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Statutory Stalemate: Strict Products Liability and Comparative Negligence in South Carolina

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STATUTORY STALEMATE: STRICT PRODUCTS LIABILITY AND COMPARATIVE NEGLIGENCE IN SOUTH CAROLINA

"No man's knowledge here can go beyond his experience."
John Locke

I. INTRODUCTION

In 1976 the South Carolina legislature embraced the then-popular national trend of allowing injured consumers to recover from manufacturers under a strict products liability theory. Section 15-73-10 of the South Carolina Code represents the legislature's codification of that common law doctrine.[1] In drafting section 15-73-10 of the South Carolina Code, the legislature adopted almost verbatim section 402A of the *Restatement (Second) of Torts*, the section dealing with strict products liability.[2]

While implementing strict products liability principles was in vogue, however, statutory adoption was not. South Carolina is, in fact, one of only a handful of states that has codified section 402A principles.[3] Despite the best intentions of the legislature, subsequent experience has shown that this codification created significant obstacles to the refinement of an evolving area of law. Of particular concern is the issue of whether comparative negligence should be allowed as a defense to a section 15-73-10 strict products liability action in South Carolina. This Article concludes that such a defense should be permitted, and the majority of jurisdictions faced with this issue have agreed.

This Article's analysis of the South Carolina Supreme Court's previous decisions in this area suggests a sort of statutory stalemate, which will be difficult to break. Part II traces the history and evolution of American products liability law, emphasizing the transition from the *Restatement (Second) of Torts* principles to the principles embodied in section 2 of the *Restatement (Third) of Torts: Products Liability*. Part III focuses on the apparent impasse South Carolina faces with respect to adopting comparative negligence as a defense to strict products liability. Finally, Part IV analyzes the approaches of other statutory strict products liability states and suggests that the best option for South Carolina might be repealing section 15-73-10 and replacing it with judicial adoption of the principles embodied in section 2 of the *Restatement (Third) of Torts: Products Liability*.

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1. S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1976).

2. *Compare id.*, *with* RESTATEMENT (SECOND) OF TORTS § 402A (1965) (illustrating the similarities between the two).

3. *See* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d § 16:20 (Timothy E. Travers et al. eds., 1987 & Supp. 2004) (explaining that Arkansas, Indiana, Maine, and Oregon join South Carolina as the only states to currently have a statutory version of section 402A strict products liability principles).

II. ORIGINS OF PRODUCTS LIABILITY

Like the Phoenix, products liability rose from the ashes of the Industrial Revolution.[4] As the fires of the forges and furnaces swept the globe, men and machines interacted more frequently, and these interactions increasingly resulted in personal injury.[5] Increased productivity led to larger and more dispersed consumer pools for manufacturers. As the likelihood of injury to more remote consumers increased, so did consumer intolerance for the traditional judicial theory of limiting recovery to those consumers in privity of contract with the manufacturer.[6] This intolerance found a voice in Justice Benjamin Cardozo when he decided in *MacPherson v. Buick Motor Co.* that consumers could, in fact, recover from manufacturers under a negligence theory in the absence of a contractual relationship.[7] From this bedrock decision, negligence eventually became the "primary basis of liability for [American] products liability claims."[8]

Despite the availability of negligence as an avenue for redress, consumers still faced significant challenges when attempting to recover from manufacturers for injuries resulting from defective products.[9] Consumers bringing such suits still had to prove all of the elements of negligence—duty, breach, cause-in-fact, proximate cause, and damage.[10] Damage is generally fairly simple for the consumer to prove. For example, severed fingers,[11] a scarred forehead,[12] and charred skin[13] are all easily recognizable personal injuries. Causation is generally more difficult to establish, though usually not impossible to do.[14] Investigations often can clearly indicate, for example, that an unreasonably safe lawn mower injured a hand,[15] a negligently constructed power tool produced a head injury,[16] or an infant's pajamas were not, in fact, flame retardant.[17] Perhaps somewhat surprisingly, a real difficulty for most

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4. For a brief but effective history of the development of products liability law, see David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 274–78 (1998) [hereinafter *Products Liability Law Restated*].

5. *See, e.g.*, *id.* at 274 ("During the first half of the twentieth century, negligence doctrine opened up as the primary basis of liability for products liability claims.").

6. The 1842 English case *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842), established that a plaintiff could not recover from a manufacturer for personal injuries under a negligence theory because privity of contract did not exist between the plaintiff and the manufacturer.

7. 111 N.E. 1050, 1053 (N.Y. 1916).

8. *Products Liability Law Restated*, *supra* note 4, at 274. *See also* DAVID G. OWEN, M. STUART MADDEN & MARY J. DAVIS, MADDEN & OWEN ON PRODUCTS LIABILITY § 1.5 (3d ed. 2000) (describing the prominence of negligence in products liability law).

9. *See* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d, *supra* note 3, at 16:25.

10. *See* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984).

11. *See* Saupitty v. Yazoo Mfg. Co., Inc., 726 F.2d 657, 659 (10th Cir. 1984).

12. *See* Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 898 (Cal. 1963).

13. *See* Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 729 (Minn. 1980).

14. *See* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d, *supra* note 3, at 16:25.

15. *See Saupitty*, 726 F.2d at 659.

16. *See Greenman*, 377 P.2d at 899.

17. *See Gryc*, 297 N.W.2d at 739.

consumers pursuing a negligence action against a manufacturer is establishing a breach of duty.[18]

MacPherson v. Buick Motor Co. provides that a manufacturer breaches his duty of care to a foreseeable consumer if the manufacturer's acts or omissions create an unreasonable risk of harm.[19] This means that the injured consumer must affirmatively show that the manufacturer unreasonably sacrificed product safety in favor of cost savings.[20] In other words, under a negligence products liability theory, a manufacturer does not owe the consumer a duty to produce an absolutely safe product, but rather it must take only those precautions that are reasonably necessary to prevent foreseeable harm to foreseeable consumers.[21]

Additionally, the consumer faces the daunting reality that he is the final recipient of a product that has often traveled a route as circuitous as Odysseus's return to Ithaca.[22] Professor William L. Prosser described the consumer's plight as follows:

> There are other sellers than the manufacturer of the product. It will pass through the hands of a whole line of other dealers, and the plaintiff may have good reason to sue any or all of them. The manufacturer is often beyond the jurisdiction. He may even, in some cases, be unknown. If he is identified and can be sued, it is very often impossible to pin the liability upon him. Even where there is a proved defect which speaks of obvious negligence on the part of some one, it may still not be possible to prove that it was on the part of the maker. . . . If the plaintiff is to recover at all, he must often look to the wholesaler, the jobber, and the retailer.
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> It is here that negligence liability breaks down. The wholesaler, the jobber, and the retailer normally are simply not negligent. They are under no duty to test or inspect the chattel, and they do not do so. . . . No inference of negligence can arise against these sellers, and *res ipsa loquitur* is of no use at all.[23]

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18. *See* OWEN, MADDEN & DAVIS, *supra* note 8, § 1.15, at 20–21.

19. MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).

20. *See* OWEN, MADDEN & DAVIS, *supra* note 8, § 1.15, at 15–17.

21. For a more comprehensive expression of this risk versus utility equation, see Judge Learned Hand's opinion in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (C.C.A. 2d Cir. 1947). See also Judge Cardozo's opinion in *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (discussing the relationship between foreseeability and culpability); OWEN, MADDEN & DAVIS, *supra* note 8, at 17 (explaining Judge Hand's "harmonious risk-benefit model").

22. In addition to traveling far afield, just as Odysseus wrought havoc upon Penelope's suitors, so too do defective products often visit damage upon their ultimate consumers. *See* HOMER, THE ODYSSEY (Butcher & Lang trans., MacMillan 1930).

23. William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1116–17 (1960) (citations omitted). *See also* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d, *supra* note 3, § 16:25 (expounding on various obstacles consumers face when bringing a products liability suit founded upon negligence).

A. Strict Products Liability

Understandably, these obstacles proved insurmountable in many cases. Assuming that a consumer could even identify the original manufacturer, affirmatively demonstrating that the manufacturer reasonably could have made a product safer requires a substantial investment of money and time on the part of the injured plaintiff. Consumer dissatisfaction with the difficulty of proving manufacturer negligence grew over several decades and reached maturity in the turbulent decades of the 1960s and 1970s. As the nation began to shuffle off the coil of racial segregation and gender discrimination, so too did the courts embrace a more liberal social view.[24]

Beginning with *Henningsen v. Bloomfield Motors, Inc.*,[25] products liability jurisprudence experienced an explosion of pro-consumer judicial decisions. In *Henningsen*, the New Jersey Supreme Court found an automobile manufacturer liable to a consumer who purchased the vehicle from an independent retailer.[26] The court refused to accept the defendant manufacturer's defenses of lack of privity of contract and contractual disclaimer, reasoning that such broad disclaimers were "violative of public policy and void."[27]

Professor David G. Owen described the importance of the *Henningsen* decision as follows:

> In allowing "strict liability" for breach of "warranty," but denying the classic contract defenses, *Henningsen* effectively adopted a principle of strict liability in "tort." So reasoned Justice Traynor for the California Supreme Court three years later . . . and so pronounced the American Law Institute, in section 402A of the *Restatement (Second) of Torts*, the following year.[28]

1. Section 402A Restatement (Second) of Torts

The California Supreme Court decision to which Professor Owen referred in his article, *The Fault Pit*,[29] was the landmark *Greenman v. Yuba Power Products, Inc.*[30] *Greenman* was the first court decision to recognize and address consumer

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24. Delaware, Massachusetts, Michigan, North Carolina, and Virginia comprise the minority of jurisdictions rejecting § 402A strict liability. *See* 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d, *supra* note 3, § 16:14.

25. 161 A.2d 69 (N.J. 1960).

26. *Id.* at 84.

27. *Id.* at 97. *See also Products Liability Law Restated*, *supra* note 4, at 276 n.23 (explaining the *Henningsen* decision).

28. David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 713–14 (1992) (citations omitted) [hereinafter *The Fault Pit*].

29. *Id.* at 713.

30. 377 P.2d 897 (Cal. 1963).

concerns over the difficulty in establishing manufacturer negligence.[31] The result was the doctrine of strict products liability in tort.[32]

As Professor Owen indicated, the general popularity of strict products liability principles ensured and demanded inclusion of section 402A in the 1965 publication of the *Restatement (Second) of Torts*.[33] In essence, section 402A addresses three policy ideas: 1) the manufacturer is better equipped to spread the cost resulting from defective products by passing the price increase on to consumers, 2) the imposition of strict liability will increase manufacturers' awareness of product safety and will, in turn, ensure safer products, and 3) eliminating the need for proof of fault will remove the often prohibitive litigation costs that prevent injured consumers from recovering for their injuries.[34]

In theory, section 402A purports to apply a single standard to what are widely recognized to be three distinct defectiveness theories—manufacturing defects, design defects, and inadequate warnings.[35] At section 402A's inception, this solitary standard seemed sufficient because the sole question with regard to manufacturer liability appeared to be whether a product was "too dangerous (defective) or safe enough (nondefective)."[36] However, as products liability law evolved, the "various forms of product dangers increasingly revealed themselves."[37]

By the 1980s, scholars and judges reflected the public's shift in attitude toward the strong pro-consumer principles of section 402A.[38] Responding to the so-called

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31. *See* OWEN, MADDEN & DAVIS, *supra* note 8, § 1.5, at 21; *Products Liability Law Restated*, *supra* note 4, at 272.

32. *See Greenman*, 377 P.2d at 900. *See also Products Liability Law Restated*, *supra* note 4, at 277 (explaining Justice Traynor's reasoning and conclusions).

33. *Products Liability Law Restated*, *supra* note 4, at 277. *See* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

34. Paraphrasing KEETON ET AL., *supra* note 10, at § 98, at 692–93. *See also* John E. Montgomery & David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 809–10 (1976) (providing a concise summary of general principles behind strict products liability).

35. RESTATEMENT (SECOND) OF TORTS § 402A provides the following:

> (1) One who sells any product in a *defective condition unreasonably dangerous* to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
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> (a) the seller is engaged in the business of selling such a product, and
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> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
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> (2) The rule stated in Subsection (1) applies although
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> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. (emphasis added). *See Products Liability Law Restated*, *supra* note 4, at 282.

