault rule in such limited areas, or else it can extend that rule to the entire field of tort law, to comply with the constitutional demands of *Broome* and *Truluck.*

B. The Present Status of Comparative Fault in South Carolina

1. The Railroad Statute.—The South Carolina Code provides that contributory negligence and assumption of the risk are not defenses in a suit by railroad employees against a railroad for injuries which result from a statutory violation; in all other such suits not alleging statutory violation, recovery is apportioned according to the degree of fault of the employee.[52]

52. *See* S.C. CODE ANN. § 58-17-3730 (1976), which provides:

> In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this article to recover damages for personal injuries to any employee or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. But no such employee who may be injured or killed shall be held to have been

This is a pure comparative-fault statute, limited to suits by railroad employees against their employers. It would seem inevitable that the statute be struck down if challenged on the authority of the *Marley* and *Broome* decisions.

2. The Avoidable Consequences Doctrine.—Professor Dobbs states the avoidable consequences doctrine in its traditional form:

> The plaintiff who is injured by actionable conduct of the defendant, is ordinarily denied recovery for any item of special damages he could have avoided by reasonable acts, including reasonable expenditures, after the actionable conduct takes place. . . .
>
> . . . .
>
> The affirmative side of the rule is that the plaintiff is entitled to recover for expenditures reasonably made in an effort to avoid or minimize damages caused by the defendant's conduct.
>
> The avoidable consequences rule in its negative form is not the same as the contributory negligence defense. For one thing, the contributory negligence defense looks to the plaintiff's pre-tort conduct, while the avoidable consequences defense looks to his post-tort conduct.[53]

Other differences between contributory negligence and avoidable consequences suggested by Professor Dobbs are: (1) the former applies only to negligence actions, while the latter applies to contract cases as well; (2) there is no duty of reasonable care to avoid damages if defendant's conduct is reckless or intentional; (3) avoidable consequences, like comparative fault, merely reduces damages, while contributory negligence bars recovery entirely; and (4) the contributory negligence standard "may be an objective one," while the "avoidable consequences rule probably takes the individual problems of the plaintiff into account somewhat more readily, though it is hard to be very sure about this."[54]

Most, if not all, of these asserted differences between the contributory negligence and avoidable consequences doctrines

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guilty of contributory negligence when the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

53. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.7, at 186-87 (1973).

54. *Id.* at 187-88.

disappear on closer analysis. Contributory negligence has been held in some jurisdictions to bar warranty claims that are contractual in nature.[55] The defense of contributory negligence is no bar if defendant's conduct is reckless or willful.[56] To state that unreasonable failure to avoid consequences reduces recovery, while contributory negligence bars recovery entirely, is only to assert a legal conclusion about the differences between the two doctrines without offering any reason why that difference should exist. There is no basis for concluding that one doctrine is any more or any less objective or subjective in its application than the other.[57]

The "affirmative side," as labeled by Professor Dobbs, of the avoidable-consequences rule has its counterpart in the contributory-negligence doctrine. If a claimant is injured in a reasonable attempt to avoid the occurrence of defendant's tort, he may recover for those injuries.[58] Rarely does the claimant incur out-of-pocket expenses to avoid a tort, but if he did so reasonably, these expenses should be recoverable. If *A* paid *B* a reasonable sum of money to induce *B* to help *A* out of the path of *C*'s tortiously approaching instrumentality, *A* should be able to recover this sum from *C*.

The one remaining difference between contributory negligence and unreasonable failure to avoid consequences is that of the timing of the claimant's conduct. As Professor Dobbs says, contributory negligence occurs prior to defendant's commission of the tort, while unreasonable failure to avoid consequences occurs after commission of the tort. This temporal distinction is often cited as the primary reason for the difference between the

55. *See* Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 111-14 (1972).

56. *See* W. PROSSER, *supra* note 12.

57. In explanation of the supposed subjective standard for determining avoidable consequences, Professor Dobbs notes that "some courts have recognized that the bank balance of the individual plaintiff should govern on the question what expenditures might reasonably be expected of him in minimizing his damages." D. DOBBS, *supra* note 53, at 186. This distinction seems no different from the general negligence rule which "must make proper allowance for the risk apparent to the actor, for his capacity to meet it, and for the circumstances under which he must act." W. PROSSER, *supra* note 12, § 32, at 150.

