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Torts

Dean A. Eichelberger

Amy Acheson

J. M. Jones

Nancy E. Caldwell

John K. Hane III

See next page for additional authors

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Authors

Dean A. Eichelberger, Amy Acheson, J. M. Jones, Nancy E. Caldwell, John K. Hane III, and Bert G. Utsey III

TORTS

I. Bystander Recovery for Negligent Infliction of Emotional Distress Recognized

In *Kinard v. Augusta Sash & Door Co.*[1] the South Carolina Supreme Court took another step toward the recognition of emotional tranquility as an interest worthy of protection[2] by holding that one who negligently causes severe injury or death to another may be liable to a bystander who witnesses the incident and suffers severe emotional distress as a result.[3] Consequently, South Carolina joins a majority of jurisdictions in recognizing a cause of action for negligently inflicted emotional distress,[4] although South Carolina has followed the minority view on the proper application of the tort.[5]

In *Kinard* the plaintiff's twenty-year-old daughter was seriously injured when roof trusses fell from the defendant's truck, broke through the windshield of the car in which Mrs. Kinard and her daughter were riding, and struck the daughter on the head. Mrs. Kinard brought suit in federal court seeking recovery for both her own physical injuries and for "the severe shock, emotional trauma, and resulting physical injuries suffered as a result of watching her child experience serious physical injury and suffering."[6] Because the district court found no controlling

1. 286 S.C. 579, 336 S.E.2d 465 (1985).

2. *See* Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981), and cases cited therein.

3. 286 S.C. at 582, 336 S.E.2d at 467. The supreme court, in Dooley v. Richland Memorial Hosp., 283 S.C. 372, 322 S.E.2d 669 (1984), addressed a claim of negligent infliction of emotional distress, but neither rejected nor adopted the new tort.

4. For discussion of the jurisdictions recognizing recovery based on negligent infliction of emotional distress arising from witnessing injury to another, see Annotation, *Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R.3d 1337 (1970), and Annotation, *Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another*, 5 A.L.R.4th 833 (1981).

5. A study published in 1981 identifies 10 states that hold to the position adopted by South Carolina and 19 states that oppose it. Note, *An Expanding Legal Duty: The Recovery of Damages for Mental Anguish by Those Observing Tortious Activity*, 19 Am. Bus. L.J. 214, 219 (1981).

6. Brief of Plaintiff at 3.

South Carolina precedent on the issue of recovery for emotional distress, the court certified the question to the South Carolina Supreme Court.[7]

The supreme court, faced with a variety of approaches in defining the new cause of action, chose a version of the "foreseeability test" first articulated in *Dillon v. Legg*.[8] The test adopted by the court, which restricts what could otherwise be almost unlimited liability, requires the following elements:

> (a) the negligence of the defendant must cause death or serious physical injury to another;
> (b) the plaintiff bystander must be in close proximity to the accident;
> (c) the plaintiff and the victim must be closely related;
> (d) the plaintiff must contemporaneously perceive the accident; and
> (e) emotional distress must both manifest itself by physical symptoms capable of objective diagnosis and be established by expert testimony.[9]

If these five elements are satisfied, the injuries to the plaintiff are deemed to be foreseeable, and the defendant owes a duty of due care to the plaintiff. A breach of this duty will subject the defendant to liability.[10]

The court noted that these factors will be applied on a case-by-case basis.[11] It is through this individualized application and the development of a body of precedent in this area that practitioners will be able to glean a clearer understanding of these factors. In the years since *Dillon* was adopted, however, other states have adopted and construed similar causes of action with similar limitations. The three "proximity" requirements[12] are

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7. The question certified pursuant to S.C. SUP. CT. R. 46 was "[w]hether a mother who is herself physically injured as a result of a delict may recover damages for severe shock, emotional trauma and resulting physical injuries caused by witnessing severe injury to her daughter in the same incident?" 286 S.C. at 580, 336 S.E.2d at 466.

8. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

9. 286 S.C. at 582-83, 336 S.E.2d at 467.

10. The seminal opinion states: "The risk reasonably to be perceived defines the duty to be obeyed . . . ." Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

11. 286 S.C. at 582, 336 S.E.2d at 467.

12. These factors are as follows: Close proximity to the accident, close relation to the victim, and contemporaneous perception of the accident. *See generally* Note, *supra* note 5.

common in virtually all *Dillon* decisions. The factors concerning the bystander's proximity and perception have been blurred in some cases to the point that "[i]f the observer is near enough to the negligent act that he senses the specifics of the occurrence, the location factor is satisfied."[13]

In addition to the contemporaneous perception requirements,[14] courts and commentators have examined the requirement of a close relationship between the victim and the plaintiff-witness.[15] The remaining elements have only recently appeared in *Dillon* decisions and therefore have not developed the volume of case law of the other elements.

Although the South Carolina Supreme Court has adopted a cause of action whereby a closely related bystander can recover for negligently inflicted emotional distress, nevertheless, the practitioner should be aware that a cause of action for "outrage," delineated by *Ford v. Hutson*,[16] is available and should be

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13. Note, *supra* note 5, at 224. This is characterized as the " 'not far distant rule.' " *Id.*

14. Annotation, *Immediacy of Observation of Injury as Affecting Right to Recover Damages for Shock or Mental Anguish from Witnessing Injury to Another*, 5 A.L.R.4TH 833 (1981). Perhaps the clearest explanation of the contemporaneous perception requirement may be found in Parsons v. Superior Court, 81 Cal. App. 3d 506, 146 Cal. Rptr. 495 (1978)(plaintiffs came upon the wreckage of defendant's automobile "before the dust settled" and knew instantly that their daughters inside were dead or dying, but were denied recovery for lack of sensory perception of the accident); *see also* Arauz v. Gerhardt, 68 Cal. App. 3d 937, 137 Cal. Rptr. 619 (1977)(victim's mother arrived on the scene within five minutes but was denied recovery for lack of contemporaneous sensory perception). *But see* Portee v. Jaffee, 84 N.J. 88, 417 A.2d 521 (1980), in which the victim's mother was allowed recovery where she arrived at the scene after her seven-year-old son became trapped between an elevator's outer door and wall of the elevator shaft. While she did not witness the accident, she did witness the unsuccessful four and one-half hour attempted rescue of her son during which time he "moaned, cried out and flailed his arms." *Id.* at 91, 417 A.2d at 522.

15. Annotation, *Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Damages in Negligence for Shock or Mental Anguish at Witnessing Victim's Injury or Death*, 94 A.L.R.3D 486 (1979). The courts look for the emotional attachments of the family relation. Thus, in Mobaldi v. Board of Regents, 55 Cal. App. 3d 573, 127 Cal. Rptr. 720 (1976), the relationship between a foster parent and foster child satisfied the relation requirement because, in part, the parent and child held themselves out to be related. *But see* Drew v. Drake, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980)(plaintiff was denied recovery after "de facto spouse" with whom she had continuously lived for three years was killed in automobile wreck caused by defendant's negligence, since there was no family relationship and no allegation that defendants knew or should have foreseen any other relationship between plaintiff and victim).

16. 276 S.C. 157, 276 S.E.2d 776 (1981). The tort of "outrage," known as the intentional infliction of emotional distress gives liability for conduct that is extreme and out-

pleaded where applicable.[17] Practitioners should also note that although the cause of action is presently limited to bystander recovery,[18] it seems likely that a South Carolina court would, in an appropriate factual situation, allow recovery when the emotional distress was directly inflicted.[19]

Dean A. Eichelberger

II. MUNICIPALITY'S FAILURE TO DISSEMINATE EXECUTIVE ORDER IS SUFFICIENT ALLEGATION OF A "POLICY" FOR SECTION 1983 ACTION

In *Moore v. City of Columbia*[20] the South Carolina Court of Appeals reversed a circuit court order sustaining a demurrer to complaints alleging a cause of action against the municipality under Title I, section 1983 of the Civil Rights Act of 1871.[21] The court of appeals held that the complaint stated a cause of action since it alleged a de facto policy of the municipality which proximately caused the deprivation of a constitutional right.[22]

The action arose when Mrs. Moore's son was shot and killed by a group of city police officers who were pursuing him. Mrs.

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rageous, causing distress of an extreme or severe nature. This conduct, however, must be so outrageous that it exceeds " 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community' . . . ." *Id.* at 162, 276 S.E.2d at 778 (citing RESTATEMENT (SECOND) OF TORTS § 46 comment d (1979).

17. *See* Brief of Plaintiff at 5. One of the advantages of a claim for "outrage," also known as the intentional infliction of emotional distress, is that punitive damages may be available.

18. 286 S.C. at 582 n.2, 336 S.E.2d at 467 n.2.

19. Arguably, the supreme court recognized negligent infliction of emotional distress without requiring that the plaintiff be in the "zone of danger" or suffer a contemporaneous impact in Padgett v. Colonial Wholesale Distrib. Co., 232 S.C. 593, 103 S.E.2d 265 (1958).

