Negligence Liability for Defective Products in Virginia

Thomas W. Williamson, Jr.
Williamson Law LC
wllc.com[1]

1.0 Introduction

Virginia imposes a duty upon the manufacturers and sellers to exercise ordinary care in the manufacture and sale of their products. Historically, the duty of a product seller was limited largely to the immediate purchasers of the product "in privity of contract" with the seller. However, the statutory abolition of the requirement of privity extended this duty to non-purchasers using, consuming or affected by the use of a product.

Although the abolition of the privity requirement for breach of warranty claims made this contractually derived "strict liability" remedy accessible to injured non purchasers, negligence remains an important and widely employed theory of liability in Virginia product liability litigation. A claimant seeking recovery predicated upon negligence will not be thwarted by contractual defenses such as disclaimer. Punitive damages, not recoverable in a breach of warranty action, can be awarded in a negligence tort action if the defendant's conduct is sufficiently egregious.

1.1 Duty of A Product Seller or Manufacturer

In either a negligence or breach of warranty action, a plaintiff contending a product hazard caused injury must show (1) that the goods were unreasonably dangerous either for the use to which they would ordinarily be put or for some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the goods left the manufacturer's hands.[2] A negligence action also requires proof that the product supplier distributed the product in an unreasonably dangerous condition due to the supplier's failure to exercise ordinary care.[3]

---

[1] Tom Williamson authored this monograph in 2013 and has not been revised to reflect any developments since its original preparation in 2013.

[2] *Garrett v. I.R. Witzer Co.*, 258 Va. 264, 267-68, 518 S.E.2d 635, 637 (1999); *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975).

[3] Simple negligence is the failure to use the degree of care that an ordinarily prudent person would exercise under similar circumstances to avoid injury to another. *Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 486, 603 S.E.2d 916, 918 (2004). See *Harris-Teeter, Inc. v. Burroughs*, 241 Va. 1, 399 S.E.2d 801(1991) (Jury verdict for plaintiff set aside because no evidence of negligent conduct in sale of cake).

A defendant is not required to supply an accident proof product.[4] Rather, a product must only be fit for the ordinary purposes for which it is used.[5]

A product is unreasonably dangerous if it is defective in assembly or manufacture, unreasonably dangerous in design, or unaccompanied by adequate warnings concerning its hazardous properties.[6]

The unreasonably dangerous condition must have existed when the product left the control of the defendant.[7] A post distribution change in condition must be causally related to the injury in order to constitute a defense to liability.[8] However, a post-sale modification of a product playing a role in causing the injury may not absolve the product supplier of liability if the evidence shows the product supplier should have foreseen prior to distributing the product that the modification would occur.[9]

II. Lack of Privity

Privity of contract between the injured party and a product supplier is not required in a product liability action alleging negligence caused an injury to person or property.[10] Privity of contract between the claimant is required for recovery from a product supplier alleged to have been negligent if the claimed damage represents solely economic loss.[11]

III. Foreseeability of Use

A product supplier's duty to protect against product related injury applies only to situations when the product was used as intended by the

---

[4] *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 148, 501 S.E.2d 393, 396 (1998); *Besser Co. v. Hansen*, 243 Va. 267, 277, 415 S.E.2d 138, 144 (1992); *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 245, 251, 252 S.E.2d 358, 367 (1979); *Turner v. Manning, Maxwell & Moore,* 216 Va. 949, 963, 217 S.E.2d 863, 868 (1975).

[5] *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 148, 501 S.E.2d 393, 396 (1998); *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975).

[6] *Morgen Indus., Inc. v. Vaughan*, 252 Va. 60, 65, 471 S.E.2d 489, 492 (1996).

[7] *Garrett v. I.R. Witzer Co.*, 258 Va. 264, 518 S.E.2d 635 (1999); *Slone v. General Motors Corp.*, 249 Va. 520, 457 S.E.2d 51 (1995).

[8] *Morgen Indus., Inc. v. Vaughan*, 252 Va. 60, 65-66, 471 S.E.2d 489, 492-93 (1996).

[9] See *Morgen Indus., Inc. v. Vaughan*, 252 Va. 60, 65, 471 S.E.2d 489, 492 (1996). Although a change in condition may negate liability for negligent design, the manufacturer may have a duty to warn against the change in condition if the manufactuer should have foreseen the change in condition and the danger posed by the change. See *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 965-66, 252 S.E.2d 358, 368-69 (1979);

[10] "Where recovery of damages for injury to person, including death, or to property resulting from negligence is sought, lack of privity between the parties shall be no defense." Va. Code § 8.01-223.

