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Restructure and Reform: Products-Liability Law in North Carolina

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INTRODUCTION

Modern products-liability law has developed in a relatively short period of time, but it has not been a systematic, continuous process. Instead, the law has developed erratically, in a series of sudden leaps. Some of the steps made in the name of progress proved to be problematic, and various solutions developed to address issues as they arose. Initially, these progressive movements caused considerable confusion, but this confusion has been resolved with time. As a result, a reasonable, workable consensus has developed.¹

In 1979 and 1997, respectively, two important developments emerged: the Model Uniform Product Liability Act (MUPLA)² and the *Restatement (Third) of Torts: Products Liability*.³ These publications present a common yet impressive picture of products-liability law.⁴ Over the last several

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1. See J. Stanley McQuade, *Products Liability – Emerging Consensus and Persisting Problems: An Analytical Review Presenting Some Options*, 25 CAMPBELL L. REV. 1, 9–10 (2002).

2. Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (Oct. 31, 1979). The Act was published by the Department of Commerce and was intended for enactment by the states. *Id.*; see also VIVIAN S. CHU, CONG. RESEARCH SERV., R40148, PRODUCTS LIABILITY: A LEGAL OVERVIEW 12 (2014). Both the draft and final versions were introduced in the 96th Congress but neither was enacted. *See id.*

3. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (AM. LAW INST. 1998) (approved unanimously by the diverse membership of the American Law Institute on May 20, 1997).

4. Much of the success of these publications stemmed from the academics who wrote them. Professors James A. Henderson, Jr. and Aaron Twerski, two formidable scholars, were the case reporters for the *Restatement*, supported by a small army of respected judges, law professors, and experienced plaintiff and defense practitioners. Similarly, MUPLA was managed and steered by Professor Victor Schwartz, another acclaimed scholar, who had the benefit of input from a variety of interested parties, including lawyers, industry executives, and representatives from the insurance industry.

decades, tort-reform movements have generated products-liability legislation in various jurisdictions. These acts incorporated provisions from various sources, but drew heavily from MUPLA. The North Carolina Products Liability Act,⁵ in particular, has gone through a number of revisions to incorporate measures introduced by the courts as well as provisions from MUPLA.

This Article suggests that, although previous revisions to the North Carolina Products Liability Act brought progress, more revisions are needed, and these revisions will be best accomplished by incorporating additional measures into the act, especially those that have gained wide acceptance elsewhere. Part I of this Article provides a brief introduction to the early development of products liability law. Part I.A discusses tort-law influences in products liability, and Part I.B focuses on contributions from contract law. Parts II.A and II.B briefly describe MUPLA and the *Restatement (Third) of Torts: Products Liability*, respectively. Part III discusses the current state of products-liability law in North Carolina and suggests a number of proposed improvements to North Carolina's products-liability act.

I. EARLY DEVELOPMENTS IN PRODUCTS-LIABILITY LAW

Products-liability law developed in American jurisdictions by adapting previously existing causes of action. Change was slow at first; the tort of negligence was first modified by eliminating the privity requirement⁶ and later by allowing circumstantial evidence of damages.⁷ Change has proceeded at an accelerated pace ever since.

A. Tort-Law Influences

Perhaps the most drastic change to products-liability law was the introduction of the strict-liability doctrine. The doctrine of strict liability was originally developed in tort law in connection with dangerous entities on land and was later extended to "abnormally dangerous activities."⁸ The

5. See N.C. GEN. STAT. §§ 99B-1 to -12 (2013).

6. See *Winterbottom v. Wright* (1842) 152 Eng. Rep. 402, 403 (introducing the requirement of privity, which was widely adopted by American courts before being rejected in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1054 (N.Y. 1916)).

7. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3.

8. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (AM. LAW INST. 1965). In determining whether an activity is abnormally dangerous, "[t]he essential question is whether the risk created is so unusual, either because of its magnitude or because of the circumstances surrounding it, as to justify the imposition of strict liability for the harm that results from it, even though it is carried on with all reasonable care." *Id.*

doctrine of strict liability was introduced into products-liability law by California Supreme Court Justice Roger J. Traynor in *Greenman v. Yuba Power Products, Inc.*,⁹ and was incorporated shortly thereafter into the *Restatement (Second) of Torts* in 1965.¹⁰ As a result, the doctrine experienced two changes. First, strict liability was no longer purely connected with land and was extended to ultra-hazardous activities.¹¹ The second change required establishing the defense that an activity was common or usual in the area, which was established by *Fletcher v. Rylands*.¹² When strict liability was applied in the *Restatement (Second) of Torts* to ultra-hazardous activities, the defense that the activity was usual in the area still applied.¹³ In products liability, however, all goods affected are usual in the area; therefore, this defense had to be dropped.

The doctrine of strict liability for defective goods as defined in section 402A of the *Restatement (Second) of Torts* was an instant success. Jurisdiction after jurisdiction adopted it, either judicially or by legislation.¹⁴ North Carolina remained in the minority of states that did not join this

9. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963) (“A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”).

10. See RESTATEMENT (SECOND) OF TORTS § 402A.

11. *Fletcher v. Rylands* (1865) 159 Eng. Rep. 737, 740–42 (dealing with ultra-hazardous activities on land). Ultra-hazardous activities were later extended to things like wild animals, explosives, and similar items in which the possession of the item alone is enough to trigger liability without proof of fault. See *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1165 (Cal. 1978).

12. *Fletcher*, 159 Eng. Rep. at 741. For example, when mining was usual in the area, there was no liability to farmers whose animals were disturbed by frequent explosions. See, e.g., *Hieber v. Cent. Ky. Traction Co.*, 140 S.W. 54, 56 (Ky. 1911) (horses); *Held v. Red Malcuit, Inc.*, 230 N.E.2d 674, 676 (Ohio C.P. 1967) (pheasants); *Gronn v. Rogers Constr., Inc.*, 350 P.2d 1086, 1088 (Or. 1960) (mink); *Madsen v. E. Jordan Irrigation Co.*, 125 P.2d 794, 795 (Utah 1942) (mink); *Foster v. Preston Mill Co.*, 268 P.2d 645, 648–49 (Wash. 1954) (mink).