36. *Products Liability Law Restated*, *supra* note 4, at 282.

37. *Id.*

38. *See The Fault Pit*, *supra* note 28, at 714–15.

"liability crises" of the 1980s, courts increasingly claimed to apply a strict liability standard to design and warning defect cases, but in reality they assessed whether the manufacturer reasonably could have made the product safer.[39] The apparent tailspin into which products liability law seemed to have slipped led W. Kip Viscusi to write, in 1991, that:

> The overall objective of products liability should be to foster appropriate incentives for accident deterrence and to provide insurance of accident victims' losses to the extent that doing so is feasible. Retaining strict liability for manufacturing defects is feasible, but in the case of design defects I advocate a reformulation of the risk-utility test that more closely resembles a formalized negligence standard.[40]

Faced with the indisputable fact that the law was, in practice, being applied differently than expressed in section 402A, the American Law Institute decided to call a spade a spade.

2. Sections 1 & 2 Restatement (Third) of Torts: Products Liability

The *Restatement (Third) of Torts: Products Liability* expressly recognizes the three distinct areas of product defects.[41] Section 2 applies a strict liability standard to manufacturing defect cases.[42] This section essentially restates the standard

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39. *See, e.g.*, Hurley v. Motor Coach Indus., 222 F.3d 377 (7th Cir. 2000) (discussing an Illinois products liability statute that allows evidence of alternative designs to be considered); Artis v. Corona Corp. of Japan, 703 A.2d 1214 (D.C. Cir. 1997) (stating explicitly that a risk-utility test was to be applied in a defective design case); Owens v. Allis-Chalmers Corp., 326 N.W.2d 372 (Mich. 1982) (deciding that the plaintiff had not provided sufficient evidence of reasonable alternative designs to support either a negligence or design defect cause of action). *See also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (1998) (describing the increasingly apparent divergence in the manner in which courts were dealing with manufacturing defect cases and design/warning defect cases).

40. W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 11–12 (Harvard Univ. Press 1991).

41. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1–2. Section 1 provides that "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." Though this section seems to maintain the unitary standard of section 402A, section 2 clearly delineates the three areas of product defects.

42. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 provides the following:

> A product is defective when, at the time of the sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
>
> (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not

adopted by section 402A, but it appropriately confines that standard to those cases involving manufacturing defects.[43] Comment *a* to section 2 describes the traditional theories behind strict products liability mentioned above as the main rationale for maintaining the manufacturing defect standard.[44]

More importantly, section 2 also rejects the section 402A notion that strict liability is appropriate for design defect and inadequate warning cases.[45] Section 2 explicitly verbalizes what courts across the nation have been implicitly practicing: applying a "risk-utility balancing" standard that more closely resembles negligence than strict liability.[46] This revolution in doctrine demonstrates the ongoing evolution of products liability law. It also appears to validate Professor Owen's hypothesis that "whether the law of torts turns to freedom, vested rights, equality, or utility as the primary determinant of responsibility for harm, it rests at bottom on principles of moral fault."[47]

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reasonably safe;

(c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

43. *Id.*

44. *Id.* § 2 cmt. a. This comment provides the following:

Strict liability without fault in this context is generally believed to foster several objectives. On the premise that tort law serves the instrumental function of creating safety incentives, imposing strict liability on manufacturers for harm caused by manufacturing defects encourages greater investment in product safety than does a regime of fault-based liability under which, as a practical matter, sellers may escape their appropriate share of responsibility. Some courts and commentators also have said that strict liability discourages the consumption of defective products by causing the purchase price of products to reflect, more than would a rule of negligence, the costs of defects. And by eliminating the issue of manufacturer fault from plaintiff's case, strict liability reduces the transaction costs involved in litigating that issue.

Several important fairness concerns are also believed to support manufacturers' liability for manufacturing defects even if the plaintiff is unable to show that the manufacturer's quality control fails to meet risk-utility norms.... Strict liability therefore performs a function similar to the concept of res ipsa loquitur, allowing deserving plaintiffs to succeed notwithstanding what would otherwise be difficult or insuperable problems of proof.

45. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1998).

46. Though the majority of states still claim to adhere to section 402A principles, it is apparent that they are, in fact, applying section 2 principles. Therefore, it seems likely that jurisdictions will begin formally to adopt the new principles since they more accurately reflect judicial practice. Indeed, Iowa has already adopted Sections 1 and 2 of the *Restatement (Third) of Torts: Products Liability* as its standard for products liability cases. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d; *see supra* note 41 and accompanying text. *See* Wright v. Brooke Group Ltd., 652 N.W.2d 159, 169 (Iowa 2002).

47. *The Fault Pit*, *supra* note 28, at 723.

III. SOUTH CAROLINA AND STRICT PRODUCTS LIABILITY

Understanding the evolving nature of products liability and where the doctrine stands today equips the observer to evaluate the effectiveness of South Carolina's current strict products liability policy. As previously mentioned, the South Carolina legislature adopted almost verbatim section 402A when it enacted section 15-73-10 of the South Carolina Code.[48] Though the principles of strict products liability were extremely popular in the 1970s, most jurisdictions phased them into their respective jurisprudence through judicial decision.[49] Statutory adoption was clearly a minority position.[50]

Motivated by what two commentators called impatience "with the inaction of the state supreme court,"[51] the South Carolina legislature codified section 402A principles. In so doing, however, the legislature seems to have given little thought to the significant complexities involved in the area of products liability law. Judicial adoption, the more popular form of integrating section 402A principles, gives the judiciary significant latitude in shaping its state's products liability policy. Statutory adoption, on the other hand, presents significant obstacles to such judicial shaping.

Through statutory adoption, the South Carolina legislature made clear that it endorsed the idea of strict liability for manufacturers of defective products. However, it did not make clear what its theoretical understanding of strict products liability was.[52] Nor did it clarify "the manner in which [strict products liability] differs from negligence, the appropriate roles of judge and jury in the administration of the doctrine, and the proper role in strict tort cases of the traditional affirmative defenses of negligence law."[53]

Perhaps acknowledging this dearth of guidance, the legislature incorporated by reference the official comments to section 402A as evidence of legislative intent.[54] This incorporation is really the root of the problem with respect to the question of whether comparative negligence should be allowed as a defense to strict products liability actions in South Carolina.