58. *See, e.g.*, Rossman v. La Grega, 28 N.Y.2d 300, 270 N.E.2d 313, 321 N.Y.S.2d 588 (1971).

two doctrines.[59] Yet, the following close examination of the cases, including those in South Carolina, shows that the purported distinction is not, and cannot, always be maintained. Moreover, even if the distinction could be drawn clearly in all cases, it nevertheless seems to be one without a difference. Under any analysis, contributory negligence and avoidable consequences cannot be distinguished in logic or in policy. The result is that one part of contributory negligence (avoidable consequences) is being compared with defendant's negligence, while the remaining portion of contributory negligence is not being compared, even though there is no rational basis under *Marley* and *Broome* for drawing this distinction. The constitutional requirement of rational classification applies to court decisions as well as to statutes.[60] Thus, either the avoidable consequences doctrine under the constitutional compulsion of these decisions must be expunged from the law of South Carolina—a result neither likely nor desirable—or sound reason and policy demand that the doctrine be extended to establish a comprehensive doctrine of comparative fault in the state.

The traditional distinction between the two doctrines is stated in *Seay v. Southern Railway-Carolina Division*[61] and *Sullivan v. City of Anderson.*[62] In *Seay,* the court described contributory negligence as follows:

> " '[W]hen the carelessness of the person inflicting the injury is antecedent to the negligence of the person injured, and the latter might, by ordinary care, have discovered the failure of the former to use such care in time to avoid the injury, there can be no recovery, because the intervening negligence of the injured person is the direct and proximate cause of the injury.' "[63]

In *Sullivan,* the court stated the traditional avoidable consequences rule: "The rule is well established that it is the duty of

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59. *See* W. PROSSER, *supra* note 12, at 423.

60. The equal protection clause of the federal constitution applies to judicial decisions as well as to legislative enactments, since both constitute state action. Virginia v. Rives, 100 U.S. 313, 318 (1880).

61. 205 S.C. 162, 31 S.E.2d 133 (1944).

62. 81 S.C. 478, 62 S.E. 862 (1908).

63. 205 S.C. at 174, 31 S.E.2d at 138 (quoting Bodie v. Charleston & W.C. Ry., 61 S.C. 468, 486, 39 S.E. 715, 721 (1901)) (quoting 7 ENCY. LAW 383-85 (2d ed.)).

the owner of property, injured by the negligence of another, to use all reasonable effort to minimize the damage."[64] As the following examination indicates, however, the distinction is not maintained in the cases, primarily because of the confusion created by continuing torts.

An early telegraph case illustrates the problem. In *Willis v. Western Union Telegraph Co.*,[65] plaintiff claimed damages for mental distress suffered as the result of the alleged negligent delay of defendant in transmitting a reply to plaintiff's inquiry regarding his mother's health. Damages were recoverable from the time when plaintiff should have received the telegram to the time when he received positive information regarding his mother's health. The delay was obviously a continuing tortious failure of defendant to act, not a completed act. Yet the court held that "the jury might consider in mitigation of damages the failure of plaintiff to use other means of communication within his reach during that period of time."[66] The mitigation of damages or avoidable consequences rule should have been applied however, only if the tortious act had been completed.

The clearest case of ongoing tort is the repeated or continuing nuisance. In these situations a duty reasonably to avoid consequences has been imposed, even though the tort has not been completed.[67]

A bizarre train case illustrates the court's uncertainty in distinguishing avoidable consequences from contributory negligence. In *Currie v. Davis*,[68] plaintiff bought a train ticket, but was forcefully prevented from entering the train by the railroad's gatekeeper. Repeated attempts to enter resulted in repeated gatekeeper rejections accompanied by abusive language. Plaintiff left the gate to complain to the ticket agent, who suggested that plaintiff try to enter the train by a nonpassenger entrance. Plaintiff then returned to the passenger gate and was again forcefully and abusively rejected by the gatekeeper. No explanation is given in the opinion for the gatekeeper's actions or for the ticket agent's failure to intervene. Plaintiff claimed dam-

64. 81 S.C. at 480, 62 S.E. at 863.
65. 69 S.C. 531, 48 S.E. 538 (1904).
66. *Id.* at 539, 48 S.E. at 541.
67. *See* Fewell v. Catawba Power Co., 102 S.C. 452, 86 S.E. 947 (1915).
68. 130 S.C. 408, 126 S.E. 119 (1923), *appeal dismissed*, 266 U.S. 182 (1924).

ages for loss of business from the four-day delay in reaching his destination and for mental anguish. A judgment for plaintiff was upheld on appeal. Defendant railroad contended on appeal that