13. See RESTATEMENT (SECOND) OF TORTS § 520 cmt. i.

14. For a representation of state decisions adopting section 402 or some form of strict liability, see, for example, *O. S. Stapley Co. v. Miller*, 447 P.2d 248, 251–52 (Ariz. 1968) (applying section 402A to a defective boat-steering mechanism); *Hiigel v. Gen. Motors Corp.*, 544 P.2d 983, 987–88 (Colo. 1975) (recognizing strict liability for casting a defective product into the stream of commerce); *Garthwait v. Burgio*, 216 A.2d 189, 192 (Conn. 1965); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 87 (Fla. 1976); *Stewart v. Budget Rent-A-Car Corp.*, 470 P.2d 240, 243 (Haw. 1970) (imposing strict liability on one who sells or leases a defective product that is dangerous to the user or consumer as long as the seller is in that business and the product reaches the ultimate consumer without substantial change); *Shields v. Morton Chem. Co.*, 518 P.2d 857, 859–60 (Idaho 1974); *Hawkeye-Sec. Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672, 684 (Iowa 1970).

trend.¹⁵ This turned out to be a fortunate decision, for it soon became apparent that serious problems arose from strict liability as it was defined in section 402A. If strict liability had been properly defined,¹⁶ there may have been less difficulty.

Finally, there was a significant problem with strict liability in relation to design and warning defects. The distinction between design defects and warning defects in strict liability and negligence is clearly indistinguishable. The standard of conduct required of the defendant is the same for both: a duty to use reasonable care.¹⁷ The relevant defect is failure to design or warn in a reasonable manner when a better warning or design was available and should have been used.¹⁸ Most jurisdictions have recognized this problem and avoided it by redefining strict liability in design or warning cases as failure to use a better design or warning. This issue was addressed in MUPLA and in the *Restatement (Third) of Torts: Products Liability* by defining the various types of defects individually.

As solutions developed to questions surrounding early products-liability law, another problem arose with relation to user fault. Because the defendant manufacturer could not avoid liability by showing due care in strict-liability jurisdictions, it was argued—although not very sensibly—that user fault on the part of the plaintiff likewise could not be pleaded.¹⁹ States that recognized contributory negligence were not required to consider this issue,²⁰ but it did require attention in the majority of states.

B. Contract-Law Influences

While much of products-liability law developed from tort law, other developments grew out of contract law. One such development was warranty law. As a result, the source of modern products-liability law on

15. See DAVID G. OWEN, PRODUCTS LIABILITY LAW § 5.3, at 282–83 & n.106 (2005) (noting that as of 2005, the only states that firmly reject the doctrine of strict products liability in tort are Delaware, Massachusetts, Michigan, North Carolina, and Virginia).

16. For example, expressly stating that there is no need to prove fault and that due care is not a defense.

17. See OWEN, *supra* note 15, § 5.9, at 331.

18. *Id.* at 330–31.

19. RESTATEMENT (SECOND) OF TORTS § 402A cmt. n (AM. LAW INST. 1965). Comment *n* mentions only two kinds of plaintiff misbehavior: (1) ordinary fault, where the plaintiff did not see the danger, and (2) assumption of the risk, where the plaintiff was actually aware of the danger but nevertheless unreasonably proceeded to chance it. There is nothing mentioned between these two extremes; however assumption of risk by the plaintiff is a defense.

20. The issue of user fault on the part of the plaintiff may also affect the law in North Carolina if contributory negligence is abolished.

warranties is the Uniform Commercial Code (UCC).²¹ The implied warranty of merchantability set out in Article 2 of the UCC reinforced earlier changes in products liability by dropping the privity requirement between the parties.²² The UCC also replaced the statute of limitations with a statute that was more comparable to the limitations period applied in tort cases.²³

Early improvements to the state of products-liability law were noticeable, though not always effective. For starters, the critical notion of defect was defined in UCC terms²⁴ as disappointing the expectations of the reasonable consumer, also known as the “consumer expectations test.”²⁵ This test proved somewhat vague and was less than helpful to juries faced with these issues in court. The consumer expectations test was, however, favored by plaintiffs’ attorneys because the test made it easier to get to the jury with a sympathetic plaintiff.²⁶

These developments in early products-liability law influenced jurisdictions and decisions that have laid the groundwork for modern products-liability law in the twenty-first century.

II. MODERN DEVELOPMENTS IN PRODUCTS-LIABILITY LAW

A. MUPLA

Federal involvement in the products-liability field can be traced to the Interagency Task Force on Product Liability created by the Ford Administration in 1976.²⁷ The working task force was chaired by Professor Victor Schwartz, an acknowledged authority on torts generally and products liability in particular.²⁸ After an eighteen-month study, the task

21. OWEN, *supra* note 15, § 1.3, at 32.

22. See U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM’N 2012). The implied warranty of merchantability requires that goods conform to certain minimum standards: they must be fit for the ordinary purpose for which the goods are used. *Id.*

23. *Id.* § 2-725 (requiring that an action must be commenced within four years after the cause of action has accrued).

24. RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (stating that the rule “applies only where the product is, at the time it leaves the seller’s hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him”).

25. See OWEN, *supra* note 15, § 7.5, at 487–90 (discussing the consumer expectations test).

26. See *id.* at 490–92.

27. Victor E. Schwartz & Mark A. Behrens, *The Road to Federal Product Liability Reform*, 55 MD. L. REV. 1363, 1363 (1996).