20. 284 S.C. 278, 326 S.E.2d 157 (Ct. App. 1985).

21. Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982). The court affirmed the demurrer to an identical complaint alleging a cause of action under 42 U.S.C. § 1985 (1982), the civil rights conspiracy statute, noting the complaint's failure to allege the necessary "invidiously discriminatory *animus*." 284 S.C. at 288, 326 S.E.2d at 163.

22. 284 S.C. at 286, 326 S.E.2d at 163. The court also held that the demurrer could not be sustained on the ground that Mrs. Moore improperly pled that supervisory police officers ordered or contributed to her son's death. The court of appeals found that Mrs. Moore should have the right to produce evidence at trial supporting her contention that these officers were carrying out a de facto policy of the City. *Id.* at 287, 326 S.E.2d at 162.

Moore alleged that her son was unarmed, did not pose a threat of death or serious bodily harm to police, and was not suspected of committing a capital offense.[23] She sought money damages from the City for both wrongful death and survivorship.[24]

An executive order issued in 1980 permitted the use of deadly force only in a situation in which the one being apprehended posed a threat of serious bodily harm or death.[25] Mrs. Moore alleged that the City's twelve-month practice of failing to disseminate the executive order to many of its policemen constituted an indifference to the officer's use of lethal force to apprehend a person posing no threat to the officer's safety.[26] Mrs. Moore further alleged that the failure of the City and the supervisory officers on the scene to enforce the order constituted a custom of the municipality which proximately caused the deprivation of her son's life without due process of law.[27]

No substantive rights are granted by section 1983. Rather, actions brought under the statute are remedial in nature.[28] Although Mrs. Moore claimed that her son's right to due process of law as guaranteed by the fourteenth amendment was violated, the circuit court found that she failed to allege a policy, practice, or custom of the City which caused the deprivation.[29]

In reversing the circuit court's decision, the court of appeals stated that a complaint properly pleads the ultimate facts behind the elements of a cause of action, rather than the evidence probative of those ultimate facts. The court held that Mrs. Moore's complaints stated both a wrongful death and survivorship action based on a violation of section 1983.[30]

More importantly, the court found that the complaints alleged an official custom or de facto policy consisting of "the City's twelve-month persistent practice of unreasonably failing to disseminate the executive order to many of its policemen."[31]

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23. 284 S.C. at 281, 326 S.E.2d at 159.
24. *Id.* at 282, 326 S.E.2d at 159.
25. *Id.* at 281, 326 S.E.2d at 159.
26. *Id.* at 286, 326 S.E.2d at 161.
27. *Id.*
28. Baker v. McCollan, 443 U.S. 137 (1979).
29. 284 S.C. at 285, 326 S.E.2d at 159.
30. *Id.* at 287, 326 S.E.2d at 162.
31. *Id.* at 286, 326 S.E.2d at 161.

The court cited *Monell v. Department of Social Services*[32] for the proposition that the official policy required in a section 1983 action need not be a de jure policy, but may be represented by custom of the municipality.[33]

Municipalities are subject to liability under section 1983.[34] This liability cannot be based on respondeat superior since a city is not considered to be at fault solely due to a tortious act of its employee.[35] The critical standard embraces the notion that a city itself must be at fault; a plaintiff must prove a municipal custom or policy in order to receive his remedy.[36]

Practitioners should take particular note that in this case the alleged de facto policy involved the enforcement of *vel non* of an executive order. In a recent United States Supreme Court case, *City of Oklahoma City v. Tuttle*,[37] the Court held that a municipal policy sufficient to impose liability under *Monell* could not be inferred merely from a single act of force.[38] According to the standard used by the Court, the custom or policy must be the deliberate choice of the policymakers.[39]

In *Moore* the claim for damages was based on an allegation that the City deliberately failed to disseminate an executive order. In applying a liberal construction of a section 1983 cause of action and upholding the complaint, the South Carolina Court of Appeals has abided by the prevailing federal standard in a suit under that section.

Amy Acheson

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32. 436 U.S. 658 (1978).

33. 284 S.C. at 283-84, 326 S.E.2d at 160.

34. *Monell*, 436 U.S. at 690.

35. *Id.* at 691-94.

36. *Id.* at 694.

37. 471 U.S. 808, 105 S. Ct. 2427 (1985)(civil rights action under section 1983 brought by widow of man shot and killed by police).

38. *Id.* at ___, 105 S. Ct. at 2436. The Court held that a single incident of unconstitutional activity must include "proof that it was caused by an existing, unconstitutional municipal policy, which can be attributed to a municipal policymaker." *Id.*

39. *Id.* at ___, 105 S. Ct. at 2436.

III. Public Policy Exception to Employment-at-Will Doctrine Recognized

In *Ludwick v. This Minute of Carolina, Inc.*[40] the South Carolina Supreme Court created a long-awaited public policy exception to South Carolina's century-old employment-at-will rule.[41] Justice Chandler, writing for a unanimous court, stated that where the retaliatory discharge of an at-will employee constitutes a violation of a clear mandate of public policy, a cause of action in tort for wrongful discharge arises.[42] This decision places South Carolina in line with a growing majority of states which have adopted the public policy exception to the at-will

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40. 287 S.C. 219, 337 S.E.2d 213 (1985).

41. The employment-at-will rule generally allowed an employer to discharge an employee for "any reason, or for no reason at all." Hudson v. Zenith Engraving Co., 273 S.C. 766, 769, 259 S.E.2d 812, 813 (1979). The doctrine was first proposed in 1877 by Professor H. G. Wood. *See* H. Wood, Master and Servant § 134 (1st ed. 1877). Because it reflected the principles of contract law and served the laissez faire economics of the late nineteenth century, it quickly became the universal rule. *See* S. Williston, Williston on Contracts § 39 (3d ed. 1957). For in-depth discussions on the historical development of the doctrine, see Feinman, *The Development of the Employment at Will Rule*, 20 Am. J. Legal Hist. 118 (1976); Vernon & Gray, *Termination at Will—The Employer's Right to Fire*, 6 Employee Rel. L.J. 25, 26-27 (1980); Annotation, *Employee's Arbitrary Dismissal as Breach of Employment Contract Terminable at Will*, 62 A.L.R.3d 271 (1975).

42. 287 S.C. at 225, 337 S.E.2d at 216. This modification of the at-will rule "applies only to this case and to those causes of action arising after the filing of this opinion, November 18, 1985." *Id.* at 225-26, 337 S.E.2d at 216.

The "public policy" exception adopted in this instance began as a narrowly construed doctrine that permitted employees to bring an action only when they could demonstrate that a statute expressly prohibited their discharge. *See, e.g.*, Kauff v. Bethlehem-Alameda Shipyard, 90 Cal. App. 2d 322, 202 P.2d 1059 (1949)(statute expressly barred the discharge of an employee for serving as an election officer). Later cases broadened the doctrine to include discharges that violate statutory codifications of public policy that do not expressly protect employees. *See, e.g.*, Petermann v. International Brotherhood of Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959)(declining to commit perjury at employer's behest); Frampton v. Central Ind. Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973)(employee terminated for filing workers' compensation claim). Eventually, courts in a few states began to apply the public policy exception to discharges that violated policy not expressed in a statute. *See, e.g.*, Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975)(employee terminated for serving on a jury). Where employee claims invoke private as opposed to public concerns, however, courts generally have been unsympathetic. *See, e.g.*, Abniss v. Pulley Freight Lines, Inc., 270 N.W.2d 454 (Iowa 1978)(questioning an employer's integrity); Keneally v. Orgain, 186 Mont. 1, 606 P.2d 127 (1980)(questioning employer's internal management system). *See generally* Decker, *At-Will Employment in Pennsylvania—A Proposal for Its Abolition and Statutory Regulation*, 87 Dick. L. Rev. 477, 484 n.60 (1983).

rule.[43]

In *Ludwick* the petitioner, Gwendolyn Ludwick, was employed as a seamstress in respondent's sewing plant. During her employment at Carolina, she was served with a subpoena to attend a hearing before the South Carolina Employment Security Commission. Although Ludwick's plant managers advised her that she would be fired if she obeyed the subpoena, Ludwick honored the subpoena and testified at the hearing. Upon returning to work the next day, she was immediately fired.[44] Consequently, Ludwick brought an action against Carolina for wrongful discharge from employment.

The trial court granted Carolina a nonsuit, and the court of appeals affirmed the dismissal.[45] The supreme court, however, reversed and remanded. The court held that South Carolina would recognize a cause of action for wrongful discharge where the termination of employment constituted a violation of public

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43. *See* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE 18-19 (1984). Mounting criticism of the at-will doctrine has led many courts to recognize several other exceptions that require at least brief mention here. These exceptions are based on the theories of implied contract and implied covenant of good faith and fair dealing.