[11] *Gerald M. Moore & Son, Inc. v. Drewry*, 251 Va. 277 467 S.E.2d 811 (1996); *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 374 S.E.2d 55 (1988).

supplier or for some other reasonably foreseeable purpose. While a product supplier is not liable for every misuse of the product, it may be held liable for a foreseeable misuse of the product.[12] Even when a product's manufacturing defect plays a causative role in an injury, the manufacturer will bear no responsibility for the injury if the product's usage at the time of injury is found to be unforeseeable.[13]

It is incumbent upon the plaintiff to prove that a misuse of the product was foreseeable to the manufacturer/seller. In *Featherall v. Firestone Tire & Rubber Co.,* the Supreme Court of Virginia held as a matter of law that simply evidence of habitual misuse of the product in the injured party's workplace would be insufficient proof of foreseeability. However, the Court suggested evidence of customary use of the product in this manner in the trade may establish the foreseeability of a product being used in other than intended.[14] The manufacturer's brochure mentioning a particular use is evidence of the foreseeability of that use.[15]

The Supreme Court of Virginia has recognized that evidence of similar prior incidents under substantially the same circumstances caused by the same defect or danger will be probative of foreseeability of product usage.[16] The burden is on the injured party to establish the required elements for admissibility of prior occurrences.[17]

The obviousness of the danger posed by the misuse influences the determination of whether the misuse of a product is foreseeable to the manufacturer. In *Jeld-Wen, Inc. v. Gamble*[18], a child pressing against a window screen fell out of the window when the screen gave way. Use of the screen as a child restraint was deemed, as a matter of law, an unforeseeable misuse "despite, or perhaps because of the danger the misuse presents."[19] When a user chooses to use a product in a patently unsafe manner, it is likely to be found to be an unforeseeable use because of a judicial reticence

---

[12] *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 148, 501 S.E.2d 393, 396 (1998).
[13] See *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 501 S.E.2d 393 (1998).
[14] 219 Va. 949, 966, 252 S.E.2d 358, 369 (1979).
[15] *Morgen Indus., Inc. v. Vaughan*, 252 Va. 60, 66, 471 S.E.2d 489, 492-93 (1996).
[16] *Funkhouser v. Ford Motor Co.,* 285 Va. 272, 281-84, 736 S.E.2d 309, 314-15 (2013); *Jones v. Ford Motor Co*., 263 Va. 237, 254, 559 S.E.2d 592, 601 (2002).
[17] *Funkhouser v. Ford Motor Co.,* 285 Va. 272, 283 n. 5, 736 S.E.2d 309, 315 n. 5 (2013);
[18] 256 Va. 144, 501 S.E.2d 393 (1998).
[19] *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 149, 501 S.E.2d 393, 397 (1998). See also *Besser Co. v. Hansen*, 243 Va. 267, 277, 415 S.E.2d 138, 144 (1992) (Manufacturer had no reason to foresee 0perator would fail to heed warning light and place himself in a dangerous position).

to impose upon a manufacturer a duty to protect against volitional encounters fraught with peril.[20]

IV. Inherently or Abnormally Dangerous Products

Virginia has never imposed absolute liability for an "abnormally dangerous activity" with respect to the distribution of a defective product. The "abnormally dangerous activity" doctrine will not be applied to any activity where due care would have prevented the injury.[21] The Supreme Court of Virginia has recognized that a higher degree of care is required when the product is inherently dangerous.[22]

V. Manufacturing Defect

A manufacturer has the duty to exercise ordinary care in the manufacture of the product, to use safe materials in its manufacture and to make reasonable tests and inspections to determine any latent hazards in the product.[23] A product is unreasonably dangerous if it is defective in assembly or manufacture.[24]

VI. Design Defect

A. Duty

A manufacturer is under a duty to exercise ordinary care to design a product that is reasonably safe for the purpose for which it is intended or some other reasonably foreseeable purpose.[25]

B. Open and Obvious

---

[20] The Supreme Court of Virginia has repeated refused to permit recovery when, in its view, the product misuse represented a disregard of "common sense". See *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 149, 501 S.E.2d 393, 397 (1998) and *Besser Co. v. Hansen*, 243 Va. 267, 277, 415 S.E.2d 138, 144 (1992)

[21] See *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 368 S.E.2d 268 (1988) (holding that strict liability would not apply to the disposal of the highly toxic chemical pentaborane, chiefly because such disposal could have been conducted safely if reasonable precautions had been taken).