28. U.S. DEP’T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY: FINAL REPORT, at ii (1978).

force issued a report that recommended the drafting of a model products-liability law for use by the states.²⁹ A final version of the model law, MUPLA, was published by the Department of Commerce in 1979.³⁰ Although it was intended for enactment by the states, it has not been applied uniformly.

The measures adopted in MUPLA were in many cases quite radical but were deemed persuasive by most commentators.³¹ The entire area of products-liability law was arranged around the central notion of defect until MUPLA abandoned the consumer expectations test for defect³² and replaced it with four individual forms of defects: (1) manufacturing or construction defects, (2) design defects, (3) informational defects, and (4) express warranties.³³ Each of these forms was described in functional terms. Section 104(A) of MUPLA, dealing with manufacturing or construction defects, provided that when a dangerous product deviated from the manufacturer's self-established standards—for example, the original design or the normal product—the product was, by definition, unreasonably unsafe.³⁴ Design defects were addressed in section 104(B), which stated that a product was defective in design if there was a safer, feasible alternative design that could have been adopted by the manufacturer.³⁵ Section 104(C) addressed the failure to warn of non-obvious dangers when the harm could have been prevented or mitigated by appropriate warnings and instructions.³⁶ Finally, section 104(D) provided that, where an express warranty was made by the seller relating to the general safety of the product or the product's use for a particular purpose, the seller would be liable if the product did not conform to the express warranty.³⁷

29. Schwartz & Behrens, *supra* note 27, at 1366.

30. Model Uniform Product Liability Act, 44 Fed. Reg. 62,714 (Oct. 31, 1979).

31. See Draft Uniform Product Liability Law, 44 Fed. Reg. 2996, 2997 (Jan. 12, 1979). The draft was published in the *Federal Register* for public comment, and over 1500 pages of written commentary were received by the Department of Commerce. The overwhelming majority of public comment was positive. These comments are available on file at the Law Library of the U.S. Department of Commerce.

32. Aaron D. Twerski & Alvin S. Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 DRAKE L. REV. 221, 230 (1979).

33. Model Uniform Product Liability Act, 44 Fed. Reg. at 62,721; see also Twerski & Weinstein, *supra* note 32, at 224.

34. Model Uniform Product Liability Act, 44 Fed. Reg. at 62,721.

35. *Id.*

36. *Id.*

37. *Id.*

MUPLA has not been enacted in whole by any jurisdiction. However, many of its provisions have been adopted in state products-liability acts.³⁸ Several measures set out in MUPLA should be considered and codified by state legislatures.³⁹

Despite MUPLA's failure to create uniformity among the states, the products-liability reform movement did not die there. In 1996, the United States House of Representatives and the Senate each approved legislation that was aimed at altering the rules of law governing products-liability actions, damages, and allocations of liability.⁴⁰ The bill, House Resolution 956,⁴¹ was passed by both the House and the Senate by a large majority but was vetoed by President Clinton.⁴² This left MUPLA and the *Restatement* as the two principal authorities on products-liability law.

B. *The Restatement of Torts*

The *Restatement (Third) of Torts: Products Liability* shares many features of MUPLA. Like MUPLA, the *Restatement* ignores the term "strict liability."⁴³ It substitutes precise, functional definitions of various types of defects for the more general consumer expectations test from section 402A of the *Restatement (Second) of Torts*.⁴⁴ There are, however, a number of differences between MUPLA and the new *Restatement*, and some of these represent the particular view of the authors.⁴⁵ Others are probably best explained by the fact that the learned authors, Professors

38. See, e.g., N.C. GEN. STAT. §§ 99B-1 to -12 (2013).

39. See *infra* notes 90–141 and accompanying text.

40. Cynthia C. Lebow, *Federalism and Federal Product Liability Reform: A Warning Not Heeded*, 64 TENN. L. REV. 665, 667–68 (1997).

41. Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. (1996).

42. See Lebow, *supra* note 40, at 666.

43. Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability: A Guide to Its Highlights*, 34 TORT & INS. L.J. 85, 88 (1998).

44. *Id.*

45. For example, concerns about the "sellers" exception, where the ultimate sellers are exempt from liability for the products that they sell, under certain conditions. Henderson's and Twerski's objection to this widely popular measure is that it may leave plaintiffs with no remedy when the ultimate seller is dismissed from a products-liability action at the early stages because the manufacturer is available for suit and is solvent. Then, later, at the time the case reaches trial, the manufacturer is insolvent and the statute of limitations has run against the retailers and wholesalers who were originally dismissed from the suit. See JAMES A HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 74–75 (6th ed. 2008) (proposing an amendment that would toll the statute of limitations against retailers and wholesalers during the life of the suit against the manufacturer of the allegedly defective product).

James Henderson and Aaron Twerski, had to modify their views in order to have the support of the ALI membership, which included both plaintiff and defense lawyers. A notable example of one of these compromises is the provision that plaintiffs need not show a feasible alternative design in all cases, since the design may be obviously defective and unreasonably dangerous with no need for an expert opinion.⁴⁶ Henderson's own comment on this is that the possibility of showing a defect without expert opinion is remote and probably nonexistent.⁴⁷

III. NORTH CAROLINA PRODUCTS LIABILITY LAW

A. *The Current State of the Law*

North Carolina products-liability law is still a work-in-progress. Serious reform began with the products-liability act, which became effective on October 1, 1979.⁴⁸ This legislation has been periodically revised and updated.⁴⁹

North Carolina is one of five states that has refused to follow the strict-liability trend within the context of products liability.⁵⁰ North Carolina was fortunate that its innate conservatism prevented it from joining the strict-liability movement in the 1960s and 1970s and was saved from several decades of confusion.

Strict liability, precisely defined, means that manufacturers and sellers are automatically liable for selling defective products that cause harm.⁵¹ The plaintiff is not required to show that the defendant was at fault, and due care on the part of the defendant is not a defense.⁵² This notion, despite statements to the contrary, can be found in the implied warranty of

46. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 (AM. LAW INST. 1998) (allowing the plaintiff to infer a defect in situations where common experience shows that an inference of defect may be warranted under the specific facts).