The implied contract exception applies when employees have been told upon being hired that they will not be terminated unless there is just cause. These assurances have been construed as consideration for acceptance of employment by the employee and are often found in personnel manuals, employee handbooks, and employee brochures that explain employee benefits. *See, e.g.*, Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); Toussaint v. Blue Cross & Blue Shield of Mich., 408 Mich. 579, 292 N.W.2d 880 (1980). *But see* Sargent v. Illinois Inst. of Technology, 178 Ill. App. 3d 117, 397 N.E.2d 443 (1979)(employee handbook rejected as basis for legally binding modification of the at-will rule). *See generally* Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

Recently, a few courts have found that, as a matter of law, a right to fair dealing is implied in all contracts, including those for employment. *See, e.g.*, Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549, 62 A.L.R.3D 264 (1974). *See generally* Note, *Protecting At-Will Employment Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980). Thus far, the doctrine has been largely restricted to situations involving long-time employees, particularly when they are terminated to prevent collection of earned commissions. *See, e.g., Fortune*, 373 Mass. at 104-05, 364 N.E.2d at 1257. At least one court, however, has refused to distinguish between discharges to deny an earned benefit and other bad faith discharges. *See* Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 917 (1981).

44. 287 S.C. at 221, 337 S.E.2d at 214.

45. *See* Ludwick v. This Minute of Carolina, Inc., 283 S.C. 149, 321 S.E.2d 618 (Ct. App. 1984).

policy.[46]

The scope of the *Ludwick* court's holding appears to be narrow. The court stated that "the public policy exception is invoked when an employer requires an at-will employee, as a condition of employment, to violate the law."[47] The court reasoned that a contrary ruling would contravene the legal process established by the legislature.[48] The limited scope of the court's holding is the result of two express concerns. First, there is a concern that a modification of the at-will rule will spawn an outpouring of vexatious and frivolous litigation. The second concern is that the employer will not be unduly fettered in exercising his rightful prerogative to select employees.[49]

After *Ludwick* a crucial uncertainty is whether the public policy exception will be invoked only when an employer requires an employee to violate the law in order to keep his job or whether this action constitutes merely one example of the numerous violations of public policy that would warrant application of the exception. In *Ludwick* the court briefly mentioned several recent South Carolina decisions that involved the retaliatory discharge of at-will employees for filing workers' compensation claims. The supreme court and the court of appeals deemed that these cases were inappropriate for review of the at-will rule.[50] This conclusion appears to indicate that the court, at least for the present, intends to restrict its application of the public policy exception to the facts found in *Ludwick*. If this is a fair assessment of the scope of the court's holding, the number of wrongfully discharged South Carolinians who can expect to benefit from the newly created public policy exception is minute.

In spite of the limited scope of the *Ludwick* decision, the

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46. 287 S.C. at 225, 337 S.E.2d at 216.

47. *Id.*

48. *Id.* The court stated, "Here, the subpoena served upon Ludwick was issued pursuant to S.C. CODE ANN. section 41-29-210 (1976) which provides a criminal penalty for failure to obey. She was confronted with the dilemma of choosing between her livelihood, on the one hand, and obedience to the law of the state, on the other." *Id.*

49. 287 S.C. at 225, 337 S.E.2d at 216.

50. *Id.* at 222, 337 S.E.2d at 215; *see* Hudson v. Zenith Engraving Co., 273 S.C. 766, 259 S.E.2d 812 (1979); Corder v. Champion Rd. Mach. Int'l Corp., 283 S.C. 520, 324 S.E.2d 79 (Ct. App. 1984). This language carries with it the unfortunate implication that employers may continue, if they so desire, to emasculate the safeguards provided by our state's workers' compensation statutes by terminating with impunity those at-will employees who pursue benefits under these laws.

case may at least prove to be the first cautious step towards a more appreciable circumscription of the employment-at-will rule in South Carolina. Given the pro-employer labor relations philosophy of our courts, however, it is likely that any further modification of the at-will rule will be slow and hardfought. Therefore, the overwhelming majority of South Carolinians who are employed at will may have a long wait before they experience the job security currently enjoyed by at-will employees residing in states that have adopted broader, more palpable exceptions to the at-will rule.[51]

J. Mark Jones

IV. EMPLOYER HELD LIABLE TO EMPLOYEE FOR SEXUAL HARASSMENT BY CO-EMPLOYEE

In *Davis v. United States Steel Corp.*[52] a majority of the Fourth Circuit Court of Appeals held that an employer may be held liable to an employee who is sexually harassed by a co-worker if a member of the employer's supervisory staff observes the misconduct and fails to take action to prevent further harassment.[53] Additionally, a different majority of the court held that, under the doctrine of *respondeat superior* in South Carolina, an employer would not be liable for the harassment unless there was inaction on the part of a supervisor after he had actual knowledge of the coemployees actions.

The plaintiff, Nanette Davis, was a secretary-receptionist at the United States Steel facility in Bamberg, South Carolina. During the fifteen months she worked for United States Steel, she was the only female employee at the Bamberg plant. Davis produced testimony that she suffered numerous indignities at the hands of her immediate boss, Jim Bryan, who was responsible for hiring and firing employees at the facility.[54] These activi-

51. *See supra* notes 42-43.

52. 779 F.2d 209 (4th Cir. 1985).

53. *Id.* at 211.

54. *Id.* at 210. During her employment, Davis was subjected to Bryan's "abusive language, off-color and sexual jokes and innuendos, and frequent invasions of her privacy concerning her marital and sexual relationship with her husband." *Id.* She also alleged direct sexual advances by Bryan. *Id.*

ties allegedly took place at the United States Steel facilities during work hours. One of Davis' co-workers corroborated the testimony.[55] In addition, Bryan's supervisor, Jim Stoutz, provided an affidavit which stated that he personally observed Bryan pat Davis on the posterior.[56] Davis testified that Stoutz had witnessed several such incidents and had overheard Bryan's derogatory remarks.[57] Stoutz, however, did not speak to Bryan about the incidents, nor did he inform his supervisors at United States Steel about Bryan's conduct.

In *Davis* the Fourth Circuit reversed the district court's grant of summary judgment for the defendant[58] and determined that it was possible for the plaintiff to establish a cause of action against United States Steel based on the testimony which reflected that the supervisor, Stoutz, had observed Bryan's conduct and failed to take action.[59] The court reasoned that knowledge of abusive activities of an employee by a supervisor, in the face of inaction, creates the inference that the employer did not object to the harassing conduct and, therefore, should be held liable for any injury suffered.[60] This theory was described by Judge Dickson as the "negligent failure to control" theory.[61]

The court of appeals based its holding, that actual knowledge of the supervisor was required for Bryan's action to be imputed, on *Rabon v. Guardsmark, Inc.*[62] In that case the Fourth Circuit ruled that an employer was not liable for the intentional

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55. 779 F.2d at 210.

56. *Id.*

57. *Id.*

58. Federal jurisdiction was based on the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1982). Davis also asserted pendent state law claims for wrongful discharge, assault and battery, and intentional infliction of emotional distress. 779 F.2d at 211.

59. 779 F.2d at 211.

60. *Id.* at 211-12.

61. *Id.* at 215 (Dickson, J., concurring in part and dissenting in part). This theory is distinct from that of ratification since ratification would relate only to the acts prior to the time the employer learned of the employee's conduct. Judge Phillips concluded that the use of this theory was inappropriate since it had never been suggested by the plaintiff as a basis of liability. *Id.* Hence, neither proof nor corresponding defenses had been presented on the issue. The judge continued that, despite the egregious nature of the alleged misconduct, plaintiff could base his action only on common law since the plaintiff chose to forego the more expansive substantive basis for employer liability under Title VII. *Id.*

62. 571 F.2d 1277 (4th Cir. 1978).

tort of his employee.[63] *Rabon* involved a factual situation in which a company's security guard, while on duty, raped a female employee. Judge Butzner distinguished *Rabon* from the *Davis* case by stating in his concurring and dissenting opinion: "The rape in *Rabon* was not a pervasive feature of the security guard's performance of his job. Rather, it was an isolated act that clearly negated the performance of the guard's duties. By contrast, a jury could reasonably find that Bryan's acts of sexual harassment were part and parcel of his supervision of Davis."[64] Nevertheless, if the *Davis* court had made an exception to the doctrine of *respondeat superior* as traditionally applied in South Carolina, the court would have had to engineer its own version of the Civil Rights Act. That action, however, is more appropriately a legislative function.