Comment *n* to section 402A addresses the applicability of contributory negligence to strict products liability actions.[55] Logically, if the defendant is liable,

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48. See *supra* notes 1–2 and accompanying text.

49. See *supra* note 2 and accompanying text.

50. *Id.*

51. Montgomery & Owen, *supra* note 34, at 803.

52. *Id.* at 807.

53. *Id.* at 807–08 (citations omitted) (presaging, in a way, the difficulties facing South Carolina today in determining whether comparative negligence should be a defense to strict products liability).

54. S.C. CODE ANN. § 15-73-30 (Law. Co-op. 1976). *See* Curcio v. Caterpillar, Inc., 344 S.C. 266, 273, 543 S.E.2d 264, 267 (Ct. App. 2001), *rev'd* 355 S.C. 316, 320, 585 S.E.2d 272, 274 (2003) (providing a discussion of the incorporated comments as evidence of legislative intent).

55. This comment states:

> *Contributory negligence.* Since the liability with which this Section deals is not based upon negligence of the seller, but is strict liability, the rule applied to strict liability cases (see § 524) applies. Contributory negligence of the plaintiff is not a defense when such negligence consists merely in a failure to discover the defect in the product, or to guard against the possibility of its existence. On the other

not because of an assessment of fault, but rather in the absence of fault—hence strictly liable—issues of comparative fault are irrelevant. Following this logic, the South Carolina Court of Appeals held that contributory negligence was not a defense to a section 15-73-10 strict products liability action.[56] The *Wallace* court explained that "[i]n South Carolina, contributory negligence is an affirmative defense to an action for negligence. It has no application to an action based on breach of warranty or liability for a defective product."[57]

Rather than clarify the law of products liability in South Carolina, *Wallace* muddied the water, for the South Carolina Supreme Court subsequently rejected contributory negligence in favor of comparative negligence as a defense to negligence actions in *Nelson v. Concrete Supply Co.*[58] This change demonstrated the Court's desire to adopt a "more equitable doctrine."[59]

A. The Comparative Negligence Question

The comparative negligence doctrine assesses damages to the parties in a negligence action based on the relative fault of those parties.[60] This doctrine developed in response to the general dissatisfaction with contributory negligence, which "places upon one party the entire burden of a loss for which two are, by hypothesis, responsible."[61] The jurisdictions adopting comparative negligence have adopted it in one of three forms: pure, modified, and slight-gross.[62] South Carolina adopted the modified form in *Nelson*.[63] This form of comparative negligence allows the plaintiff to recover damages only if his contributory negligence is equal to or less than that of the defendant.[64] When a plaintiff is allowed to recover, "[t]he

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> hand the form of contributory negligence which consists in voluntarily and unreasonably proceeding to encounter a known danger, and commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability. If the user or consumer discovers the defect and is aware of the danger, and nevertheless proceeds unreasonably to make use of the product and is injured by it, he is barred from recovery.

RESTATEMENT (SECOND) OF TORTS, *supra* note 2, § 402A cmt. n.

56. Wallace v. Owens-Illinois, Inc., 300 S.C. 518, 523, 389 S.E.2d 155, 157 (Ct. App. 1989).

57. *Id.*

58. 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991).

59. *Id.*

60. KEETON ET AL., *supra* note 10, § 67, at 470.

61. *Id.* at 468–69.

62. *Id.* at 471. Pure comparative negligence reduces the plaintiff's recovery in proportion to his fault. *Id.* at 472. Modified comparative negligence does not "bar recovery so long as it remains below a specified proportion of the total fault." *Id.* at 473 (citations omitted). Two types of comparative negligence exist, equal fault bar and greater fault bar. *Id.* The equal fault bar does not allow recovery if plaintiff's "fault is *equal to* or granter than" defendant's fault. *Id.* The greater fault bar approach prevents plaintiff from recovery "only if his fault *exceeds* the defendant's." KEETON, ET AL., *supra* note 10, at 473. Finally, the slight-gross system bars plaintiff's "recovery unless his negligence is 'slight,' and the defendant's negligence by comparison is 'gross.'" *Id.* at 474.

63. *See Nelson*, 303 S.C. at 245, 399 S.E.2d at 784.

64. *See supra* note 62.

amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence."[65]

While section 402A's comment *n* rejects contributory negligence, it accepts the assumption of risk concept and is silent on the issue of comparative negligence.[66] The logical assumption drawn from this fact is that the Restatement's rejection of contributory negligence is most likely a reaction to the rather harsh result that occurs when an injured plaintiff, who is only minimally at fault, is, as a result of his own negligence, completely barred from recovery.[67] For actions based on pure strict liability, this is a sensible approach. As indicated above, however, the modern conception of product defect classification is one of a trifurcated system.[68] Courts assess only manufacturing defects with a truly strict liability standard.[69] Design defect and inadequate warning cases are, in practice, evaluated by a risk-utility test more akin to negligence.[70]

As explained above, South Carolina rejected contributory negligence in favor of comparative negligence because of considerations of fairness and equity.[71] The desire to abandon the inflexible rules and imbalanced results of contributory negligence is not unique to South Carolina. Embracing apportionment of damages is a modern trend.[72] The same concepts of parity and equity that drove South Carolina to abandon contributory negligence have led other jurisdictions to adopt comparative negligence as a defense to strict products liability actions.[73]

In *Bragg v. Hi-Ranger, Inc.*, the South Carolina Court of Appeals acknowledged the genesis of the strict products liability doctrine mentioned above[74] and clearly articulated some of the state's policy goals when it declared that "[s]trict products liability in tort was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations of negligence and warranty remedies."[75]

Using nearly identical language, the California Supreme Court, in *Daly v. General Motors Corp.*, explained California's reasons for adopting strict products liability: "[Strict products] liability was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies."[76] However, the *Daly* court cautioned, "[S]trict liability has never been,

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65. *Nelson*, 303 S.C. at 245, 399 S.E.2d at 784.

66. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (1965).

67. *See* KEETON ET AL., *supra* note 10, § 67, at 468–69 (explaining the inequities of contributory negligence).

68. *Products Liability Law Restated*, *supra* note 4, at 282.

69. *Id.* at 283–85.

70. *Id. See also* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (1998).