47. See Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 BROOK. L. REV. 1061, 1095 (2009).

48. N.C. GEN. STAT. §§ 99B-1 to -12 (2013).

49. One update came in the form of a provision on ineffective warnings and instructions that was added in 1995. See Act of July 29, 1995, ch. 522, § 1, 1995 N.C. Sess. Laws 1872, 1874-76 (codified at N.C. GEN. STAT. § 99B-5).

50. OWEN, *supra* note 15, § 5.3, at 282-83 & n.106. The other four states are Delaware, Massachusetts, Michigan, and Virginia. *Id.*

51. See *Strict Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

52. OWEN, *supra* note 15, § 5.3, at 266-67.

merchantability.⁵³ Strict liability, which seemed to be a good thing in the early sixties, later proved to have a number of serious deficiencies.

First, strict liability does not work well for design and informational defects. At first, it was thought that a design or informational defect was still a defect, or something that the ordinary user would refuse, and thus, it should fall under the strict-liability rule of section 402A of the *Restatement (Second) of Torts*.⁵⁴ It was soon realized, however, that both design and informational defects inevitably involve negligence, since both refer to a standard that should have been followed.⁵⁵ This finding was reconciled with strict liability in a number of jurisdictions by applying strict liability in a case and defining it to mean that an alternative, safer, feasible design or set of warnings was available and was not used or followed.⁵⁶ This simply puts a patch on the problem, but the problem still exists.

Second, when strict liability was treated as a separate cause of action from negligence, the door was opened for juries to find on the same set of facts that the defendant was not liable in strict liability but was liable under negligence.⁵⁷ This is clearly inconsistent, as there can be no fault if the product is not defective.⁵⁸ On appeal, the error was sometimes deemed harmless, and the verdict allowed to stand.⁵⁹ But in other appeals, the case was remanded for a new trial with different jury instructions.⁶⁰ When the problems already mentioned were not apparent, the very term “strict liability,” even when correctly explained to the jury, suggests a more severe kind of liability, and thus, the presence or absence of fault can be viewed as irrelevant, minimized, or even overlooked.

Finally, and most importantly, the notion of strict liability is not necessary in modern products-liability litigation. Strict liability only applies, with any degree of comfort, in manufacturing-defect cases, where

53. See *id.* § 5.9, at 335–37; see also *infra* notes 123–130 and accompanying text.

54. RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (AM. LAW INST. 1965).

55. OWEN, *supra* note 15, § 5.9, at 331. For example, a better design or set of warnings.

56. See, e.g., *Boatland of Hous., Inc. v. Bailey*, 609 S.W.2d 743, 745–46 (Tex. 1980).

57. See, e.g., *Lecy v. Bayliner Marine Corp.*, 973 P.2d 1110, 1116–17 (Wash. Ct. App. 1999) (holding that, under admiralty jurisdiction, the jury’s finding that the design of the yacht’s boat door system was not unreasonably dangerous precluded the jury from finding that the system was negligently designed). This problem is also found when breach of warranty and strict liability are used for identical fact patterns.

58. See OWEN, *supra* note 15, § 5.9, at 332–33.

59. See *id.* at 333 n.34 (noting decisions where various courts found it acceptable for jury to find liability under one theory but not the other).

60. See Donald P. Blydenburgh, *Analyzing Inconsistent Verdicts in Products Liability Cases: How the Law Promotes Them, Why Juries Render Them, and Why Some Courts Permit Them*, 73 DEF. COUNS. J. 46, 47 (2006) (citing *Witt v. Norfe, Inc.*, 725 F.2d 1277, 1278 (11th Cir. 1984)).

fault is indeed irrelevant.⁶¹ Yet, even then, it is unnecessary, since manufacturing defects can be, and usually are, defined in terms of variation from the design that carries an unacceptable risk of harm.⁶² The North Carolina Products Liability Act expressly states that North Carolina does not apply strict liability in this context.⁶³ Section 99B-1.1 declares in no uncertain terms that “[t]here shall be no strict liability in tort in product liability actions.”⁶⁴

The current products-liability act is divided into twelve sections, each covering a specific provision of the act. Definitions pertinent to the act are set out in section 99B-1.⁶⁵ This section defines terms used within the context of the act, such as “claimant,” “manufacturer,” and “seller.”⁶⁶

The act also provides protections for sellers by imposing an actual-fault requirement. This exception, set out in section 99B-2(a), prohibits an action against a seller who acquires and sells a product in a sealed container or against one who does not have a reasonable opportunity to inspect.⁶⁷ This essentially amounts to no liability without fault, and it is now the law in many jurisdictions.⁶⁸ This is most clearly stated in judicial opinions,⁶⁹ but it would be more effective if it was incorporated into the text of section 99B-1 as an exception to the definition of liability.

One of the most significant changes in North Carolina products-liability law came in section 99B-2(b), which effectively eliminated the

61. See OWEN, *supra* note 15, § 1.3, at 36.

62. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a) (AM. LAW INST. 1998).

63. N.C. GEN. STAT. § 99B-1.1 (2013).

64. *Id.*

65. *Id.* § 99B-1.

66. *Id.*

67. *Id.* § 99B-2(a).

68. Twenty-four states now have some form of legislative protection for non-manufacturing sellers. See Jim Sinunu & Amy Kott, Commentary, *Protection for Retailers: Developments in Strict Product Liability and Indemnification*, WESTLAW J. PROD. LIAB., June 2011, at 1, 3. But see Alani Golanski, *Paradigm Shifts in Products Liability and Negligence*, 71 U. PITT. L. REV. 673, 696 (2010) (“[T]he consensus view in this country has been that commercial product sellers are subject to privity-free, nondisclaimable strict liability in tort for physical harm caused by product defects existing at the time of sale.” (quoting James A. Henderson, Jr. & Aaron D. Twerski, *What Europe, Japan, and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT’L L.J. 1, 3 (1999))).