> under the facts of this case the law imposed upon the plaintiff the duty to minimize his damages, in so far as they were due to humiliation resulting from the gatekeeper's first rejection, by not thereafter subjecting himself to affront by repeatedly approaching the Cerberus at the gate, or by accepting the ticket agent's kindly suggestion that he try a flanking movement. We think the law applicable in that aspect of the case was the rule of contributory negligence or willfulness rather than the principle as to mitigation or reduction of damages. But, if the latter principle were applicable, the avoidable consequential damages which the defendant was entitled to have eliminated from the consideration of the jury were only such as could have been avoided by the injured party in the exercise of proper care.[69]

The temporal distinction between contributory negligence and unreasonable failure to avoid consequences is so ephemeral and unjustified that the courts occasionally have rejected it. In *Lipman v. Atlantic Coast Line Railroad,*[70] for example, plaintiff sued defendant for mental anguish caused by the abusive language of defendant's conductor. Defendant's defense was that the conductor's actions were provoked by plaintiff's wrongful conduct in tendering cash instead of a ticket—conduct clearly preceding defendant's actions and, therefore, traditionally described as contributory negligence. The court stated: "If that be true [defendant's claim of provocation], it is a matter of defense, and in mitigation of damages, even if [plaintiff's] technical rights as a passenger were violated."[71]

In *Gardner v. Q.H.S., Inc.,*[72] fire damage to plaintiff's premises allegedly resulted from defendant-product supplier's failure to provide an adequate warning. The Court of Appeals for the Fourth Circuit stated that the "contributory negligence of

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69. 130 S.C. at 422, 126 S.E. at 124.

70. 108 S.C. 151, 93 S.E. 714 (1917).

71. *Id.* at 154, 93 S.E. at 715.

If defendant's misconduct were willful and plaintiff's merely negligent, plaintiff's misconduct should be irrelevant whether it be deemed contributory negligence or unreasonable failure to mitigate damages. *See* note 56 and accompanying text *supra.*

72. 448 F.2d 238 (4th Cir. 1971)(applying South Carolina law).

[plaintiff's] employees . . . in failing to respond promptly"[73] when they discovered the fire might be a defense if, on remand, the trial court found that "contributory negligence is a defense in a suit for breach of implied warranty . . . ."[74] The employees' conduct here, characterized as "contributory negligence," clearly followed defendant's commission of the tort.

In *Spier v. Barker*,[75] the New York Court of Appeals recognized that plaintiff's failure to wear a seat belt is conduct that precedes an automobile accident and that "[t]raditionally" the doctrine of avoidable consequences has been applied "only to postaccident conduct."[76] The court nevertheless chose to treat plaintiff's failure to wear her seat belt as an unreasonable failure to avoid consequences, apparently in order to avoid the harsh consequences of the all-or-nothing contributory negligence rule.[77]

Dean Prosser candidly admits that "the doctrines of contributory negligence and avoidable consequences are in reality the same . . . ."[78] The Uniform Comparative Fault Act includes within the definition of comparative fault the failure to avoid or mitigate damages.[79]

Thus, both case law and commentators make clear that the doctrines of contributory negligence and unreasonable failure to avoid consequences cannot be distinguished effectively. South Carolina, therefore, already has a limited rule of comparative fault in its avoidable consequences doctrine, which is not rationally distinguishable from contributory negligence. The only question is whether the courts will acknowledge this fact and take appropriate steps to extend the avoidable consequences principle of comparative fault and to eliminate the defense of

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73. *Id.* at 245.

74. *Id.* *See* note 55 and accompanying text *supra*.

75. 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

76. *Id.* at 451, 323 N.E.2d at 168, 363 N.Y.S.2d at 921.

77. In *Jones v. Dague*, the court rejected "the view that the mere failure to use a seat belt constitutes negligence or a failure to minimize damages" because defendant failed to prove what portion of plaintiff's injuries were due to her failure to use a seat belt. 252 S.C. 261, 271, 166 S.E.2d 99, 103-04 (1969). *See* TENN. CODE ANN. § 59-930 (1980), which provides: "[I]n no event shall failure to wear seat belts be considered as contributory negligence, nor shall such failure to wear said seat belt be considered in mitigation of damages on the trial of any civil action."

78. W. PROSSER, *supra* note 12, at 424.

79. UNIFORM COMPARATIVE FAULT ACT § 1(b).

contributory negligence. The alternative is to bar recovery entirely for unreasonable failure to avoid consequences so as to conform this principle to the present rule of contributory negligence in South Carolina for equal protection purposes. This alternative would be unfair to a plaintiff who unreasonably fails to avoid consequences and it demonstrates the basic unfairness of the contributory negligence rule.