[22] *McClanahan v. California Spray-Chemical Corp.*, 194 Va. 842, 853-54, 75 S.E.2d 712, 719 (1953); *American Oil Co. v. Nicholas*, 156 Va. 1, 10-11, 157 S.E. 754, 757 (1931).

[23] *Sneath v. Conair Corp.*, 35 Va. Cir. 127 (Warren 1994).

[24] *Morgen Indus., Inc. v. Vaughan*, 252 Va. 60, 65-66, 471 S.E.2d 489, 492 (1996).

[25] See *Morgen Indus., Inc. v. Vaughan*, 252 Va. 60, 65-66, 471 S.E.2d 489, 492 (1996); *Turner v. Manning, Maxwell & Moore,* 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975). .

A manufacturer can be held liable for designing a product with an open and obvious condition alleged to be a product defect. The salient issue in a negligent product design action is whether the user of the product was aware of the danger created by the defect. *Morgen Indus., Inc. v. Vaughan*[26] illustrates this distinction between an obvious condition of the product and the hazard this condition poses during a foreseeable use of the product. In *Morgen* a "nip point" between the wheel and a rail on a conveyor belt was an obvious condition but it was a controverted issue whether the hazard posed by the nip point was open and obvious to the injured user. For this reason, the Court held, in affirming judgment for the plaintiff, a jury was entitled to accept the plaintiff's evidence that the hazard was not open and obvious.[27]

The "open and obvious" defense to a claim of negligent product design constitutes the tort defense of assumption of risk. Although at times convergent factually with the contractual breach of warranty defense of disclaimer of liability for product conditions known, visible or obvious to the product purchaser, assumption of risk requires proof that the nature and extent of the risk of injury was fully appreciated and voluntarily incurred by the injured person.[28]

C. Role of Industry Customs and Standards

Whether or not a product's design complied with customary usage or standards of the industry plays a role in determining whether the product is unreasonably dangerous. Compliance will establish conclusively that due care was exercised by the product manufacturer if there is no evidence showing the industry custom or norm was unsafe.[29] If the industry's customary usage is shown to be unsafe, then a manufacturer can be found negligent notwithstanding its compliance with the customs and practice of the industry.[30]

---

[26] 252 Va. 60, 65-66, 471 S.E.2d 489, 492 (1996)

[27] "Virginia law looks not to whether the defect itself was obvious, but whether the *hazard* was clearly apparent." *Freeman v. Case Corp.,* 118 F.3d 1011, 1015 (4th Cir. 1997) (discussing *Morgen Industries*).

[28] See *Wood v. Bass Pro Shops,* 250 Va. 297, 462 S.E.2d 101 (1995); *Amusement Slides Corp. v. Lehmann*, 217 Va. 815, 819, 232 S.E.2d 803, 805 (1977).

[29] *Turner v. Manning, Maxwell & Moore,* 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975).

[30] "[T]he existence of a custom or usage cannot excuse conduct which is otherwise negligent where, as here, the custom or usage itself is not "reasonably safe or adequate for its purpose and occasion. See *C. & M. Promotions v. Ryland*, 208 Va. 365, 368, 158 S.E.2d 132, 134-35 (1967), and *Keith v. Clinchfield Coal Corp.*, 189 Va. 592, 601, 54 S.E.2d 126, 130 (1949)." *Reed v. Carlyle & Martin, Inc.*, 214 Va. 592, 595, 202 S.E.2d 874, 877 (1974).

A plaintiff is not required to establish a manufacturer deviated from an industry norm or safety standard in order to prove a defective product design. When there is no established industry norm, a design defect rendering the product unsafe can be established by the opinion of a qualified expert.[31]

[31] See *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430, 297 S.E.2d 675, 679 (1982).