71. *See supra* note 59 and accompanying text.

72. *See infra* notes 80–93 and accompanying text.

73. *See generally* Romualdo P. Eclavea, Annotation, *Applicability of Comparative Negligence Doctrine to Actions Based on Strict Liability in Tort*, 9 A.L.R. 4th 633 (1981–2004) (providing a general discussion of different jurisdictions' treatment of this issue).

74. *See* KEETON ET AL., *supra* note 10, § 98, at 692.

75. 319 S.C. 531, 542, 462 S.E.2d 321, 327 (Ct. App. 1995).

76. 575 P.2d 1162, 1166 (Cal. 1978).

and is not now, *absolute* liability.... [T]he manufacturer does not thereby become the insurer of the safety of the product's user."[77]

In commenting on its decision to embrace the doctrine of strict products liability, the Supreme Court of Hawaii articulated a slightly broader range of policy goals by explaining:

> The leading arguments for the adoption of a rule of strict products liability have been that the public interest in human life and safety requires the maximum possible protection that the law can muster against dangerous defects in products; that by placing the goods on the market the maker and those in the chain of distribution represent to the public that the products are suitable and safe for use; and that the burden of accidental injuries caused by defective chattels should be placed upon those in the chain of distribution as a cost of doing business and as an incentive to guard against such defects.[78]

While most jurisdictions have conceptually similar strict products liability policy goals, many have wrestled with the question of whether comparative negligence should be permitted as a defense in a strict products liability action. Though some states have concluded that comparative negligence should not be allowed as a defense,[79] the majority of jurisdictions deciding this issue have permitted the defense.[80]

Hawaii is typical of the numerous jurisdictions that have accepted comparative negligence as a defense to strict products liability claims. The *Stewart* decision clearly demonstrates Hawaii's concern for consumer protection, yet the Hawaii Supreme Court subsequently decided that adopting comparative negligence as a defense to strict products liability claims would not negatively affect this policy goal.[81] In *Kaneko v. Hilo Coast Processing*, the Hawaii Supreme Court observed that "those [jurisdictions] who oppose the merger [of strict products liability and comparative negligence] believe that negligence and strict liability are different theories and therefore are not compatible. Those jurisdictions that are in favor of the merger argue that *fairness and equity* are more important than semantic consistency."[82]

In *Daly*, the California Supreme Court similarly eschewed theoretical and linguistic hair-splitting in favor of equitable principles, allowing comparative negligence to be asserted as a defense to strict products liability.[83] The *Daly* court

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77. *Id.*

78. Stewart v. Budget Rent-A-Car Corp., 470 P.2d 240, 243 (Haw. 1970).

79. *See* Eclavea, *supra* note 73, § 3.

80. KEETON ET AL., *supra* note 10, § 67, at 478; *see also* Eclavea, *supra* note 73, § 4 (listing Alaska, California, Colorado, Connecticut, Florida, Idaho, Illinois, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oregon, Texas, Tennessee, and Washington as some of the states having joined the majority of jurisdictions allowing comparative negligence as a defense to strict products liability).

81. *Stewart*, 470 P.2d at 240.

82. 654 P.2d 343, 352 (Haw. 1982) (emphasis added).

83. Daly v. General Motors Corp., 575 P.2d 1162, 1169 (Cal. 1978).

reasoned its strict products liability policy goals would not be hampered by adopting the comparative negligence defense because "[p]laintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question."[84] The court went on to declare that any "loss should be assessed equitably in proportion to fault."[85]

In contrast, the Pennsylvania Supreme Court decided not to allow comparative negligence as a defense to strict products liability actions in *Kimco Development Corp. v. Michael D's Carpet Outlets*.[86] The *Kimco* court explained that its policy goals for employing strict products liability focused on protecting the consumer and the marketplace from defective manufacturing.[87] It felt these policy goals were incompatible with principles of comparative fault because "the underlying purpose of strict product liability is undermined by introducing negligence concepts into it."[88]

Although some states share the Pennsylvania view,[89] the strength of its reasoning is questionable. Most jurisdictions would agree that protecting the consumer from defective products is of paramount importance. The California and Hawaii courts concurred, but felt that allowing comparative negligence as a defense to strict products liability actions would not threaten this important policy goal.[90] Instead, these courts believed promoting fairness and equity could, and should, be achieved while continuing to provide the market and the consumer the protection they require.[91]

Professor Owen recognizes the popularity of these sentiments from a more doctrinal perspective:

> [Courts] no doubt will continue to purport to apply "strict" liability *doctrine* to products liability in the years ahead, so that the "law" of strict liability should by no means be expected to vanish quickly from the landscape. But the "strictness" in products liability doctrine has been stripped of much of its practical and moral force, and the trend toward its express abandonment should be expected to continue.[92]

The *Restatement (Third) of Torts: Apportionment of Liability*, reflecting the modern trend towards apportionment of damages, suggests a policy of determining comparative *responsibility* in the case of strict products liability:

> The plaintiff is still relieved of the necessity of proving fault to prove that the product was defective, but the defendant can

84. *Id.* at 1168.
85. *Id.* at 1169.
86. 637 A.2d 603, 607 (Pa. 1993).
87. *Id.* at 606.
88. *Id.*
89. *See supra* note 79 and accompanying text.
90. *See supra* notes 78–85 and accompanying text.
91. *See supra* notes 78–85 and accompanying text.
92. *The Fault Pit, supra* note 28, at 710.

> introduce evidence related to the absence of fault to reduce its percentage of responsibility. This is consistent with at least one goal of strict liability, which is to relieve the plaintiff of the difficulty of proving fault.[93]

In *Nelson*, the South Carolina Supreme Court expressed its desire to jettison contributory negligence because of its unfairness.[94] Logic suggests South Carolina's desire for equity, as stated in *Nelson*, would make the California and Hawaii approach to comparative negligence, as a defense to strict products liability actions, attractive to the South Carolina Supreme Court. Equally attractive should be the realization that the consumer protection policy goals described in *Bragg*, which prompted South Carolina to adopt strict products liability in the first place, would not be compromised by adopting comparative negligence as a defense.[95] Together, these concepts frame an approach to the issue that is consistent with South Carolina's goals and the modern trend towards apportionment of damages.