In holding that the inactivity of a supervisor after receiving knowledge of sexual harassment of employees can be imputed to the company, the *Davis* court gave a broad reading to the traditional common-law principle of *respondeat superior* as applied in South Carolina. In its quest for a fair means by which to hold a financially responsible employer liable for the egregious conduct of an employee, *Davis* may have opened the doors to claims that could be better handled by federal laws that address this type of discrimination.[65]

Nancy E. Caldwell

V. Wrongful Death Judgment Upheld on Grounds of Negligent Supervision

In 1979 a divorced, mentally ill mother who was living with her parents shot and killed her two children while they were staying with her for weekend visitation. Six years later, in *Crow-*

63. *Id.* at 1281-82.

64. 779 F.2d at 213 (Butzner, J., concurring and dissenting).

65. Unfortunately, Davis lost the more liberal, remedial interpretation of tort law which attaches to Title VII actions when she dropped her claim under the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-5 (1982). *See* Barnes v. Costle, 561 F.2d 983, 996-97 (D.C. Cir. 1977). *Compare* Bradley v. John M. Brabham Agency, 463 F. Supp. 27 (D.S.C. 1978)(using liberal interpretation of tort law for civil rights claim) *with* Rabon v. Guardsmark, Inc., 571 F.2d 1277 (4th Cir. 1978)(using stricter interpretation of tort law absent federal civil rights claim).

ley v. Spivey,[66] the South Carolina Court of Appeals held that the jury reasonably could have found that the proximate cause of the children's death was the maternal grandparents' negligent supervision of the visit.[67]

Lynette Spivey Crowley's mental problems with paranoid schizophrenia began in 1971. In 1975 she and her husband, Timothy Crowley, divorced and Lynette moved to her parents' home in Beaufort. Her mental condition began to deteriorate in 1978 and, after she spent six weeks in a mental institution,[68] custody of the children was transferred to her husband. In January Timothy learned that Lynette had purchased a gun and he refused to allow her to exercise her visitation rights.[69] A few weeks later, Lynette and her father called Timothy and offered assurances that Lynette had disposed of the gun. Mr. Spivey stated that he had searched repeatedly, yet unsuccessfully, for the gun. Agreeing to take "full responsibility" and supervise the children's visits,[70] Mr. Spivey asked Timothy to allow the visitation to resume. Timothy agreed. The shooting occurred a few weeks later.

To recover in negligence, a plaintiff must show a duty of care owed by the defendant, a breach of that duty by a negligent act or omission, and damage proximately resulting from the breach.[71] In *Crowley* the court found a duty based upon the legal principle that one who assumes to act, even though under no obligation to do so, may have a duty to exercise reasonable care.[72] By stating that the defendants were under no duty to act

66. 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985).

67. *Id.* at 409, 329 S.E.2d at 781-82.

68. *Id.* at 403, 329 S.E.2d at 778. Lynette voluntarily committed herself to the William S. Hall Institute in Columbia after a doctor who had treated her, and whom she called incessantly, obtained involuntary commitment papers. On June 9 she was released to her parents' care with prescribed medication and an order to attend follow-up visits at a Beaufort mental health clinic. After the shooting Mr. Spivey told the police that Lynette had stopped taking her medication and had not been attending therapy. *Id.* at 405-06, 329 S.E.2d at 780.

69. *Id.* at 403-04, 329 S.E.2d at 778.

70. *Id.* at 404, 329 S.E.2d at 779.

71. *Id.* at 406, 329 S.E.2d at 780; Bullard v. Ehrhardt, 283 S.C. 557, 324 S.E.2d 61 (1984); Wannamaker v. Traywick, 136 S.C. 21, 134 S.E. 234 (1926); Gunter v. Graniteville Mfg. Co., 15 S.C. 443 (1881); Brown v. South Carolina Ins. Co., 284 S.C. 47, 324 S.E.2d 641 (Ct. App. 1984), *cert. granted in part, cert. denied in part*, 285 S.C. 456, 329 S.E.2d 768 (1985).

72. 285 S.C. at 406, 329 S.E.2d at 780.

until they affirmatively agreed to supervise the visits, the court of appeals implicitly rejected a duty that might have been imposed by law based on the defendants acting both as custodians of a mentally ill person and as custodians of helpless children.[73] The court, nevertheless, in cursory treatment of the issue, found a voluntary assumption of duty sufficient to support liability.[74]

The court next addressed the problem of proximate cause. The defendants contended that their conduct was not the proximate cause of the children's death. They argued that they were insulated from liability by the intervening act of Lynette and that no evidence supported the jury's conclusion that they could reasonably have foreseen that Lynette would harm the children as a consequence of their negligence.[75] The court rejected this argument based on the longstanding rule in South Carolina that the intervening act of a third party, even an intentional or criminal act, will not break the causal chain and insulate the original negligent party from liability if "the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in light of the attendant circumstances."[76] The

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73. *Id.* The court cited Roundtree Villas Ass'n v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984) which relied upon RESTATEMENT (SECOND) OF TORTS § 323 (1979) in holding that when one who is under no obligation to do so nevertheless undertakes a duty, he is bound to proceed with due care. *See also* Carolina Bank and Trust Co. v. St. Paul Fire and Marine Co., 279 S.C. 576, 310 S.E.2d 163 (Ct. App. 1983).

74. 285 S.C. at 406, 329 S.E.2d at 780. By stating that the Spiveys were not obligated to act, the court may well have rejected other authority that would impute a duty in this situation even if the Spiveys had not voluntarily assumed one. *See* RESTATEMENT (SECOND) OF TORTS §§ 318, 319, 320, 324 (1965). Each of the Restatement propositions, which could arguably apply to the facts of *Crowley*, imputes a duty based on the relationship of the parties whether or not a duty has been voluntarily assumed. It is significant that the court of appeals chose to find a voluntary assumption of a duty when one could have been easily imposed by law. For a discussion of the duties arising from these relationships, see Harper & Kime, *The Duty to Control the Conduct of Another*, 43 YALE L.J. 886 (1934).

75. 285 S.C. at 406-07, 329 S.E.2d at 780.

76. *Id.* at 407, 329 S.E.2d at 780 (quoting Stone v. Bethea, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968)); *see also* Shipes v. Piggly Wiggly of St. Andrews, Inc., 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977)("the intervening criminal act of another may not always relieve one of liability for his negligence"); Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962); Scott v. Greenville Pharmacy, Inc., 212 S.C. 485, 48 S.E.2d 324, 11 A.L.R.2d 745 (1948); Ayers v. Atlantic Greyhound Corp., 208 S.C. 267, 37 S.E.2d 737 (1946); Woody v. South Carolina Power Co., 202 S.C. 73, 24 S.E.2d 121 (1943); Horne v. Atlantic Coast Line R.R., 177 S.C. 461, 181 S.E. 642 (1935); Howell v. Union-Buffalo Mills Co., 121 S.C. 133, 113 S.E. 577 (1923); Harrison v. Berkeley, 32 S.C.L. (1 Strob.)

jury, therefore, had only to find that the Spiveys could reasonably have foreseen "that the children would be at risk while with Lynette when she was armed with a pistol . . . [and] was deviating from a prescribed course of treatment that was necessary for her to lead a normal life."[77] Evidence showed that the defendants had known of Lynette's mental problem since 1971, that they were aware of her worsening condition beginning in 1978, and that they knew of the effect that failure to take the prescribed medication would have on her.[78] Furthermore, the Spiveys had testified that it was common sense that Lynette should not have a pistol and that they had searched for the pistol so that they could have "peace of mind" when the children visited.[79] These facts, coupled with Timothy's obvious goal of protecting the children when he prohibited visitation, led the court to conclude that the danger to the children was, in fact, foreseen.[80]

Although *Crowley* does not change the longstanding South Carolina negligence formula, it recognizes its application in a novel fact situation. Previously, when a duty to protect the plaintiff from the foreseeable intervening negligence or criminal acts of a third party had been found, some other pre-existing legal relation, usually of a contractual nature, had been present between the plaintiff and defendant.[81] The South Carolina Su-

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525 (1847); Accordini v. Security Cent., Inc., 283 S.C. 16, 320 S.E.2d 713 (Ct.App. 1984).

