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PROPOSED LEGISLATION

PRODUCTS LIABILITY TORT REFORM: WHY VIRGINIA SHOULD ADOPT THE HENDERSON-TWERSKI PROPOSED REVISION OF SECTION 402A, RESTATEMENT (SECOND) OF TORTS

*Peter Nash Swisher**

I. INTRODUCTION

Over the past three decades, literally thousands of American products liability judicial opinions have explicitly referred to, and analyzed, section 402A of the Second Restatement of Torts.¹ At least thirty-four states have judicially adopted section 402A,² and five other states have passed specific statutes adopting the section.³ Since the landmark products liability case of *Greenman v. Yuba Power Products, Inc.*⁴ in 1963, at least forty-five states have now adopted some form of strict liability in tort remedy in American products liability actions.⁵ Only Virginia and four other states do

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1. RESTATEMENT (SECOND) OF TORTS § 402A (1964).

2. For a comprehensive listing of such state law, see generally 2 AMERICAN LAW OF PRODUCTS LIABILITY 3d § 16:9 (Timothy E. Travers et al. eds. 1987); Richard W. Bieman, *Strict Products Liability: An Overview of State Law*, 10 J. PROD. LIAB. 111 (1987).

3. See ARK. CODE ANN. § 4-86-102 (Michie 1991); IND. CODE ANN. § 33-1-1.5-3 (Burns 1992); ME. REV. STAT. ANN. tit. 14, § 221 (West 1980); OR. REV. STAT. § 30.920 (1988); S.C. CODE ANN. § 15-73-10 (Law. Co-op. 1977).

4. 377 P.2d 897 (Cal. 1963).

5. See, e.g., Bieman, *supra* note 2.

not recognize a strict liability in tort remedy applied to state products liability actions.⁶

Over the past thirty years, however, American products liability law has reached a surprising, and increasingly more balanced, national consensus on how the vast majority of states now interpret and apply strict liability in tort remedies to products liability cases.⁷ Indeed, if the American products liability trend in the 1970s and the early 1980s was to compensate and to protect the consumer, perhaps excessively, then the trend in the 1990s is to recognize and to equalize the rights of the manufacturer and retailer with those rights of the consumer, through a more balanced judicial and legislative application of state products liability tort reform.⁸ It is this "quiet revolution" in American products liability law that Virginia can readily agree with, and adopt.

Accordingly, the time now has come for Virginia to leave behind its nineteenth century products liability tort law, and adopt the modern consensus view. Such a legislative action will serve the Commonwealth well into the twenty-first century.

The purpose of this Article, therefore, is fourfold: first, to illustrate that there is currently a newer, more balanced consensus view in American products liability law today; second, to demonstrate that this current, realistically balanced, consensus in American products liability law is persuasively codified in a proposed revision to section 402A, Restatement (Second) of Torts, by Professors James Henderson and Aaron Twerski; third, to compare and contrast current Virginia products liability law with the Henderson-Twerski proposed revision of section 402A; fourth, to propose new legislation in Virginia that would incorporate the Henderson-Twerski proposal, and would realistically reform existing Virginia prod-

6. Delaware, Massachusetts, and Michigan have rejected a strict liability in tort action, but recognize an implied breach of warranty remedy that cannot be easily disclaimed by the seller. See, e.g., MASS. ANN. LAWS ch. 106, § 2-316A (Law. Co-op. Supp. 1992) (forbidding warranty disclaimers in consumer transactions). Apparently only Virginia and North Carolina have not yet recognized a true strict liability remedy in either tort or contract. See generally 2 AMERICAN LAW OF PRODUCTS LIABILITY 3D, *supra* note 2, §§ 16:21-:22 (1987); and 1 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY §§ 1.05-.06 (perm. ed. rev. vol. 1992).

7. See *infra* notes 9-37 and accompanying text. See also James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990). See generally FRUMER & FRIEDMAN, *supra* note 6; TRAVERS, *supra* note 2.

8. See, e.g., Henderson & Eisenberg, *supra* note 7. Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992).

ucts liability law to objectively and fairly meet the current and future needs of the Virginia consumer, the Virginia manufacturer, and the Virginia retailer into the twenty-first century.

II. AMERICAN PRODUCTS LIABILITY: A SURPRISING NEW CONSENSUS

For the past half century, an overwhelming majority of American commentators and courts have recognized that traditional negligence actions and breach of warranty actions are often inadequate remedies for the consumer in products liability cases.⁹ Negligence actions often involve insurmountable problems of proof for the consumer, as a negligence action traditionally is based upon the seller's conduct, rather than being based upon the defective condition of the product itself.¹⁰ Additionally, negligence defenses such as contributory negligence may completely bar any recovery by the consumer.¹¹

Breach of warranty actions under the Uniform Commercial Code, on the other hand, are properly based upon the fitness of a product, rather than on the conduct of the seller,¹² and contributory negligence defenses are not recognized in most breach of warranty actions.¹³ However, a breach of warranty action is not always an adequate remedy in products liability cases since warranties are

9. Products liability law generally encompasses liability arising from personal injury or property damage caused by defective products sold in the marketplace, and includes claims against any party in the marketing chain of distribution from the manufacturer to the retailer. See generally FRUMER & FRIEDMAN, *supra* note 6; AMERICAN LAW OF PRODUCTS LIABILITY 3D *supra* note 2; GARY G. SPAHN & ROBERT E. DRAIM, VIRGINIA LAW OF PRODUCTS LIABILITY (1990).