Why, then, has the South Carolina Supreme Court not adopted comparative negligence as a defense to strict products liability claims? Is it not odd that the California Supreme Court—the same court that handed down *Greenman*, which spawned section 402A—subsequently endorsed comparative negligence as a defense, yet South Carolina, which so strongly approved of section 402A that it legislatively adopted it, has yet to do so? As mentioned above, the problem seems to lie in the statutory stalemate created by the legislative adoption of section 402A and, more specifically, the legislature's incorporation of section 402A comments as evidence of legislative intent.[96]

B. The Comparative Negligence Answer

In *Barnwell v. Barber-Colman Co.*, the South Carolina Supreme Court articulated why it would not allow punitive damages to be recovered in a section 15-73-10 strict products liability action:

> Where the legislature has, by statute, acted upon a subject, the judiciary is limited to interpretation and construction of that statute. . . .
>
> > It is perhaps unnecessary to say that Courts have no legislative power, and in the interpretation and construction of statutes their sole function is to determine, and within the constitutional limits of the legislative power to give effect to, the intention of the Legislature. They cannot read into a statute something that is not within the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to

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93. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 cmt. c (2000).
94. Nelson v. Concrete Supply Co., 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991).
95. *See supra* notes 74–75 and accompanying text.
96. *See supra* notes 54–57 and accompanying text.

> legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws.
>
> If the Act is to be amended so as to provide for the recovery of punitive damages, this must be accomplished by the legislature, not the courts.[97]

The majority's opinion clearly explains that legislative enactment of section 402A principles demands significant judicial deference with respect to strict products liability decisions.[98] The opinion dismisses a compelling dissent which presents an argument conceptually similar to the position on comparative negligence offered in this Article.[99] The court states:

> Citing numerous decisions from other jurisdictions which permit recovery of punitive damages in strict liability, the dissent concludes that our decision places South Carolina in a minority. The conclusion is misleading, in that this Court is compelled to interpret the laws of the General Assembly in their plain meaning, whether or not the result places South Carolina in the minority among jurisdictions. Our State is one of a small number which initially adopted strict liability, *not by judicial decision*, but through legislative enactment.[100]

The South Carolina Supreme Court's position on punitive damages is obviously not dispositive of its position on comparative negligence. Indeed, section 15-73-10 expressly limits recovery to damages resulting from physical harm,[101] while comment *n* is silent with regard to comparative negligence.[102] Robert H. Brunson makes a compelling argument in favor of adopting comparative negligence as a defense to South Carolina products liability crashworthiness cases.[103] Brunson further predicts judicial acceptance of comparative negligence principles based on then-recent South Carolina Supreme Court decisions that held comparative

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97. 301 S.C. 534, 537–38, 393 S.E.2d 162, 163–64 (1989) (quoting Creech v. S.C. Pub. Serv. Auth., 200 S.C. 127, 146, 20 S.E.2d 645, 652 (1942)). It is informative to note how the majority's treatment of the dissent implies a narrow interpretation of comment m of section 402A. For another South Carolina case in which the court demonstrated a narrow interpretation of the incorporated comments, see *Curcio v. Caterpillar, Inc.*, 344 S.C. 266, 273, 543 S.E.2d 264, 267 (Ct. App. 2001), *rev'd* 355 S.C. 316, 585 S.E.2d 272 (2003) (reversing based on lower court's failure to apply correct standard for a judgment notwithstanding the verdict).

98. *Barnwell*, 301 S.C. at 537–38, 393 S.E.2d at 163–64.

99. *Id.* at 538–43, 393 S.E.2d at 164–66 (Finney, J., dissenting).

100. *Id.* at 537, 393 S.E.2d at 163 (citations omitted).

101. S.C. CODE ANN. § 15-73-10(1) (Law. Co-op. 1976).

102. *See supra* note 55.

103. Robert H. Brunson, *Comparing First Collision "Fault" with Second Collision "Defect,"* S.C. LAWYER, Aug. 1999, at 39 (presenting the familiar argument of fairness and equity).

negligence had subsumed the defenses of assumption of risk and last clear chance.[104]

However, these cases deal with the application of comparative negligence in *negligence* causes of action. With respect to strict products liability actions, *Barnwell* and *Curcio* indicate the South Carolina Supreme Court's high degree of aversion to a broad interpretation of section 15-73-10.[105] This obvious reluctance to modernize its interpretation of section 15-73-10 and the incorporated comments—to recognize that design defects and inadequate warnings are evaluated according to fault despite being called strict liability[106]—suggests that the South Carolina Supreme Court would feel obligated to reject comparative negligence as a defense to strict products liability. Professors F. Patrick Hubbard and Robert L. Felix conveyed much the same thought in their article, *Comparative Negligence in South Carolina: Implementing* Nelson v. Concrete Supply Co.:[107]

> Although some states have included strict products liability in their comparative schemes, it is not likely that South Carolina will do so . . . .
>
> . . . .
>
> . . . Because strict liability for products is a statutory scheme, the courts are likely to be hesitant to alter the scheme by imposing a new and judicially-developed approach to defenses within this scheme. This deference to the legislative scheme is particularly important because the *Nelson* court adopted a modified approach to comparative fault. Under this modified system a plaintiff is partially barred if the plaintiff was equally or less negligent than the defendant and totally barred if the plaintiff was more negligent. Thus, if *Nelson* were applied to strict products liability, the resulting change in the statutory scheme would be unfavorable to plaintiffs in some fact situations.[108]

IV. OPTIONS FOR CHANGE

With respect to the applicability of comparative negligence to strict products liability, South Carolina, not unlike Robert Frost's nostalgic traveler,[109] seems to have reached a divergence in the jurisprudential woods. Either the South Carolina Supreme Court can set aside its concerns over judicial legislation, or the legislature can realize that its experience with strict products liability was limited in 1976 and

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104. *Id.* at 44–45; *see also* Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998) (finding assumption of risk and comparative negligence to be incongruous); Spahn v. Town of Port Royal, 330 S.C. 168, 499 S.E.2d 205 (1998) (finding last clear chance to have been subsumed by comparative negligence).

105. *See supra* note 97–100.

106. *See supra* Part II.A.

107. F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing* Nelson v. Concrete Supply Co., 43 S.C. L. REV. 273 (1992).