77. 285 S.C. at 408, 329 S.E.2d at 781.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* Accordini v. Security Cent., Inc., 283 S.C. 16, 320 S.E.2d 713 (Ct. App. 1984)(defendant burglar alarm installer was found liable for property stolen when an alarm he had installed failed to operate); *see also* Green v. Atlanta & C. Air Line Ry., 131 S.C. 124, 126 S.E.441 (1925)(railroad company was held liable for injuries sustained by one of its employees who was shot by robbers in the course of his employment). The ruling in *Green* was on appeal from an order overruling a demurrer. The South Carolina Supreme Court heard the case again, 135 S.C. 147, 132 S.E. 172 (1926), on a motion pertaining to pretrial matters, and again, 151 S.C. 1, 148 S.E. 633 (1928), on appeal from judgment on the merits. The last opinion was reversed per curiam by the United States Supreme Court, 279 U.S. 821 (1929). It is not clear whether the specific holding in the opinion cited was overturned by the Supreme Court. South Carolina courts have repeatedly cited this opinion without referring to the Supreme Court's disposition. Several years later the Supreme Court in Lillie v. Thompson, 332 U.S. 459 (1947), held for the plaintiff in a case very similar to *Green*. *But see* Ayers v. Atlantic Greyhound Corp., 208 S.C. 267, 37 S.E.2d 737 (1946), where defendant's driver parked a bus on a highway at night in violation of a safety statute. Although no contractual relation existed, the court

preme Court has imposed a duty upon a defendant to protect a plaintiff against foreseeable intervening forces when there was an employer-employee relationship,[82] a vendor-vendee relationship,[83] or when a more specific duty to the plaintiff already existed by operation of law.[84] Likewise, when there is no special relationship between the plaintiff and defendant, the court has found intervening intentional acts to be superseding causes.[85]

By finding liability in the novel facts of *Crowley*, the court of appeals has established that one who assumes a duty, though under no obligation to do so and though otherwise in no special relationship with the plaintiff,[86] will be liable for injury caused by a breach of that duty. This breach may include the foreseeable acts, intentional or negligent, of a third party.

John Keitt Hane III

VI. STANDARD OF CARE REQUIRED OF NURSING HOME CIRCUMSCRIBED

In *Flinn v. Crittenden*[87] the South Carolina Court of Appeals held that a nursing home has no duty to provide continuous, individualized patient supervision.[88]

Flinn brought this suit under section 15-75-20 of the South Carolina Code,[89] seeking damages for loss of consortium. He alleged in his pleadings that the defendant nursing home operator breached its duty of care to the plaintiff's wife by allowing the daughter to take her from the facility.[90] The defendant de-

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stated that a specific duty owed to the plaintiff was within the meaning of the statute. *Id.* at 277, 37 S.E.2d at 741.

82. Howell v. Union-Buffalo Mills Co., 121 S.C. 133, 113 S.E. 577 (1923).

83. *Accordini*, 283 S.C. at 16, 320 S.E.2d at 713.

84. Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962)(one negligent in causing a highway to be blocked owes a duty to warn others using the highway of the danger).

85. Scott v. Greenville Pharmacy, Inc., 212 S.C. 485, 48 S.E.2d 324 (1948); Lewis v. Seaboard Air Line Ry., 167 S.C. 204, 166 S.E. 134 (1932).

86. The court did not acknowledge a special custodial relationship between the defendants and the plaintiff or the defendants and the intervening party that would impose a specific duty by operation of law. *See supra* note 74.

87. 287 S.C. 427, 339 S.E.2d 138 (Ct. App. 1985).

88. *Id.* at 430, 339 S.E.2d at 139.

89. S.C. CODE ANN. § 15-75-20 (1976) provides for recovery of loss of "companionship, aid, society and services of his or her spouses."

90. 287 S.C. at 428, 339 S.E.2d at 138. The plaintiff's wife in *Flinn* was admitted for

murred and moved for summary judgment, which the trial court granted.[91]

The court of appeals reviewed the trial court's decision and framed the issue succinctly: "Did the nursing home neglect its duty?"[92] In affirming the summary judgment in favor of the nursing home operator, the court stated that the facility is obliged to provide a reasonable standard of care, but this standard does not require the nursing home to provide continuous, individualized patient supervision.[93] The court implied that such a higher duty could be created contractually through a mutual agreement between the parties regarding special care.[94]

Amy Acheson

VII. South Carolina Recognizes Sovereign Immunity of Sister State

In *Newberry v. Georgia Department of Industry and Trade*[95] the South Carolina Supreme Court declined to exercise jurisdiction over a nonconsenting sister state. This decision

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care to the defendant's nursing home facility, the Oakmont Nursing Center, in April 1982. *Id.* at 429, 339 S.E.2d at 139. On April 9, 1982, Flinn signed a release agreement that obligated the home to provide "only general duty nursing care" and specifically excluded a duty to provide "continuous or special duty nursing care." *Id.* In November 1982 the plaintiff's wife was taken from the nursing home by her daughter and moved to Mississippi. *Id.* at 428, 339 S.E.2d at 139. The court later found that there was "no evidence that the mother was forceably [sic] removed." *Id.* at 429, 339 S.E.2d at 139.

91. *Id.* at 429, 339 S.E.2d at 139.

92. *Id.*

93. *Id.* at 430, 339 S.E.2d at 139. In *Flinn* the court of appeals implicitly adopted the reasoning of Murphy v. Allstate Ins. Co., 295 So. 2d 29 (La. Ct. App. 1974). In that case, the plaintiff's husband escaped from the defendant nursing home and was subsequently hit and killed by an automobile. *Id.* at 30. The trial court held that the nursing home was liable for negligence. *Id.* at 31. Thus, the issue on appeal was whether the nursing home breached its duty of care by permitting Mr. Murphy, the decedent, to leave the home's facilities unattended. The court reasoned that the doctrine of *res ipsa loquitur* was inapplicable to the facts and stated that "there is no presumption of negligence on the part of the institution merely because of the injury to a patient." *Id.* at 34. Furthermore, in holding that there was no duty breached, the court concluded that the institution "gave as much care and attention to Murphy's needs and safety as could be reasonably expected without assigning a special nurse or attendant to him around the clock which clearly was not within the understanding of either party at the time he was admitted." *Id.* at 36.

94. *Id.*; *see Murphy*, 295 So. 2d at 36.

95. 286 S.C. 574, 336 S.E.2d 464 (1985).

places South Carolina with a distinct minority of jurisdictions that recognize the right of a sister state to assert the defense of sovereign immunity.[96]

The defendant in *Newberry* operated a trade show that promoted Georgia tourism in Columbia, South Carolina. The plaintiff, while attending the show, tripped over an electrical cord and was injured. She subsequently brought suit in South Carolina state court, pursuant to South Carolina's long-arm statute,[97] alleging negligence on the part of the defendant. At trial the defendant demurred on the ground of sovereign immunity, but was overruled. The South Carolina Court of Appeals,[98] citing the United States Supreme Court's opinion in *Nevada v. Hall*,[99] affirmed the decision of the trial court. The court of appeals indicated that it was adopting the rule followed by the majority of jurisdictions that have addressed the issue of whether a sister state can rightly assert the defense of sovereign immunity.[100] The Supreme Court of South Carolina granted certiorari and overturned the decision of the court of appeals.

The supreme court based its decision upon three policy considerations. First, the court recognized that the rule adopted by the court of appeals would encourage forum shopping by pro-

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96. *See infra* note 100.

97. S.C. CODE ANN. § 36-2-803 (1976).

98. 283 S.C. 312, 322 S.E.2d 212 (Ct. App. 1984).

99. 440 U.S. 410 (1979). In *Hall* the Supreme Court held that the State of California was free to assert jurisdiction over the State of Nevada, despite the latter's retention of the doctrine of sovereign immunity within its own jurisdiction. The Court stated that the decision of whether to deny or grant immunity to a sister state ultimately rests within the discretion of the forum state: "It may be wise policy, as a matter of harmonious interstate relations, for States to accord each other immunity or to respect any established limits on liability. They are free to do so." 440 U.S. at 426.

100. 283 S.C. at 318, 322 S.E.2d at 215. The court cited the following cases as establishing the "majority rule": Peterson v. Texas, 635 P.2d 241 (Colo. Ct. App. 1981); Streubin v. Iowa, 322 N.W.2d 84 (Iowa 1982); Mianecki v. Second Judicial Court, 99 Nev. 93, 658 P.2d 422 (1983); Ehrlich-Bober & Co. v. University of Houston, 49 N.Y.2d 574, 404 N.E.2d 726, 427 N.Y.S.2d 604 (1980); *see also* Qasim v. Washington Metro. Area Transit Auth., 455 A.2d 904 (D.C. 1983); Wendt v. County of Osceola, Iowa, 289 N.W.2d 67 (Minn. 1979); *cf.* Martin v. Educational Testing Serv., 179 N.J. Super. 317, 322-23, 431 A.2d 868, 870 (1981)(the court noted in dicta that if squarely faced with the issue, it "perceive[d] no jurisdictional bar" to a suit against a sister state). *But see* Ramsden v. Illinois, 695 S.W.2d 457 (Mo. 1985)(en banc)(declining to exercise jurisdiction over defendant State of Illinois); *cf.* Maroon v. Department of Mental Health, 411 N.E.2d 404 (Ind. Ct. App. 1980)(applying a statute of a sister state based upon authority of Nevada v. Hall).

spective plaintiffs.[101] Second, the court sought to avoid "tension" between the states that could result from the refusal of one state to recognize another state's sovereign immunity.[102] Last, the court discussed the more tangible, realistic threat arising from the possibility that Georgia might remove its assets from South Carolina in an attempt to avoid a levy against them by one seeking to enforce a judgment.[103]

The decision is interesting for several reasons. Initially, one should certainly recognize the supreme court's refusal to follow the majority of jurisdictions that deny sovereign immunity to sister states[104] and its articulation of the policy reasons that support this decision.[105] Equally interesting is the court's apparent departure from earlier decisions that seem to construe South Carolina's long-arm statute[106] rather broadly.[107] Furthermore, it is intriguing that the supreme court refused to entertain suit over a sister state within a mere six months of the court's abolition of sovereign immunity in South Carolina;[108] a decision in which the supreme court recognized the overall devolution of this ancient doctrine.[109]

Nevertheless, the supreme court's decision to respect the

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101. The problem of forum shopping is manifest if a plaintiff, foreclosed from suit in a sister state because of that state's sovereign immunity, is allowed to travel to South Carolina and bring suit in this forum. 286 S.C. at 575, 336 S.E.2d at 465.