D. Role of Statutes and Regulations

Compliance with a regulation or statute is relevant evidence of whether a product is defective but not dispositive.[32] Conversely, violation of a statute or regulation may establish, as a matter of law, negligent design under the doctrine of negligence *per se.*[33]

E. "Crashworthiness"

In *Slone v. General Motors Corp.*, the Supreme Court of Virginia expressly rejected the doctrine of "crashworthiness" as a standard for assessing the liability of a motor vehicle manufacturer.[34] A crashworthy vehicle is defined as "one which, in the event of a collision, resulting accidentally or negligently from the act of another and not from any defect or malfunction in the vehicle itself, protects against unreasonable risk of injury to the occupants."[35]

Slone held the liability of a vehicle manufacturer for injuries alleged to be caused by a lack of crashworthiness should be determined by established Virginia jurisprudence governing product safety. When the crash is an event reasonably foreseeable to the product manufacturer, it may be deemed to be a foreseeable misuse of the product for which liability can be imposed if injury was caused by an unreasonably dangerous condition of the vehicle when it left the control of the manufacturer. According to *Slone,* there was "no reason to confuse our well-settled jurisprudence by injecting the doctrine of "crashworthiness…."[36]

---

[32] See *S.L.M. v. Dorel Juvenile Group, Inc.,* 2013 U.S. App. Lexis 5889 (4th Cir. 2013) (applying Virginia law).
[33] See Section VIII *infra.*
[34] 249 Va. 520, 457 S.E.2d 51 (1995).
[35] *Slone v. General Motors Corp.*, 249 Va. 520, 525, fn. *, 457 S.E.2d 51, 53, fn. * (1995) quoting *Madden*, *Products Liability* § 8.4 (2d ed. 1988).
[36] 249 Va. 520, 525, 457 S.E.2d 51,53 (1995). According to *Slone*, the crashworthiness doctrine determines whether a vehicle is crashworthy by application of specific criteria. "The factors to be considered in determining whether the risk is unreasonable include the likelihood of the harm, the obviousness of the danger, the purpose for which the vehicle is to be used, the styling, the cost of reducing the risk, and the circumstances of the accident." 249 Va. 520, 525, fn. *, 457 S.E.2d 51, 53, fn. * (1995) quoting *Madden*, *Products Liability* § 8.4 (2d ed. 1988).

F. Will Virginia Adopt A Design Defect Test?

The standard of safety governing product design established by the Supreme Court of Virginia is that a product manufacturer may be liable if the product is unreasonably dangerous for a reasonably foreseeable use. The manufacturer is not required to supply an accident-proof product and accordingly, will not be liable for an injury resulting from an unforeseen misuse of the product.[37] No other requirements have been articulated by the Supreme Court of Virginia.

Other courts have adopted tests or criteria to be utilized in ascertaining whether or not a product's design is unreasonably dangerous. These formulations include the consumer expectation test and the risk/utlility analysis. Although the Fourth Circuit Court of Appeals has imposed a consumer expectation test upon Virginia diversity litigation, the Supreme Court of Virginia has never adopted or even commented upon such a test.[38]

A discussion of whether Virginia would adopt a test in the future delineating specific criteria to establish a product design is unreasonably dangerous raises implicates two distinct issues. Would a specific criteria test be adopted for instructing a jury on proof required to find a product was unreasonably dangerous and secondly, would a judicial determination of whether the evidence would support a jury finding of fact that the product was unreasonably dangerous. These are distinct issues because the standard employed by a court to assess sufficiency of the evidence may differ from the proof a jury is instructed is required to find in favor of a plaintiff.[39]

The customary practice in Virginia is to simply instruct the jury that a manufacturer has a duty to design a product that will be reasonably safe for

---

[37] *Slone v. General Motors Corp.*, 249 Va. 520, 526, 457 S.E.2d 51, 54 (1995).

[38] *Alevromagiros v. Hechinger Co., 993 F.2d 417, 422 (4th Cir. 1993)* cited *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430, 297 S.E.2d 675, 679 (1982) in holding Virginia law requires a plaintiff to produce either evidence of violation of industry or government standards or prove that consumer expectations have risen above such standards. See also *Freeman v. Case Corp.*, 118 F.3d 1011 (4th Cir. Va. 1997) cert. denied 522 U.S. 1069 (1998). *Freeman* distinguishes its facts from *Alevromagiros* because the plaintiff's expert in *Freeman* relied upon extensive published literature and testing of the subject product unlike the *Alevromagiros* expert who merely gave his own subjective opinion.