69. See, e.g., McLaurin v. E. Jordan Iron Works, Inc., 666 F. Supp. 2d 590, 601–02 (E.D.N.C. 2009) (holding that products-liability claims of negligence and breach of implied warranty could not stand because the distributor had no duty pursuant to N.C. GEN. STAT. § 99B-2(a) nor any reasonable opportunity to perform diagnostic tests that would have revealed latent defects).

privity requirement that existed in prior case law.⁷⁰ Section 99B-2(b) provides that the “lack of privity of contract shall not be grounds for . . . dismissal” in an implied-warranty action against a manufacturer.⁷¹ Therefore, a plaintiff may now sue the manufacturer under an implied-warranty theory without fearing that the privity defense will be raised.

Another significant feature of the products-liability act relates to the alteration or modification of a product.⁷² Under section 99B-3(a), if someone other than the manufacturer or seller alters or modifies the product, both parties are relieved of liability if (1) the modification or alteration was not done according to instructions or specifications, or (2) the alteration or modification was made without the express consent of the manufacturer or seller.⁷³ Further, the statute broadly defines modification and alteration, and expressly excludes ordinary wear and tear.⁷⁴ As a result, alteration and modification of a product are now affirmative defenses, and each one, if proven, is an absolute defense.⁷⁵

Section 99B-4 addresses knowledge or reasonable care on behalf of the plaintiff.⁷⁶ If the plaintiff is injured because he disregarded “express and adequate instructions” of which he knew or should have known, the manufacturer or seller escapes liability.⁷⁷ The manufacturer or seller will not be liable if the plaintiff knew the product was defective and used it in spite of the danger,⁷⁸ or if he failed to use reasonable care under the circumstances.⁷⁹

The 1995 amendments to the products-liability act were the “first major alteration[s]” to the statute since its enactment in 1979.⁸⁰ A section was added to the act outlining what a claimant must prove to prevail on a claim involving an inadequate warning or instruction.⁸¹ Section 99B-5 sets

70. Charles F. Blanchard & Doug B. Abrams, *North Carolina's New Products Liability Act: A Critical Analysis*, 16 WAKE FOREST L. REV. 171, 174 (1980).

71. N.C. GEN. STAT. § 99B-2(b).

72. *See id.* § 99B-3.

73. *Id.* § 99B-3(a).

74. *Id.* § 99B-3(b).

75. This is the case as long as North Carolina retains the defense of contributory negligence. If North Carolina ever abolishes contributory negligence, it will be argued that a new section should be created for user fault.

76. N.C. GEN. STAT. § 99B-4.

77. *Id.* § 99B-4(1).

78. *Id.* § 99B-4(2).

79. *Id.* § 99B-4(3).

80. Matthew William Stevens, Note, *Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, the Products Liability Act*, 74 N.C. L. REV. 2240, 2241 (1996).

81. N.C. GEN. STAT. § 99B-5.

out the elements for an inadequate warning or instruction claim, but it does little more “than provide a succinct summary of the elements of a negligence action in products liability.”⁸²

Section 99B-6 was also added in 1995.⁸³ This particular section “lays out the standard elements for unreasonable design and formulation cases and provides two alternative ways of proving negligence.”⁸⁴ The first alternative is to show that the manufacturer unreasonably failed to implement a safer alternative design that could have been adopted without substantially impairing the product.⁸⁵ The second alternative is to show that the design was so unreasonable that a reasonable person, aware of the relevant facts, would not use the product.⁸⁶

The act also provides protections for public policy purposes. Section 99B-10 provides immunity for donated food.⁸⁷ This is an important provision because it allows perfectly good surplus food from stores, restaurants, churches, and private banquets to be donated for charitable use without the fear of liability.⁸⁸ Immunity could be lost, however, if an injury is caused by the “gross negligence, recklessness, or intentional misconduct” of the donor.⁸⁹

B. *A Proposal for Change*

Chapter 99B of the North Carolina General Statutes encompasses a good deal of modern products-liability law. However, much of the law is found in judicial opinions, and these rules of law should be incorporated into the text of the statute. The act also retains some unhelpful residual provisions from earlier developments;⁹⁰ modification and explanatory development of some of these would significantly improve the state of products-liability law in North Carolina.

Many of the newer provisions that bring the act in line with recent developments in products-liability law are in the form of judicial opinions. Although the act includes many of the features set out in reform proposals, especially adopted measures from MUPLA, more needs to be done. The recent developments made by the courts should be integrated into the

82. See Stevens, *supra* note 80, at 2249.

83. N.C. GEN. STAT. § 99B-6.

84. See Stevens, *supra* note 80, at 2250.

85. N.C. GEN. STAT. § 99B-6(a)(1).

86. *Id.* § 99B-6(a)(2).

87. *Id.* § 99B-10.

88. *Id.*

89. *Id.*

90. For example, the user-expectation definition of defect.

appropriate sections of the act. In short, going forward, North Carolina law would benefit from further revision of chapter 99B, specifically the revisions discussed below.

1. Adopt the Functional Definitions of “Defect”

One issue that needs attention is the way that defects and terms are defined. Section 99B-1 could be greatly improved by including the definition of defect in terms of functionality. This could easily be accomplished by listing and describing the three specific forms of defect: manufacturing, design, and informational (packaging) defects.⁹¹ The functional definitions of manufacturing or construction, design, and informational defects, as stated in MUPLA and in the *Restatement*, are widely acknowledged both in the courts and by learned commentators.⁹² The definitions are present in North Carolina’s products-liability act, but they are scattered throughout.⁹³ A more definite statement would better serve North Carolina products-liability law.