102. This aspect of the court's opinion stresses "comity" between the states. *Id.* at 576, 336 S.E.2d at 465.

103. The plaintiff's prayer in the present case was for $9900 in actual damages. Record at 6.

104. *See supra* note 100.

105. *See supra* notes 101-03 and accompanying text.

106. S.C. CODE ANN. § 36-2-803 (1976).

107. *See, e.g.*, Parker v. Williams & Madjanik, Inc., 270 S.C. 570, 243 S.E.2d 451 (1978)(nonresident architect who designed building while outside of the state held subject to jurisdiction of South Carolina in suit alleging negligent design of building); Engineered Prods. v. Cleveland Crane & Eng'g, 262 S.C. 1, 201 S.E.2d 921 (1974)(foreign corporation held subject to jurisdiction of South Carolina in a case involving plans furnished by the corporation for manufacture of products, components of which were fabricated in South Carolina).

Additionally, the court in *Newberry* failed to hold that the defendant was amenable to suit even though the defendant was allegedly involved in the "commission of a tortious act." *See* S.C. CODE ANN. § 36-2-803(1)(c) (1976).

108. *See* McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985); *see also* South Carolina Tort Claims Act, 1986 S.C. Acts ___, No. 463 (to be codified at S.C. CODE ANN. § 15-78-10 to -170 (1976)).

109. 285 S.C. at 245, 329 S.E.2d at 742 (court noted that 36 other jurisdictions had abolished sovereign immunity in whole or in part).

sovereign immunity of nonconsenting states appears expressly permissible in light of *Nevada v. Hall*.[110] The soundness of the court's judgment is questionable only insofar as one disagrees with its underlying policy bases.[111]

Bert Glenn Utsey III

VIII. SOVEREIGN IMMUNITY ABOLISHED

In *McCall v. Batson*[112] the South Carolina Supreme Court abolished the doctrine of sovereign immunity from liability for tortious conduct. The court, however, declined to extend the abrogation to the acts of legislative, executive, and judicial entities, or to public officials endowed with discretionary authority engaged in the commission of their duties.[113] By this ruling, South Carolina joins a majority of states that have partially or completely abrogated the doctrine of sovereign immunity.[114] *McCall*

110. 440 U.S. 410 (1979).

111. The opinion of the court of appeals offers a variety of persuasive alternative policies for those who do not concur with the supreme court's position. *See* Newberry v. Georgia Dep't of Indus. and Trade, 283 S.C. 312, 332 S.E.2d 212 (Ct. App. 1984).

112. 285 S.C. 243, 329 S.E.2d 741 (1985).

113. *Id.* at 246, 329 S.E.2d at 742.

114. For jurisdictions that have partially or totally abrogated the doctrine by judicial decision, see Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Proffitt v. State, 174 Colo. 113, 482 P.2d 965 (1971); Platt Bros. v. City of Waterbury, 72 Conn. 531, 45 A. 154 (1900); Mayor of Dalton v. Wilson, 118 Ga. 100, 44 S.E. 830 (1903); Lundahl v. City of Idaho Falls, 78 Idaho 338, 303 P.2d 667 (1956); Eastern Ill. State Normal School v. City of Charleston, 271 Ill. 602, 111 N.E. 573 (1916); Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964); Board of Comm'rs v. Splendour Shipping & Enters. Co., 273 So. 2d 19 (La. 1973); Davies v. City of Bath, 364 A.2d 1269 (Me. 1976); Higginson v. Treasurer of Boston, 212 Mass. 583, 99 N.E. 523 (1912); Pittman v. City of Taylor, 398 Mich. 41, 247 N.W.2d 512 (1976); Nieting v. Blondell, 306 Minn. 122, 235 N.W.2d 597 (1975); Jones v. State Highway Comm'n, 557 S.W.2d 225 (Mo. 1977); Johnson v. Muncipal Univ. of Omaha, 184 Neb. 512, 169 N.W.2d 286 (1969); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378 (1974); Willis v. Department of Conservation & Economic Dev., 55 N.J. 534, 264 A.2d 34 (1970); Hicks v. State, 88 N.M. 588, 544 P.2d 1153 (1975); Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952); Thacker v. Board of Trustees, 35 Ohio St. 2d 49, 298 N.E.2d 542 (1973); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877 (1973); Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896 (1970); Memphis Power & Light Co. v. City of Memphis, 172 Tenn. 346, 112 S.W.2d 817 (1937); Town of Stockbridge v. State Highway Bd., 125 Vt. 366, 216 A.2d 44 (1965); Hewitt v. City of Seattle, 62 Wash. 377, 113 P. 1084 (1911); Long v. City of Weirton, 158 W. Va. 741, 214 S.E.2d 932 (1975); Cords v. State, 62 Wis. 2d 42, 214 N.W.2d 405 (1975); Jivelekas v. City of Worland, 546 P.2d 419 (Wyo. 1976).

also represents the completion of a recent judicial trend abolishing parental and charitable immunities in South Carolina.[115] In response to the *McCall* decision, the South Carolina General Assembly enacted the South Carolina Tort Claims Act,[116] which "qualified and limited liability" of the State and its political subdivisions for torts committed by the government, its employees, and agents, acting within the scope of official duty.[117]

The plaintiff, a minor, was sexually assaulted by a classmate while attending school in Greenville County. The plaintiff brought suit against his teacher, Batson, alleging intentional infliction of emotional distress. He also sued the School District of Greenville County, alleging negligent failure to provide adequate supervision.[118] The defendants demurred on the ground that the cause of action was barred by the doctrine of sovereign immunity.[119] The trial court overruled the demurrers. The supreme court affirmed and remanded for trial.

The *McCall* court reasoned that in the minority of jurisdictions which recognize the doctrine of sovereign immunity, it is an anachronism.[120] The court recognized that although the initial reason for the adoption of the doctrine was the states' financial inability to remunerate rightful damage claims, there was now more concern with the fundamental tenet of law that liability follows tortious conduct.[121] The court also stated that stare decisis did not prevent constructive change since continued adherence to the rule would sustain inequity.[122] The court stated that although the legislature had acted to modify the doctrine, its exceptions were incongruous and inadequate.[123] Furthermore, the court reasoned that "[t]he doctrine, being court-created,

115. Elam v. Elam, 275 S.C. 132, 268 S.E.2d 109 (1980)(abolishing parental immunity); Fitzer v. Greater Greenville South Carolina Y.M.C.A., 277 S.C. 1, 282 S.E.2d 230 (1981)(abolishing charitable immunity).

116. 1986 S.C. Acts ___, No. 463 (to be codified at S.C. CODE ANN. § 15-78-10 to -170 (1976)).

117. *Id.* (to be codified at S.C. CODE ANN. § 15-78-20(a), (b) (1976)).

118. Record at 1.

119. *Id.*

120. 285 S.C. at 245, 329 S.E.2d at 742.

121. *Id.* at 253, 329 S.E.2d at 746 (Chandler, J., concurring).

122. *Id.* at 255-56, 329 S.E.2d at 747 (Chandler, J., concurring).

123. *See id.* at 245, 329 S.E.2d at 742 (citing S.C. CODE ANN. §§ 5-7-70, 57-5-810 to -860 (1976)).

may be court-abrogated."[124]

Prior to *McCall*, abrogation of the doctrine in South Carolina required legislative action.[125] *McCall* overcomes judicial reluctance to proceed without initial reform by the legislature and attempts to implement the dissenting opinions in a line of supreme court decisions which have favored decisional abrogation.[126] This judicial abrogation, nevertheless, is limited. In cases filed on or before July 1, 1986, recovery is conditioned upon the defendant's having liability insurance coverage. If the defendant is covered, recovery is then constrained by the insurance policy amount.[127] The court clearly delays the full effect of the decision in order to permit legislative intervention.[128] The legislature responded by enacting the South Carolina Tort Claims Act, which took effect on July 1, 1986.[129] The *McCall* court's concern with liability insurance coverage, however, indicates that it would approve a statutorily restricted damage recovery.[130] The Tort Claims Act, in fact, specifically limits recovery to stated dollar amounts.[131] A ceiling on the liability of the governmental

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124. *Id.* at 258, 329 S.E.2d at 749.