[39] See *Blondel v. Hays*, 241 Va. 467, 403 S.E.2d 340 (1991) (in medical malpractice litigation, "substantial possibility of survival" is a decisional standard to guide a court in determining sufficiency of evidence but is not to used to instruct a jury).

its intended purpose and for some other reasonably foreseeably purpose.[40] Elaborating on specific evidence to be considered by a jury in deciding whether a product is reasonably safe may be inconsistent with Virginia practice. The Supreme Court of Virginia frowns on jury instructions which comment on the evidence.[41]

In discussing the sufficiency of evidence required to create a triable issue of fact as to whether a product is unreasonably dangerous, the Supreme Court of Virginia has avoided the adoption of any specific test or criteria. In *Slone v. General Motors Corp.,* the Court acknowledged that other jurisdictions have done so in the context of determining a manufacturer's duty to design a motor vehicle to reduce risk of injury during collisions but refused to adopt a multifactorial analysis to assess the vehicle's "crashworthiness".[42]

When adjudicating the sufficiency of evidence to support a finding of negligent product design, the Supreme Court of Virginia has focused on whether the use of the product was foreseeable to the manufacturer. If the use of the product fell within the ambit of foreseeability, the Court will refuse to hold as a matter of law that the product's design is reasonably safe.[43] Conversely, if the Court concludes the product's use was unforeseeable to the manufacturer, the product design will not be deemed unreasonably dangerous.[44]

Evidence material to the various criteria and tests adopted by some courts to delineate what products are unreasonably dangerous may be admitted into evidence in the trial of a Virginia product liability action. However, Virginia jurisprudence does not suggest that the criteria and tests themselves will be used to instruct the jury or serve as a litmus test to adjudicate sufficiency of evidence.

VII. Duty To Warn

A. Description of the Duty

Although not an insurer of its product's safety, a manufacturer or seller of a product has a duty to warn if it knows or has reason to know that

---

[40] See V.M.J.I No. 34.140.
[41] *Weinberg v. Given*, 252 Va. 221, 223 fn. *, 476 S.E.2d 502, 503 fn. * (1996); *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 134, 413 S.E.2d 630, 634 (1992).
[42] *Slone v. General Motors Corp.*, 249 Va. 520, 526, 457 S.E.2d 51, 54 (1995).
[43] *Morgen Indus., Inc. v. Vaughan, 252 Va. 60, 471 S.E.2d 489 (1996); Slone v. General Motors Corp.*, 249 Va. 520, 457 S.E.2d 51 (1995).
[44] *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 501 S.E.2d 393 (1998); *Besser Co. v. Hansen*, 243 Va. 267, 415 S.E.2d 138 (1992); *Turner v. Manning, Maxwell & Moore,* 216 Va. 245, 217 S.E.2d 863 (1975).

its product is dangerous.[45] A manufacturer or seller of a product will be subject to liability if:

> (a) it knows or has reason to know that the product is or is likely to be dangerous for the use for which it is supplied,
>
> (b) has no reason to believe that those for whose use the product is supplied will realize its dangerous condition, and
>
> (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.[46]

Imposition of the duty to warn stems from the view that a manufacturer should have superior knowledge of its product.[47] The duty to warn extends not only to the immediate purchaser but to other persons who might in the ordinary and natural course of events be subjected to danger.[48]

The duty requires a reasonable warning, not the best possible one.[49] However, a mere general warning of danger may not be sufficient. An insufficient warning is in legal effect no warning.[50]

No duty to warn exists in respect to a product which is not in fact dangerous or when the product is used in an unlikely, unexpected or unforeseeable manner.[51]

B. Reason to Know

A manufacturer does not insure its product's safety, and a manufacturer has a duty to warn only if it knows or has reason to know that its product is dangerous.[52] "Reason to know" means constructive knowledge of a product hazard will trigger a duty to warn but absent actual or