Defect should be treated as a central notion and should be defined, not in general terms, but in terms of the basis of liability for each functional category.⁹⁴ Products would then be deemed defective if a product (1) contains a manufacturing defect by virtue of the manufacturer’s variance from the original design or usual product, (2) is defective in design and it is shown that a safer, feasible design was available and should have been adopted by the manufacturer, or (3) is defective because of inadequate instructions or warnings where there is non-obvious danger or dangers, and the harm could be avoided or mitigated by feasible warnings and instructions.⁹⁵

MUPLA also adds a category of defect where a product is rendered dangerous by “express warranty” (commonly in promotional materials) either inducing users to rely on safety promises or encouraging them to relax their standards for self-care.⁹⁶ The *Restatement* omits this provision

91. William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 782 (1983).

92. See Twerski & Weinstein, *supra* note 32, at 225–27, 233–34.

93. N.C. GEN. STAT. §§ 99B-5, -6.

94. See Twerski & Weinstein, *supra* note 32, at 224 (discussing MUPLA’s classification of the different bases for liability).

95. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (AM. LAW INST. 1998).

96. Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,721 (Oct. 31, 1979). See *Leichtamer v. Am. Motors Corp.*, 424 N.E.2d 568, 578 (Ohio 1981) (allowing the admission of evidence of a car commercial that would have a bearing on the expectations of an ordinary consumer). This provision is not included in the *Restatement (Third) of Torts*:

because it sounds more in contract law. But if, as suggested here, the UCC should no longer be used for tort cases, a further category should be inserted in section 99B-1 and “express warranty” should be clearly defined as a category of defect. This schema constitutes a simpler and more rational way of looking at defective products. It avoids much of the complexity and confusion inherent in the older statements of remedies. Chapter 99B does not, as it currently stands, successfully accomplish this because it has not done more than direct a plaintiff to a commentary regarding causes of action. For example, if the manufacturer or seller has failed to respond adequately to a duty or adequately test its product for safety, it should be clearly stated that an action in negligence is available.

The North Carolina Products Liability Act incorporates these definitions specifically in sections 99B-5 and 99B-6, but the sections are rendered unduly complex and somewhat confusing by appending older notions, such as “unreasonably dangerous.” These older notions might be deemed harmless if they are intended merely to flesh out the functional definitions.⁹⁷

2. *Abolish Separate Forms of Plaintiff Misconduct*

Plaintiff misconduct is traditionally divided into a number of forms, such as misuse, abuse, alteration, and failure to observe routine care.⁹⁸ The North Carolina Products Liability Act follows in this general direction.⁹⁹ These will remain absolute defenses in North Carolina as long as contributory negligence is the law. These categories are also over-technical. They are difficult for lawyers to understand and even more difficult to explain to jurors. Both MUPLA and the *Restatement* advocate abolishing these separate notions and bundling all forms of plaintiff misconduct together in a single percentage amount to be deducted from the plaintiff’s recovery.¹⁰⁰ A number of jurisdictions have followed suit, and North Carolina should consider taking this approach as well.¹⁰¹

Products Liability. This is quite probably because major manufacturers are adept at puffing and staying clear of legal warranting.

97. For example, pointing out that the design or warnings or the manufacturer in question must not only deviate from the suggested models, but the deviation must also be potentially harmful. It would be better if the intent of these provisions was made plain by adding a comment distinguishing them from harmless defects.

98. See, e.g., N.C. GEN. STAT. § 99B-3.

99. *Id.*

100. Model Uniform Product Liability Act, 44 Fed. Reg. at 62,734; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 17 cmt. c.

101. See, e.g., *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1172 (Cal. 1978); *Armstrong v. Cione*, 738 P.2d 79, 82 (Haw. 1987).

MUPLA suggests the following simple procedure. First, the court will ask the jury to estimate the total amount of damages.¹⁰² Second, the jury will be directed to decide how much the amount should be reduced for the total fault attributed to the plaintiff.¹⁰³

It has been suggested in a number of jurisdictions that this measure also applies to assumption of the risk.¹⁰⁴ In cases where the plaintiff has expressly or impliedly agreed to hold the defendant harmless (primary assumption of the risk), the court could assign 100% of the fault to the plaintiff and no fault to the defendant. In cases of secondary assumption of the risk, where the defendant was also at fault, the jury could be instructed to reduce the overall recovery by 25%, 50%, or 75%. This would simplify the vexing question of user fault considerably.

3. *Replace Contributory Negligence with a Better Option for Addressing User Fault*

Beyond eliminating categories of user misconduct, North Carolina should consider a new method for determining user fault and liability. Contributory negligence is the law in North Carolina and in four other jurisdictions.¹⁰⁵ Under the doctrine of contributory negligence, any fault on the part of the plaintiff completely bars recovery for the plaintiff.¹⁰⁶ This harsh rule prevents a plaintiff with relatively minor fault from recovering from a far more negligent defendant.¹⁰⁷

The majority of states have moved away from the doctrine of contributory negligence in favor of other doctrines of user fault. Pure comparative fault was originally established in the California case *Li v. Yellow Cab Co. of California*¹⁰⁸ and is now used in twelve states.¹⁰⁹ Under pure comparative fault, the plaintiffs lose only that part of the recovery that

102. Model Uniform Product Liability Act, 44 Fed. Reg. at 62,734.

103. *Id.* at 62,734–35.

104. *See, e.g.,* *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1243 (Cal. 1975).

105. *See* Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945, 950 (2012) (“Contributory negligence is still used in five jurisdictions: Alabama, Maryland, North Carolina, Virginia, and the District of Columbia.”) (footnote omitted).

106. N.C. GEN. STAT. § 99B-4(3) (2013).

107. The doctrine was grounded on the notion of causation, as established in a nineteenth-century case in which the plaintiff rode a horse recklessly down a narrow street and caused his own harm. *Butterfield v. Forrester* (1809) 103 Eng. Rep. 926, 927.

108. *Li*, 532 P.2d at 1232.