3. Crashworthiness.—The South Carolina Supreme Court, in *Mickle v. Blackmon,*[80] apportioned a judgment between cotortfeasors, a construction company and an automobile manufacturer, for injuries plaintiff received when she was impaled on an allegedly defectively designed stick shift lever. The accident was caused by the construction company's negligent removal of road signs and the injuries were aggravated by Ford's defective design.

Cases of this type are often described as second-collision or crashworthiness cases.[81] The distinguishing feature is considered to be that the conduct of one of the defendants does not cause the accident, but only increases the injuries. This distinction is not maintained consistently in the cases, however. For example, if plaintiff is negligently injured by the operator of a lawn mower and the injury could have been prevented had the manufacturer of the mower installed an inexpensive safety guard or shield, the operator and manufacturer are both generally held to be the cause of the entire injury. But for the negligent operation of the mower, the injury would never have happened. Yet, had the mower been "crashworthy" (had it been equipped with an adequate guard), the injury likewise would not have occurred. Nevertheless, in *Harrison v. McDonough Power Equipment, Inc.,*[82] this factual situation was treated as a crashworthiness case.

That the injuries caused by each defendant often occur at slightly different times, rather than simultaneously, seems to be immaterial. The use of this temporal difference for the purpose of differentiating these cases from other cotortfeasor cases in

80. 252 S.C. 202, 166 S.E.2d 173 (1969).

81. *See* D. NOEL & J. PHILLIPS, CASES AND MATERIALS ON PRODUCTS LIABILITY 417-45 (1976).

82. 381 F. Supp. 926 (S.D. Fla. 1974). *Compare id. with* the theoretically comparable case of Carpini v. Pittsburgh and Weirton Bus Co., 216 F.2d 404 (3d Cir. 1954)(defendants apparently were held jointly and severally liable).

which joint and several liability is imposed, resembles the use of the artificial distinction traditionally employed to distinguish contributory negligence from avoidable consequences.[83]

In the *Mickle* situation, the construction company usually should be liable for the entire damages if the aggravating conduct is reasonably foreseeable.[84] Some courts place the burden of making any required apportionment on the plaintiff.[85] The better rule is to place this burden on the defendant, as is done with contributory negligence, avoidable consequences, and comparative fault.[86]

The *Mickle* apportionment rule embodies a doctrine of comparative contribution between or among cotortfeasors with no joint and several liability to the plaintiff. If the rule cannot be logically restricted to successive, as opposed to concurrent, injuries—as it cannot be—the same compulsion that dictates extension of the avoidable consequences damages reduction approach to include contributory negligence also dictates extension of the crashworthiness damages reduction approach to establish a broad principle of comparative contribution in South Carolina.

IV. CONCLUSION

Justice Holmes once said that "[t]he life of the law has not been logic. It has been experience."[87] There is, however, no necessary conflict between logic and experience. Indeed, the one should lend support to the other. The essence of good judicial decision-making is reasoned analysis and when such analysis commands a particular course courts should not hesitate to proceed.

The South Carolina Supreme Court has imposed a heavy

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83. *See* W. PROSSER, *supra* note 12, at 423-24 (aggravation of damages by plaintiff); Phillips, *In Tribute: Arno Cumming Becht*, 1979 WASH. U.L.Q. 661, 664-65 (aggravation of damages by defendant).

84. Thus, when a treating doctor foreseeably aggravates injuries caused by a tortfeasor, the latter is liable for all damages. *See, e.g.*, Gertz v. Campbell, 55 Ill. 2d 84, 302 N.E.2d 40 (1973).

85. *E.g.*, Huddell v. Levin, 537 F.2d 726 (3d Cir. 1976).

86. *See* Zimmerman v. Ausland, 266 Or. 427, 513 P.2d 1167 (1973)(avoidable consequences); Chrysler Corp. v. Todorovich, 580 P.2d 1123 (Wyo. 1978)(crashworthiness); W. PROSSER, *supra* note 12, at 416 (contributory negligence); V. SCHWARTZ, *supra* note 7, § 17.2 (comparative fault).

87. O. HOLMES, THE COMMON LAW 1 (1881).

duty on the state's lawmaking bodies, both legislative and judicial, to justify their actions on especially strict constitutional principles of rational classification and equal protection. That duty fairly demands that the court deal with its avoidable consequences and crashworthiness doctrines either by their elimination or by their logical extension to the full-blown doctrines of comparative fault and comparative contribution. Moreover, the federally required application in South Carolina of a pure comparative-fault rule under the Federal Employers' Liability Act mandates the extension of that rule to all areas of tort law in this state, in order to comply with the state constitutional requirements of rational classification and equal protection.