---

[45] *Funkhouser v. Ford Motor Co.,* 285 Va. 272,280, 736 S.E.2d 309, 313 (2013);
[46] *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 962, 252 S.E.2d 358, 366 (1979) (quoting *Restatement (Second) of Torts* § 388 (1965)). Accord *Funkhouser v. Ford Motor Co*., 285 Va. 272, 281, 736 S.E.2d 309, 313 (2013) *Slone v. General Motors Corp.*, 249 Va. 520, 527, 457 S.E.2d 51, 54 (1995); *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 135, 413 S.E.2d 630, 634-35 (Va. 1992).
[47] *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 962, 252 S.E.2d 358, 366 (1979). The duty will not be imposed on persons on persons who did not manufacture or sell the product. See *Baker v. Poolservice Co*., 272 Va. 677, 685, 636 S.E.2d 360, 365 (2006) (repairer of product owed no duty to warn).
[48] *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 962, 252 S.E.2d 358, 366 (1979).
[49] *Pfizer, Inc. v. Jones,* 221 Va. 681, 684, 272 S.E.2d. 43, 45 (1980).
[50] *Ford Motor Co. v. Boomer,* 285 Va. 141, 162, 736 S.E.2d 724, 734 (2013); *McClanahan v. California Spray-Chemical Corp*., 194 Va. 842, 852, 75 S.E.2d 712, 718 (1953).
[51] *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 962, 252 S.E.2d 358, 367 (1979).
[52] *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 135, 413 S.E.2d 630, 634-35 (1992).

constructive knowledge of a product hazard, a manufacturer will have no duty to investigate.[53]

C. Learned Intermediary Doctrine.

According to the learned intermediary doctrine, a drug manufacturer has the duty to warn the prescribing physician and not the patient about the dangers and usage of drugs and medical devices that require a prescription.[54] Although the Supreme Court of Virginia has never expressly adopted the learned intermediary doctrine, the Court observed in *Pfizer, Inc. v. Jones,* that, in the case of prescription drugs, the duty of the drug manufacturer is to warn the prescribing physician.[55] Courts, citing *Pfizer,* have concluded that Virginia does adhere to the learned intermediary doctrine.[56]

D. Post Sale Duty to Warn

Federal district and state circuit courts have reached varying conclusions as to whether the Supreme Court of Virginia recognizes a duty on the part of a manufacturer or seller to warn product users about an unreasonably dangerous condition of the product which the manufacturer/seller becomes aware after it distributes the product.[57]

The Supreme Court of Virginia commented on the scenario of liability for failure to warn post distribution in *American Oil Co. v. Nicholas.*[58] The defendants distributed gasoline misidentified as kerosene. According to the Court, it was the defendants' duty "on discovering the mistake to exercise

---

[53] *Funkhouser v. Ford Motor Co*., 285 Va. 272, 283 fn. 5, 736 S.E.2d 309, 315 fn. 5. A "reason to know implies no duty of knowledge on the part of the actor whereas 'should know' implies that the actor owes another the duty of ascertaining the fact in question." *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 135, 413 S.E.2d 630, 634-35 (1992) quoting Restatement (Second) of Torts § 12 cmt. A.

[54] *Talley v. Danek Medical, Inc.,* 179 F.3d 154, 162-63 (4th Cir. 1999). *Talley* stated that the learned intermediary doctrine only applies if the prescribing physician is an intervening and independent party between patient and manufacturer.

[55] 221 Va. 681, 684, 272 S.E.2d. 43, 44 (1980). No contention was made in *Pfizer* that the drug manufacturer should have warned the patient directly. The only issue adjudicated in *Pfizer* was the adequacy of the warning to the prescribing physician.

[56] *Talley v. Danek Medical, Inc.,* 179 F.3d 154, 162-63 (4th Cir. 1999); *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1115 (4th Cir.1988) ; *Hart v. Savage*, 72 Va. Cir. 41 (Norfolk 2006);

[57] *Russell ex rel. Russell v.* Wright, 916 F. Supp. 2d 629 (W.D. Va. 2013); *Rash v. Stryker Corp.,* 589 F. Supp. 2d 733 (W.D. Va. 2008) (district courts review conflicting cases and decide Supreme Court of Virginia would impose post sale duty to warn). Contra *Hart v. Savage*, 72 Va. Cir. 41 (Norfolk 2006) (after review of conflicting federal cases and the treatises, court concludes legislature not courts should determine if Virginia would adopt post sale duty).