108. *Id.* at 296–97 (citations omitted).

109. *See* ROBERT FROST, *The Road Not Taken*, *in* MOUNTAIN INTERVAL 9 (1916).

that section 15-73-10 reflects an equally limited knowledge of strict products liability. An examination of the other states that legislatively adopted section 402A principles coupled with an understanding of the South Carolina Supreme Court's reluctance to broadly construe section 15-73-10 suggest that between these two choices the State will take "the one less traveled by."[110]

As discussed above, Arkansas, Indiana, Maine, and Oregon join South Carolina as the only states to currently have a statutory version of section 402A strict products liability principles.[111] Arkansas legislatively adopted section 402A principles in 1973.[112] Section 85-2-318.2 of the Arkansas Statutes adopted section 402A essentially verbatim; however, it broadened section 402A's scope "by substituting 'supplier' for 'seller' and injury to 'persons and property' for 'users' or 'consumers.'"[113] Despite this broad sweep by the legislature, the Arkansas Supreme Court, in construing the meaning of "unreasonably dangerous" and "defective condition," concluded that "it was not the intent of 402A to make manufacturers insurers of their products, irrespective of fault or warranty, and going beyond foreseeable consequences, and hence to apply strict liability simply on the basis of a finding of 'defective condition' widens the scope of 402A considerably."[114]

Arkansas also legislatively adopted comparative negligence as an affirmative defense in actions in which "recovery is predicated upon fault."[115] In either a show of deference to the legislature's adoption of comparative fault or an acknowledgment of the moderate principles expressed in *Berkeley Pump*—or perhaps a little of both—the Arkansas Supreme Court has found comparative negligence to be applicable in strict products liability actions.[116] In *Elk Corp. of Arkansas v. Jackson*, the Arkansas Supreme Court declared that "strict liability is not absolute liability in Arkansas."[117] The court explained that a manufacturer can be at "fault" for simply "'supplying a product in a defective condition.'"[118] The court also explained that "[a] plaintiff in a strict product liability action can also be at fault."[119] These statements led the Arkansas Supreme Court to the logical conclusion that comparative negligence and strict products liability are not mutually exclusive doctrines.[120]

The Indiana legislature also legislatively adopted section 402A principles in the Indiana Products Liability Act (IPLA) in 1978.[121] This statute codified section 402A and governed only those products liability claims brought under a strict

110. *See* FROST, *supra* note 109. Hopefully, this choice will make "all the difference." *Id.*

111. *See supra* note 3.

112. *See* ARK. CODE ANN. § 85-2-318.2 (Michie 1973) (current version at ARK. CODE ANN. § 4-86-102 (Lexis 2001)).

113. Berkeley Pump Co. v. Reed-Joseph Land Co., 653 S.W.2d 128, 131 (Ark. 1983).

114. *Id.* at 132.

115. ARK. CODE ANN. § 16-64-122 (Michie 1987).

116. Elk Corp. of Ark. v. Jackson, 725 S.W.2d 829 (Ark. 1987).

117. *Id.* at 833.

118. *Id.* (citing AMI Civil 2d, No. 306).

119. *Id.*

120. *Id.*

121. IND. CODE ANN. § 33-1-1.5-1 (Michie 2004).

liability theory. Indiana's Comparative Fault Act was not applicable to IPLA claims but was relevant to products liability claims brought under a negligence theory.[122]

In 1995 the Indiana legislature reformed the IPLA through a series of amendments. Perhaps recognizing the inconsistency in applying the strict liability standards of the old IPLA to design defect and inadequate warning actions, the legislature ensured that the new statute governed all products liability actions "regardless of the substantive legal theory or theories upon which the action is brought."[123] The 1995 amendments also codified comparative negligence as a defense to strict products liability: "In a product liability action . . . the fault of all others who caused or contributed to cause the harm, shall be compared by the trier of fact . . . ."[124]

Maine's approach to the comparative negligence-strict products liability question illuminates jurisdictions' enduring struggle to define the roles and limits of their judicial and legislative branches. Maine's strict products liability statute is principally modeled on section 402A.[125] However, judicial interpretation of this statute has focused largely on negligence concepts.[126] Displaying a strikingly similar approach to that of the South Carolina Supreme Court, the Maine Supreme Court concluded in *Austin v. Raybestos-Manhattan, Inc.* that the statutory limitations imposed by legislative adoption of both strict products liability and comparative negligence prohibited comparative fault as a defense to strict products liability unless that fault consisted solely of assumption of risk.[127]

Since South Carolina adopted comparative negligence judicially rather than legislatively, it is interesting to note how the *Austin* court considered California's treatment of the comparative negligence issue. The *Austin* court compared the relative flexibility and freedom that judicial adoption of strict products liability created in California with the restrictions imposed by statutory adoption of those principles in Maine.[128] The court explained that "*Daly* represents the California court's completion of the judicial evolution of a consistent body of products liability law. In contrast, in Maine both the strict liability and comparative negligence rules have been legislatively imposed, with their own special constraints."[129]

The difference in statutory and judicial adoptions of comparative negligence is an important and distinguishing factor between Maine and South Carolina. Interestingly, Oregon found itself in a situation almost identical to Maine's. Oregon's legislature, like South Carolina's, codified section 402A and specifically

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122. IND. CODE ANN. § 34-4-33-2 (amended and recodified by §§ 34-20-1-1 et seq. (1998)).

123. IND. CODE ANN. § 34-20-1-1 (Lexis 1998).

124. IND. CODE ANN. § 34-20-8-1.

125. ME. REV. STAT. ANN. tit. 14, § 221 (West 1964).

126. *See* Ames v. Dipietro-Kay Corp., 617 A.2d 559, 561 (Me. 1992) (citing Marois v. Paper Converting Mach. Co., 539 A.2d 621, 623 (Me. 1988)); *see also* Bernier v. Raymark Indus., 516 A.2d 534, 538 (Me. 1986); PRODUCTS LIABILITY DESK REFERENCE: A FIFTY-STATE COMPENDIUM 271–76 (Morton F. Daller ed., 2003) (describing this phenomenon and presenting these cases).

127. 471 A.2d 280, 285–88 (Me. 1984).

128. *Id.* at 287–88.