125. *See Torts, Annual Survey of South Carolina Law*, 34 S.C.L. REV. 218, 222 (1982).

126. *See* Copeland v. Housing Auth. of Spartanburg, 282 S.C. 8, 316 S.E.2d 408 (1984); Belue v. City of Spartanburg, 276 S.C. 381, 280 S.E.2d 49 (1981); Lyon v. City of Sumter, 272 S.C. 359, 252 S.E.2d 118 (1979); Boyce v. Lancaster County Natural Gas Auth., 266 S.C. 398, 403, 223 S.E.2d 769, 771 (1976). In his dissenting opinion in *Lyon*, Justice Ness stated:

> I would abolish the sovereign immunity doctrine in its entirety and hold prospectively that where an individual suffers a direct, personal injury or property loss proximately caused by the negligence of a governmental unit or its employee while acting within the scope of employment, the injured individual may recover for the wrong.

272 S.C. at 365, 252 S.E.2d at 121.

127. 285 S.C. at 246, 329 S.E.2d at 743.

128. *Id.*, 329 S.E.2d at 742.

129. 1986 S.C. Acts ___, No. 463, § 8.

130. The court evinced this concern when it abolished the common law doctrine of parental immunity. Elam v. Elam, 275 S.C. 132, 136, 268 S.E.2d 109, 111 (1980)("Moreover, this Court is not blind to the existence of universal automobile liability insurance. An injured daughter suing her automobile driver father, is, in reality, a daughter suing her father's insurer. Although the existence of liability insurance does not translate into automatic liability, it is a relevant factor to be considered by this Court in evaluating the continued vitality of a court-created common law doctrine.").

131. The Act provides in pertinent part:

(a) [L]iability shall not exceed the following limits:

(1) No person shall recover in any action or claim brought hereunder a sum exceeding two hundred fifty thousand dollars because of loss arising from

tortfeasor, however, creates a class which is treated more favorably than other tortfeasors not protected by such a limitation. Whether this restriction amounts to an improper classification in violation of the equal protection clause of the South Carolina Constitution[132] and the fourteenth amendment of the United States Constitution[133] is undetermined.[134]

The South Carolina Supreme Court's view of the equal protection clause is exemplified by two recent decisions. In *Marley v. Kirby*[135] the court held that "limitation of the operation of the South Carolina statute [adopting comparative negligence] to motor vehicle accidents renders the provision constitutionally defective."[136] The court delineated an equal protection standard which requires a rational relationship between the exclusion of a class and the objective sought to be accomplished by the statute.[137] The court used the same standard in *Broome v. Truluck*[138] to invalidate a statutory scheme limiting the liability of a class. The statute[139] provides immunity to architects, engineers, and contractors from liability for negligence in the erection of improvements after ten years from the time of renovations. Owners and manufacturers are excluded from the immune class. The court found no reasonable justification for preferential treatment of the class. It is unclear whether the court would

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a single occurrence regardless of the number of agencies on political subdivisions involved . . . .

(2) The total sum recovered hereunder arising out of a single occurrence shall not exceed five thousand dollars regardless of the number of agencies or political subdivisions or claims on actions involved . . . .

(b) No award for damages under this chapter shall include punitive or exemplary damages or interest prior to judgment.

1986 S.C. Acts ___, No. 463 (to be codified at S.C. CODE ANN. § 15-78-120 (1976)).

132. S.C. CONST. art. I, § 3.

133. U.S. CONST. amend. XIV, § 1.

134. McKenzie v. S.C. Highway Dep't, 276 S.C. 461, 463, 279 S.E.2d 609, 610 (1981)(Ness, J., dissenting)(" '[O]nce sovereign immunity has been waived, legislative enactments must conform to the equal protection and due process guarantees of the state and federal constitutions.' Therefore, the legislature still possesses the power to impose ceilings. However, these ceilings shall not create improper classifications in violation of the state and federal constitutions.")(quoting Sambs v. City of Brookfield, 95 Wis. 2d 1, 289 N.W.2d 308 (Ct. App. 1979), *rev'd*, 97 Wis. 2d 356, 293 N.W.2d 504 (1980)).

135. 271 S.C. 122, 125, 245 S.E.2d 604, 606 (1978).

136. *Id.* at 125, 245 S.E.2d at 606; *see* S.C. CODE ANN. § 15-1-300 (1976).

137. *Id.*

138. 270 S.C. 227, 241 S.E.2d 739 (1978).

139. S.C. CODE ANN. § 15-3-640 (1976).

find the limited liability of governmental entities reasonable using this standard. If, however, the purpose of abolishing the doctrine is to remedy damages caused by wrongful acts of the State, then an artificial limit on the State's liability does not appear to have a rational basis.

Since *McCall* and the South Carolina Tort Claims Act retain immunity regarding acts of legislative, executive, and judicial entities and acts of public officials vested with discretionary authority,[140] the question arises concerning when the state will be amenable to suit. In *Long v. Seabrook*[141] the court distinguished between the exercise of discretionary power by an official of a governmental entity and the mere execution of ministerial duties by a functionary. The authority to commit a discretionary act involves "the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued."[142] It is unclear whether the same test would be used in a suit seeking to hold a public official liable for negligence in his representative capacity.

By abolishing the doctrine of sovereign immunity, South Carolina aligns itself with a majority of jurisdictions that have limited sovereign immunity in some manner. *McCall* reflects the South Carolina Supreme Court's intention of balancing the interest of the aggrieved individual in compensation against that of the State in the free exercise of judgment in the execution of its governmental duties.

Amy Acheson

IX. NEW SOUTH CAROLINA DOG BITE RULE

In *Hossenlopp v. Cannon*[143] the South Carolina Supreme Court rejected the state's 135-year-old dog bite law[144] and em-

140. 285 S.C. at 246, 329 S.E.2d at 742; 1986 S.C. Acts ___, No. 463 (to be codified at S.C. CODE ANN. § 15-78-60(a) (1976)).

141. 260 S.C. 562, 197 S.E.2d 659 (1982)(holding that the Board of Assessment Control of the Tax Assessor exercised discretionary power and did not merely perform a ministerial function in its dissemination of information to taxpayers).

142. *Id.* at 568, 197 S.E.2d at 662.

143. 285 S.C. 367, 329 S.E.2d 438 (1985).

144. The rule was established in M'Caskill v. Elliott, 36 S.C.L. (5 Strob.) 196 (1850).

braced the statutory rule of California[145] which imposes liability upon the owner of a biting dog regardless of the dog's former disposition or the owner's knowledge of any prior vicious acts.[146] The supreme court prefaced its adoption of the new rule by noting its reversal of the common law presumption that dogs are not harmful until proven otherwise; yet, it disclaimed the imposition of strict liability in tort under the new rule.[147] The South Carolina General Assembly responded to the *Hossenlopp* decision by enacting section 47-3-110, which codifies the new rule adopted by the court.[148]

Four-year-old Eric Hossenlopp was at the home of a baby-

The rule placed liability on the owner of a biting dog if he knew, or should have known, that his dog was of a vicious or mischievous disposition.

145. *See* CAL. CIV. CODE § 3342 (West 1970).

146. The court quoted from a jury instruction which was based upon the statute. The quoted portion of the instruction read:

> The law of California provides that the owner of any dog which bites a person while such person is on or in a public place or is lawfully on or in a private place, including the property of the owner of such dog, is liable for such damages as may be suffered by the person bitten regardless of whether or not the dog previously had been vicious, regardless of the owner's knowledge or lack of knowledge of any such viciousness, and regardless of whether or not the owner has been negligent in respect to the dog, provided, however, that if a person knowingly and voluntarily invites attack upon himself [herself], or if, when on the property of the dog owner, a person voluntarily, knowingly, and without reasonable necessity, exposes himself [herself] to the danger, the owner of the dog is not liable for the consequences . . . .

California Jury Instructions—Civil (1950 Supp.).

147. The court noted: "[The California Rule] is short of the rule of strict liability for dogs." 285 S.C. at 372, 329 S.E.2d at 441; *see also* Couillard v. Hawkins, 285 S.C. 463, 330 S.E.2d 293 (1985).

148. The new statute provides:

> Whenever any person is bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, including the property of the owner of the dog or other person having the dog in his care or keeping, the owner of the dog or other person having the dog in his care of keeping is liable for the damages suffered by the person bitten or otherwise attacked. For the purposes of this section, a person bitten or otherwise attacked is lawfully in a private place, including the property of the owner of the dog or other person having the dog in his care or keeping, when the person bitten or otherwise attacked is on the property in the performance of any duty imposed upon him by the laws of this State, by the ordinances of any political subdivision of this State, by the laws of the United States of America, including, but not limited to, postal regulations, or when the person bitten or otherwise attacked is on the property upon the invitation, express or implied, of the owner of the property or of any lawful tenant or resident of the property. If a person provokes a dog into attacking him then the owner of the dog is not liable.