[58] 156 Va. 1, 157 S.E. 754 (1931).

due care to see that the public for whom the product was designed was not permitted to remain in ignorance of the character of the commodity…."[59]

VIII. Negligence *Per Se*

Violation of a statute or regulation may constitute negligence as a matter of law. The statute or regulation applicable to a product manufacturer creates the standard of conduct required of the manufacturer in a negligence action for damages caused by use of its product.[60]

In order to prove negligence *per se*, a plaintiff must establish that (1) the defendant manufacturer violated a statute enacted for public safety, (2) the plaintiff belonged to the class of persons for whose benefit the statute was enacted and the harm that occurred was of the type against which the statute was designed to protect and (3) the violation was a proximate cause of the injury.[61]

IX. Innocent Misrepresentation

The Supreme Court of Virginia has permitted rescission of product sale in the case of innocent material misrepresentations inducing the sale.[62] Contractual defenses of disclaimers and limitation of remedies do not relieve a seller of liability for misrepresentation.[63]

X. Proximate Causation

A plaintiff has the duty to prove that the unreasonably dangerous condition of the product was a proximate cause of the complained of injury.[64] A proximate cause of an event is an act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces that event and without which that event would not have occurred. This standard test for proximate causation is called the "but for" or *sine qua non* rule.[65]

---

[59] *American Oil Co. v. Nicholas,* 156 Va. 1, 14, 157 S.E. 754, 756 (1931). The Court's usage of the quoted language may have been influenced by the higher degree of care associated with "dealing with a dangerous agency".
[60] *McClanahan v. California Spray-Chemical Corp*., 194 Va. 842, 851-52, 75 S.E.2d 712, 718 (1953).
[61] *Kaltman v. All Am. Pest Control, Inc.*, 281 Va. 483, 496, 706 S.E.2d 864, 872 (2011).
[62] *Packard Norfolk v. Miller*, 198 Va. 557 95 S.E.2d 207 (1956). For a discussion of whether *Packard Norfolk* is a precedent supporting monetary damages for innocent misrepresentation, see *Comment, A Seller's Liability for Innocent Misrepresentation,* 43 Va. L. Rev. 765 (1957).
[63] George Robberecht Seafood, Inc. v. Maitland Bros. Co., 220 Va. 109, 112, 255 S.E.2d 682, 683 (1979).
[64] *Cooper Indus., Inc. v. Melendez,* 260 Va. 578, 587, 537 S.E.2d 580, 589-90 (2000).
[65] *Ford Motor Co. v. Boomer,* 285 Va. 141, 150, 736 S.E.2d 724, 728 (2013).

An exception to the "but for" proximate cause test applies when a single injury was potentially caused by more than one events or actors (whether tortious or innocent) each of which was sufficient to cause injury. In this factual context, a negligent party will be liable for the injury if its conduct alone was sufficient to have caused the harm.[66]

In a failure to warn claim, the plaintiff must prove that if an adequate warning had been given, the warning would have been heeded.[67] Unlike some jurisdictions, Virginia law does not provide a rebuttable presumption that an adequate warning if given would have been heeded. However, if the injured party, due to disability or death, is unable to testify at trial, a jury may infer from their experience, the character of the injured party and other evidence that the injured party would have heeded an adequate warning.[68]

Proximate causation may be established with circumstantial evidence. All that is required is proof leading to a conclusion with probable certainty that a defendant's tortious conduct caused the injury.[69]

---

[66] This "sufficient cause" test was articulated in *Ford Motor Co. v. Boomer,* 285 Va. 141, 736 S.E.2d 724, (2013). *Boomer* concerned cancer caused by asbestos exposure. The Supreme Court in *Boomer* left open the possibility that in toxic exposure cases involving multiple exposures caused by different actors combining to reach a disease causing threshold, a different rule may apply. *Id.* at 285 Va. 158, 736 S.E.2d 732.

[67] See *Ford Motor Co. v. Boomer,* 285 Va. 141, 160-62, 736 S.E.2d 724, 733-34 (2013); *Tashman v. Gibbs,* 263 Va. 65,75-76, 556 S.E.2d 772, 779 (2002) (in medical malpractice lack of "informed consent" claim, plaintiff required to prove failure to give information affected her decision to undergo surgery).

[68] *Ford Motor Co. v. Boomer,* 285 Va. 141, 160-62, 736 S.E.2d 724, 733-34 (2013).

[69] *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 143, 413 S.E.2d 630, 639 (1992); *Southern States Coop. v. Doggett,* 223 Va. 650, 657, 292S.E.2d 877, 878 (1982).