109. Best & Donohue, *supra* note 105, at 949. The states that use pure comparative negligence are Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington. *Id.*

represents their own assigned percentage of fault.¹¹⁰ Thus, a plaintiff who is attributed 99% of the fault with a recovery of one million dollars will still receive ten thousand dollars. This has always seemed eminently fair, but unfortunately, human beings, including jurors, are incapable of determining such precise percentage degrees of fault.¹¹¹ In addition, there is an objection that this system encourages negligent behavior at the expense of more careful members of society by rewarding plaintiffs with high degrees of fault.¹¹²

Other jurisdictions have implemented the doctrine of modified comparative fault. The perceived defects in pure comparative fault schemes have encouraged many states to adopt modified comparative fault. In twenty-one states, the “fifty percent” rule of comparative negligence is used.¹¹³ Under this system, the “plaintiff[] can recover unless [his] negligence exceeds that of the defendant.”¹¹⁴ In other words, the plaintiff will recover as long as his percentage of negligence does not exceed 50%.

Eleven states use the “forty-nine percent” rule.¹¹⁵ In those jurisdictions, the plaintiff can recover, as long as his percentage of negligence is less than that of the defendant.¹¹⁶ Unlike pure comparative fault, the jury is usually informed about the effects of their calculations before they make their decision.¹¹⁷ This may have the effect of causing a jury to allocate fault of less than 50% to a sympathetic, badly injured plaintiff. That risk, however, is better than the alternative, where the plaintiff receives nothing if he is contributorily negligent.

Finally, user fault is entirely irrelevant in jurisdictions that recognize strict liability in the context of products liability.¹¹⁸ This extreme notion was posited on the argument that, because it is not necessary to show that the defendant was at fault under strict liability, the plaintiff’s fault should

110. *Li*, 532 P.2d at 1229.

111. *See id.* at 1231 (discussing the haphazard ways that juries sometimes apportion fault).

112. *See* William L. Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, 3–4 (1953) (“It has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety . . .”).

113. Best & Donohue, *supra* note 105, at 949.

114. *Id.*

115. *Id.* at 950.

116. *Id.*

117. *Id.* at 952.

118. RESTATEMENT (SECOND) OF TORTS § 402A & cmt. n (AM. LAW INST. 1965). *But see id.* § 402A cmt. h (providing that sellers are not responsible for unforeseeable “abnormal handling”).

likewise be irrelevant.¹¹⁹ This implausible doctrine has been abandoned by all but a few jurisdictions.

Because no system of user fault is without flaw, an additional alternative is suggested. This is based on the concurring opinion of Justice Clark in *Daly v. General Motors Corp.*¹²⁰ Justice Clark contended that it was ridiculous to ask a jury to decide on a number between zero and 100% and that the jury should be presented with a uniform index factor such as 30%, 50%, or 70%.¹²¹ This suggested alternative is in line with the way that psychologists approach similar problems, such as the measurement of pain and other things that extend over a broad spectrum of meanings so that they are difficult for individuals to describe. In these circumstances, the decision maker is given a limited number of possibilities (for example, four or five shades of red to represent the pain he is feeling).

In the measurement of fault, the jury, according to this scheme, would be presented with only three possibilities: 25%, 50%, and 75%.¹²² Using this system, it should be reasonably easy for a jury to agree on a percentage allocation of fault. The court would then apply the results to the case. If the jurors fail to reach a consensus, a mean value could easily be reached—for instance, by striking out the lowest and highest estimates or adopting a mean value for their findings. This eliminates the need to instruct the jury regarding the meaning of their decision; the procedure clearly describes what will happen. This alternative would be simple to explain, reasonably fair, and it would hopefully avoid the manipulation of the verdict by the jury in order to bring their findings in line with their sympathies.

4. *Eliminate the UCC from Products-Liability Tort Cases*

Products-liability law incorporated several principles from the UCC that were very useful in its early development. The most important of these principles was the implied warranty of merchantability.¹²³ This included the warranty of safety, which was helpful in avoiding contributory negligence and the difficulty of providing proof of defendant fault.¹²⁴ But these problems were addressed in other ways as products-liability law developed, and the cause of action in warranty is no longer needed. Furthermore, it shared with strict liability the potential to allow a jury, when confronted with two more-or-less identical causes of action (warranty

119. *Id.* § 402A & cmt. n.

120. *Daly v. Gen. Motors Corp.*, 575 P.2d 1162, 1175 (Cal. 1978) (Clark, J., concurring).

121. *Id.* at 1176.

122. *See id.* Some might add a 10% possibility for minimal fault.

123. OWEN, *supra* note 15, § 4.3, at 171.

124. *Id.* at 171, 176–77.

and product defect), to reach inconsistent verdicts.¹²⁵ If the defendant is held liable under both warranty and product defect, there is no problem. But if the jury finds no defect in the article and at the same time finds that there was a breach of warranty, the findings are inconsistent because there can be no breach of warranty in an article that is not defective.¹²⁶

The problem might have been solved if the revised version of Article 2 of the UCC had been approved, allowing the UCC to be used in contract cases but not in torts. Unfortunately, for other reasons, it was not approved.¹²⁷ The only remaining option is for individual states to enact legislation that restricts the use of the UCC to contracts and eliminates its use in tort actions. This would be a simpler solution to the problem than waiting for a new version of Article 2 to be approved.

Eliminating the use of the UCC in tort cases would also solve the problem of inconsistent statutes of limitation and repose. When a party's statute of limitations has run for a cause of action in contracts, the party may attempt to bring his action in products liability, where either the triggering event or the time limitation allowed is more favorable.¹²⁸ The provisions governing the statute of limitations and repose should be the same in all products-liability cases.

The distinction between products-liability cases and those sounding in contract should be clearly stated in North Carolina's products-liability act. It is well established that products liability is limited to personal injury and damage to property other than to the article sold.¹²⁹ Damage to the article

125. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. n (AM. LAW INST. 1998).