1986 S.C. Acts, ____, No. 343 (to be codified at S.C. CODE ANN. § 47-3-110).

sitter on the day of his injuries. He and a playmate were in the yard when the Cannon's dog, which had roamed from their nearby house, charged toward the two and attacked Hossenlopp, who suffered bite wounds to his leg and ankle.

The trial judge, applying the traditional South Carolina dog bite law,[149] held that Cannon's knowledge of the dog's previously exhibited vicious propensities left no material issue of fact and granted summary judgment in favor of the plaintiff. The supreme court affirmed the grant of summary judgment based upon the state's traditional dog bite rule and also affirmed on the basis that, in light of the California rule, the conventional South Carolina rule was antiquated.[150]

The court's primary reason for favoring a more stringent rule was the eradication of a "paradoxical situation"[151] caused by a state statute[152] that placed greater liability on the parents of minor children who caused property damage than on dog owners in the same situation.[153] In adopting the new rule, however, the court has actually adopted a liability greater than that of the parental liability statute, which requires proof of malice and limits damages to one thousand dollars.[154] Although the court had foreshadowed the abolition of the common-law rule in earlier cases,[155] the court's propriety in choosing *Hossenlopp* as a vehicle for such action is questionable since liability was pre-

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149. *See supra* note 144.

150. 285 S.C. at 367, 329 S.E.2d at 441. The court cited S.C. SUP. CT. R. 4, § 8, which provided authority to sustain a trial judge's decision upon any ground appearing in the record. The only such ground appearing in the *Hossenlopp* record is a reference to Reed v. Clark, 277 S.C. 310, 286 S.E.2d 384 (1982), in Judge Maring's order for summary judgment. Record at 18. In discussing the common-law dog bite rule applied in *Reed*, Judge Maring noted: "[T]he Supreme Court set forth what it said was an antiquated rule . . . ." Record at 20. Neither of the parties raised the issue in their briefs.

151. 285 S.C. at 371, 329 S.E.2d at 441.

152. S.C. CODE ANN. § 15-75-30 (1976)(amended by S.C. CODE ANN. § 20-7-34 (1985)).

153. The statute reads in pertinent part:

> When any unmarried minor under the age of seventeen years and living with his parent shall maliciously and intentionally destroy, damage or steal property, . . . the owner of such property shall be entitled to recover from such parent of such minor actual damages . . . in an amount not exceeding one thousand dollars . . .

Id.

154. *Id.*

155. *Cf.* Conoley v. Riel, 279 S.C. 521, 309 S.E.2d 291 (1983)(indicating a needed change in existing law); McQuaig v. Brown, 270 S.C. 512, 517, 242 S.E.2d 688, 690 (1978)(Littlejohn, J., concurring)(advocating adoption of the California rule).

sent under the existing rule. Justices Harwell and Gregory raised this point in their dissents.[156]

Until *Hossenlopp*, South Carolina had followed the common-law rule frequently referred to by the misnomer, "the one-bite rule."[157] Under this rule, there could be no liability on the owner of an attacking dog absent some prior notice to the owner that the dog was of a vicious or mischievous nature. The common-law rule carried with it a presumption that a domestic animal is not dangerous until proven otherwise.[158] The new rule apparently presumes against such passiveness by viewing the animal as vicious and imputing knowledge of this trait to its master; hence, scienter need not be proven to impose liability.

The new rule has been treated extensively in the California courts. California cases reflect that the rule does not impose absolute or strict liability, since they allow for the traditional negligence defenses of contributory negligence and assumption of risk.[159] This distinction is not entirely clear from the face of the California statute, but is indicated in its paraphrased form found in the aforementioned jury instruction which clearly implies the defense of assumption of risk and perhaps that of contributory negligence.[160] The difference between the two probably explains an earlier rejection by the South Carolina Legislature of a reworded version of the California rule[161] and subsequent judicial adoption of the rule in its paraphrased jury-instruction form.[162] The newly enacted statutory version of the rule[163] clari-

156. 285 S.C. at 372-73, 329 S.E.2d at 441-42; *see also* S.C. House Bill 3200 (1983)(legislature's rejection of a bill roughly equivalent to the California statute).

157. The term "one-bite rule" derives its appellation from a misapprehension of the common-law basis of liability. While a previously nonviolent dog may be allowed "one bite" before the owner has notice of his dangerous propensities, other mischievous or violent traits of his nature may provide notice to his owner prior to even one bite. For a discussion of this misinterpretation, see 2 F. HARPER & F. JAMES, JR., THE LAW OF TORTS § 14.11, at 836 (1956).

158. *See, e.g.*, Mungo v. Bennett, 238 S.C. 79, 119 S.E.2d 522 (1961)(stating that the old rule was to apply to all domestic animals).

159. *See, e.g.*, Ellsworth v. Elite Dry Cleaners, Dyers and Laundry, 127 Cal. App. 2d 479, 274 P.2d 17 (1954).

160. *See supra* note 146.

161. *See* cases cited *supra* note 155. The bill, like the California statute, contained no provision relating to defenses.

162. This analysis produces a distinction between the California rule and strict liability which may not be entirely real. While the California courts continue to pay lip service to the concept of contributory negligence as a defense to the dog bite statute, *see*

fies the ambiguities in the supreme court's holding[164] as well as codifying other judicial interpretations of the California Statute;[165] however, the statute also breaks new ground[166] which may prove to create another "paradoxical situation" in South Carolina dog-bite law.[167]

The new rule will not be restricted to "bite" cases, but will apply to all cases of property loss or personal injury caused by a dog.[168] Like its California counterpart, the newly adopted rule

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supra note 157, they do not seem to apply it as such. There are apparently no California cases holding a plaintiff contributorily negligent in an action based upon the statute or any cases defining the scope of the defense as applied to the statute. *See also* Smythe v. Schacht, 93 Cal. App. 2d 315, 321-22, 209 P.2d 114, 118 (1949)(construing the predecessor statute to the current statute, CAL. GEN. LAWS ANN. act 384a (Deering 1931)) (same content as present statute and inviting the conclusion that contributory negligence is not a proper defense to the statute since liability under the statute is not predicated on negligence). Thus, it may be a vast logical leap to assume that California actually applies contributory negligence as a defense to the statutory rule and that South Carolina will, therefore, follow suit. While assumption of risk is clearly inferable as a defense to the California rule given the language of the earlier-quoted jury instruction, *see supra* note 146, it serves as no distinction between the rule and strict liability in South Carolina since it is a valid defense to strict liability claims in this state. *See, e.g.*, S.C. CODE ANN. § 15-73-20 (1976)(applying the defense of assumption of risk to strict products liability claims). Hence, considering the contributory negligence defense to be effectively nonexistent and the assumption of risk defense as no ground to distinguish the new rule from strict liability, the supreme court's line dividing the two forms of liability becomes increasingly blurred.

163. S.C. CODE ANN. § 47-3-110 (1976).

164. For example, the statutory version of the rule explicity provides the owner with a defense if the victim "provokes [the] dog into attacking him." *Id.*

165. The new rule, like the California rule, will apply to "other person[s] having the day in [their] care or keeping." *Id.*; *see* O'Rourke v. Finch, 9 Cal. App. 324, 99 P. 392 (1908).

166. The new law will impose liability on a dog-owner when the victim of the bite is on the owner's property by invitation from "any lawful tenant or resident of the property." S.C. CODE ANN. § 47-3-110.

167. The addition of liability when the victim is upon the owner's land by invitation of another resident of the property is probably necessary when applied to family members of the owner. Nevertheless, the statute's extension beyond family members' invitations and its addition of tenant invitations may even lead to cases of owner liability for "negligent selection of tenant," or for greater potential liability on dog-owning landlords than that upon landlords which rent buildings with faulty wiring. *See* Young v. Morrisey, 285 S.C. 236, 329 S.E.2d 426 (1985).

168. The court recently recognized that the new rule applied where a dog caused a motorcycle accident. Couillard v. Hawkins, *supra* note 147. The old rule had previously applied to this situation. *See, e.g.*, Giles v. Russel, 255 S.C. 513, 180 S.E.2d 201 (1971). Thus, it seems that the rule will apply in all cases involving property injury in which the former rule applied. *See also* S.C. CODE ANN. § 47-3-110 (applying the rule to bites and other "attack[s]").

retains the traditional negligence defenses. Unresolved by the case and the statute, however, are the issues of whether the new rule will apply to all domestic animals[169] and what type of liability the court will impose.

Bert Glenn Utsey III

169. *See supra* note 157.