129. *Id.*

referenced the official comments as legislative intent.[130] Oregon's legislature, like Maine's, subsequently enacted a comparative fault statute.[131]

Unlike Maine, however, Oregon's Supreme Court concluded that comparative negligence was an acceptable defense to strict products liability in *Baccelleri v. Hyster Co.*[132] The court deduced from a legislative memorandum that comparative negligence as a defense to strict products liability was reasonably within the contemplation of the legislature when it enacted the comparative fault act.[133] Note once again, however, that South Carolina adopted comparative negligence judicially rather than legislatively.[134]

Synthesizing the reasoning behind these states' choices regarding the applicability of comparative negligence to strict products liability produces an interesting picture. Not surprisingly, almost every state that legislatively adopted strict products liability also legislatively adopted comparative negligence: South Carolina is the exception.[135] Some of the highest courts of these states deferred to the legislature and declined to adopt comparative negligence as a defense to strict liability.[136] Yet, even in the face of legislative action on the subject, courts in other states found that comparative negligence was a defense to such actions.[137]

The fact that South Carolina's judiciary, rather than its legislative branch, was responsible for the rejection of contributory negligence in favor of comparative negligence would seem to suggest an environment more receptive to judicial application of that doctrine to strict products liability. However, as noted above, the South Carolina Supreme Court may be less willing to apply comparative negligence to strict products liability than are some jurisdictions in which comparative negligence was legislatively adopted.[138]

Based on this analysis of the other jurisdictions that legislatively adopted strict products liability, it follows that judicial handling of the strict products liability-comparative negligence question is the more common method. However, another approach exists—one implicated by Indiana's treatment of the issue.[139] Legislative action, specifically the act of repealing the state's outdated section 402A-based statutes, seems to be the road "less traveled by."[140]

Louisiana tentatively explored this less traveled road in 1996 when it gutted its strict products liability statute.[141] Yet, like Indiana, Louisiana filled the resulting void with another legislative creation.[142] Though these legislatures were attempting

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130. OR. REV. STAT. § 30.920(3) (2003).
131. OR. REV. STAT. § 31.600 (2003).
132. 597 P.2d 351 (Or. 1979).
133. *Id.* at 354.
134. *See supra* note 58 and accompanying text.
135. *See supra* notes 111–34 and accompanying text.
136. *See supra* notes 125–31 and accompanying text.
137. *See supra* notes 115–34 and accompanying text.
138. *See supra* note 97 and accompanying text.
139. *See supra* notes 122–24 and accompanying text.
140. *See* FROST, *supra* note 109.
141. LA. CIV. CODE ANN. art. 2317 (West 1997) (effectively repealed by LA. CIV. CODE ANN. art. 2317.1 (West 1997)).
142. LA. CIV. CODE ANN. art. 2317.1 (West 1997); *see supra* notes 122–24 and accompanying text.

to resolve the theoretical inconsistencies resulting from application of their statutes, they only addressed half the problem by replacing one legislative construction with another.

What will happen in another thirty years if the "pendulum of American products liability"[143] begins to swing again? How will the courts address the next problem created by the lack of legislative foresight? The answer in South Carolina seems to be that the judiciary will feel constrained by statutory restrictions and then will simply decline to update the law through judicial interpretation. The South Carolina legislature could not have intended this result when it enacted section 15-73-10 of the South Carolina Code.

When the legislature enacts a valid statute that specifically and narrowly addresses an issue, which it arguably has done here, the judiciary must accord the enactment due deference. However, the legislature is not faced daily with the implications of judicially interpreting a statute that is broad in scope yet narrow in latitude. The legislature is, therefore, often unaware of the nuances that cause the judiciary to wrestle with defining its ability to interpret a statute. The result is a sort of statutory stalemate under which refinement of evolving areas of the law like products liability is inhibited to the detriment of society.

Judicial deference to the legislature is a necessary and admirable component of the American form of democracy.[144] Equally prominent in our Great Experiment is the judiciary's ability to create law through judicial decision.[145] The symbiotic relationship so created is delicate and must be carefully cultivated.[146] At times, the judiciary must accept that certain laws are perhaps not the most effective or efficient, but they are nonetheless valid. An important counter-point is that the legislature must constantly evaluate its existing laws against the ebb and flow of time.

With respect to the applicability of comparative negligence to strict products liability in South Carolina, the time has come for the legislature to fulfill its part of this agreement. The South Carolina legislature should recognize that products liability law has evolved significantly since the enactment of section 15-73-10. A truly strict liability standard is not used to measure design defect and inadequate warning causes of action, but rather a risk-utility equation that assesses fault is used to evaluate them. This recognition, coupled with the realization that the South Carolina Supreme Court feels powerless to do anything about it—lest it fail to faithfully discharge its obligations in the precarious relationship that is our trifurcated system of government—should prompt the legislature to unbind the Supreme Court's hands by repealing section 15-73-10.

In its place, the South Carolina Supreme Court should adopt judicially the modern products liability principles embodied in section 2 of the *Restatement (Third) of Torts: Products Liability*. This judicial adoption is preferred over subsequent legislative action because of the flexibility it affords.

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143. Geraint G. Howells & Mark Mildred, *Is European Products Liability More Protective Than the* Restatement (Third) of Torts: Products Liability?, 65 TENN. L. REV. 985, 1019 (1998).

144. THE FEDERALIST No. 78 (Alexander Hamilton).

145. *Id.*

146. *Id.*

V. CONCLUSION

Products liability has evolved significantly since *Greenman v. Yuba Power Products*, and this evolution can be expected to continue. Any attempt by the legislature to craft specific statutory solutions for such a dynamic area of law will not solve today's problems but will only postpone them until tomorrow. In order to effectively govern products liability law, flexibility is required. The legislature would be wise to heed John Locke's admonition and accept, as all humans must, that knowledge can never exceed experience. Because the South Carolina Supreme Court will likely never feel comfortable broadly interpreting section 15-73-10 and because the principles embodied in section 15-73-10 are in conflict with current products liability law, the legislature should repeal section 15-73-10. In its place the judiciary should adopt the modern products liability principles embodied in section 2 of the *Restatement (Third) of Torts: Products Liability*. This, it seems, is the most effective way to successfully break South Carolina's strict products liability statutory stalemate.

Andrew A. Bennington