126. See, e.g., *Lecy v. Bayliner Marine Corp.*, 973 P.2d 1110, 1116 (Wash. Ct. App. 1999). A similar problem can occur where strict liability and negligence are both pleaded.

127. See Richard E. Speidel, *Revising UCC Article 2: A View from the Trenches*, 52 HASTINGS L.J. 607, 611–12 & nn.15–17 (2001) (providing an insider's perspective into the attempted passage of a revised draft of Article 2).

128. See, e.g., *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 861 (1986). In *East River Steamship Corp.*, the plaintiffs originally brought tort and warranty claims, but after a statute-of-limitations defense was interposed, several plaintiffs were dismissed and the complaint was amended to allege only tort claims. *Id.*

129. N.C. GEN. STAT. § 99B-1(3) (2013) (defining a “[p]roduct liability action” as “any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product”); see also *E. River S.S. Corp.*, 476 U.S. at 871–75 (holding that there was no negligence or products-liability claim where the only injured property was the purchased product itself).

sold is a contract matter, which should be brought under UCC provisions.¹³⁰

5. *Address Liability for Used Goods*

Liability for used goods is not addressed in chapter 99B. The general principle that fault should be required¹³¹ is a good one and might be deemed to refer to used goods, but the rule needs to be clearly stated. The general rule is that sellers of used goods are not liable, especially if they sell the good “as is.”¹³² Sellers are liable, however, if they fail to notify the buyer of known defects or if a defect would have been discovered through reasonable inspection of the goods.¹³³ Some courts have treated expensive, recently manufactured used cars as being sufficiently new to be covered under this rule.¹³⁴ However, the seller in this situation is in no better position than the buyer to guarantee the safety of the product, especially if the product is sold “as is.”¹³⁵ Thus, a used car should not be governed by the same rules as a new car.

It is recommended that the rules governing used products be incorporated into chapter 99B. It is also recommended that nearly new, expensive products be treated as used items. Warranty for parts and labor is commonly supplied with such items, but the buyer should seek further warranty. Breach of any additional warranties given by the seller would lie in contract.

6. *Expand the Learned-Intermediary Rule*

The learned-intermediary rule in section 99B-5(c) refers only to the ordering of prescription drugs by physicians.¹³⁶ This application is too narrow, since the learned-intermediary rule is intended to apply to many persons who might be regarded as reliable mediators of warnings, like safety officers, factory foremen, or foremen in garages.¹³⁷ The learned-

130. *See* *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 878 (1997) (describing that the loss of the added superstructures on a defective hull were deemed property other than the article sold); *E. River S.S. Corp.*, 476 U.S. at 871–75; *see also* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 21 & cmts. d, e.

131. N.C. GEN. STAT. § 99B-4.

132. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 8 & cmts. a, k.

133. *Id.* § 8.

134. *See* OWEN, *supra* note 15, § 6.5, at 435.

135. *See id.*

136. N.C. GEN. STAT. § 99B-5(c).

137. *See* Keith A. Laughery, Comment, *Warnings in the Workplace: Expanding the Learned Intermediary Rule to Include Employers in the Context of the Product*

intermediary doctrine provides that it is sufficient to deliver a warning to a responsible person who has a duty to pass on the warning to the ultimate user.¹³⁸ However, the exceptions almost swallow the rule. The learned-intermediary rule will not avoid liability if the danger is great, if the learned intermediary might fail to pass on the warning, and if it is feasible to directly warn the ultimate user.¹³⁹ It is clear that the first of these two exceptions are inevitably present so that the rule reads that the ultimate user should be warned if it is reasonably feasible to do so.

The learned-intermediary rule is most applicable to doctors who must adapt any warnings and instructions to the peculiar conditions of their patients, but there are two exceptions that are recognized. Birth control pills¹⁴⁰ and mass immunization programs¹⁴¹ require adequate warnings and instructions to be provided to the ultimate user. In both situations, physician involvement with the patient is considered to be limited so that there is a duty on the part of the suppliers to directly warn the ultimate users.

It is recommended that the rule be stated generally not just as it applies to prescribing physicians. The general exception should state that, where it is feasible to provide a warning to the ultimate user, a warning should be provided. In addition, a note might be added to include illustrative cases—in particular, cases relating to mismatched parts on assembled truck wheels where mistakes could be alleviated by stamping the items to be matched on their parts.

CONCLUSION

A revision of the North Carolina Products Liability Act would be the best method of incorporating additional products-liability provisions into North Carolina law. While many of the provisions of the *Restatement (Third) of Torts: Products Liability* and MUPLA are already incorporated into North Carolina's products-liability act or in the case law derived from

Manufacturer/Employer/Employee Relationship, 46 S. TEX. L. REV. 627, 632, 635–36 (2005); see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i.

138. See Laughery, *supra* note 137, at 632; see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i.

139. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. i; see also Richard B. Goetz & Karen R. Growdon, *A Defense of the Learned Intermediary Doctrine*, 63 FOOD & DRUG L.J. 421, 428 (2008) (discussing cases in which the manufacturer had a duty to provide a direct warning to the consumer).

140. Diane Schmauder Kane, Annotation, *Construction and Application of Learned-Intermediary Doctrine*, 57 A.L.R.5th 1, 56–61 (1998).

141. *Id.* at 50–51.

the act, both sources should be formally included in chapter 99B. In many cases, older notions in the existing provisions of chapter 99B should be removed or clarified to avoid confusion.

From trading contributory negligence for some version of comparative fault, to expanding the learned-intermediary rule to new contexts, simple changes to chapter 99B could bring North Carolina's products-liability law into the twenty-first century. This could be accomplished with relative ease with guidance from MUPLA, *The Restatement (Third) of Torts: Products Liability*, and the example of other jurisdictions that have implemented modern changes.