10. See, e.g., *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974); *Feldman v. Lederle Lab.*, 479 A.2d 374 (N.J. 1984), *cert. denied*, 112 S. Ct. 3027 (1992); see also 1 AMERICAN LAW OF PRODUCTS LIABILITY 3D, *supra* note 2, § 10:1; 2 AMERICAN LAW OF PRODUCTS LIABILITY 3D, *supra* note 2, § 16:30.

11. See, 1 FRUMER & FRIEDMAN, *supra* note 6, § 1.04; See also SPAHN & DRAIM, *supra* note 9, §§ 6-3, 8-3; James A. Henderson, Jr., *Coping with the Time Dimensions in Products Liability*, 69 CAL. L. REV. 919 (1981):

In general, strict liability is thought to be preferable to negligence because it better enhances social utility by reducing the costs associated with accidents and because it promotes fairness. Strict liability is believed to increase utility by satisfying four major objectives: encouraging investment in product safety, discouraging consumption of hazardous products, reducing transaction costs, and promoting loss spreading.

Id. at 931-32 (footnotes omitted).

12. See U.C.C. §§ 2-313 to -315 (1992); VA. CODE ANN. §§ 8.2-313 to -315 (Repl. Vol. 1991).

13. See, e.g., *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 373 (4th Cir. 1983); *Matthews v. Ford Motor Co.*, 479 F.2d 399, 401 n.1 (4th Cir. 1973).

often limited¹⁴ or totally disclaimed¹⁵ by the seller under the Uniform Commercial Code, and additional notice and privity requirements are placed upon the consumer.¹⁶

Indeed, there have been numerous commentators who have argued that the primary purpose of the Uniform Commercial Code is to regulate transactions within the business community, and *not* to regulate products liability disputes.¹⁷

Accordingly, since the landmark case of *Greenman v. Yuba Power Products, Inc.*¹⁸ in 1963, forty-five states have adopted a strict liability in tort remedy in products liability actions.¹⁹ The purpose of a strict liability tort remedy in such actions was "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves. Sales warranties serve this purpose fitfully at best."²⁰

14. See U.C.C. § 2-719 (1990); VA. CODE ANN. § 8.2-719 (Repl. Vol. 1991).

15. See, e.g., U.C.C. § 2-316; (1987) VA. CODE ANN. § 8.2-316 (Repl. Vol. 1991); see also Rothschild, *The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests?*, 44 GEO. WASH. L. REV. 335, 343-44 (1976) ("The disclaimer section of the U.C.C. is the most controversial and ambiguous warranty section. . . . This provision has enabled merchants to continue shifting the risk of loss back to consumers while camouflaging their action with legal jargon.").

16. See, e.g., U.C.C. § 2-607 (1987); VA. CODE ANN. § 8.2-607 (Repl. Vol. 1991) (discussing notice requirements). Traditional privity requirements between buyer and seller, however, are no longer as important as they once were. See, e.g., U.C.C. § 2-318 (1958); VA. CODE ANN. § 2-318 (Repl. Vol. 1991). See generally FRUMER & FRIEDMAN, *supra* note 6, §§ 1.05-.06; and 2 AMERICAN LAW OF PRODUCTS LIABILITY 3D, *supra* note 2, § 16:32, :36-39.

17. See, e.g., Marc A. Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases*, 18 STAN. L. REV. 974 (1966); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); John W. Wade, *Tort Liability for Products Causing Physical Injury and Article 2 of the U.C.C.*, 48 MO. L. REV. 1 (1983). Indeed, some recent recommendations have been to revise the Uniform Commercial Code so that it will have a more limited application to personal injury actions. See, Fairfax Leary, Jr. & David Frisch, *Is Revision Due for Article 2?* 31 VILL. L. REV. 399 (1986); Speidel, *Committee Studies Revising U.C.C. Article 2*, 8 BUS. LAW. UPDATE 3 (1988) (suggesting that a personally injured or property damaged buyer who proceeds under Article 2 should be subject to the same Article 2 limitations as a buyer who is asserting a claim for economic loss).

18. 377 P.2d 897 (Cal. 1963).

19. See generally Bieman, *supra* note 2, at 111 n.1.

20. *Greenman v. Yuba Power Prod.*, 377 P.2d at 901 (citing William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1124-34 (1960)).

More recently, the courts and legal commentators have advanced five public policy justifications for adopting a strict liability tort remedy in products liability actions.

The first public policy justification is compensation and loss spreading. Losses inevitably result from the use of complex modern products, and because these losses can have a devastating effect on the individual consumer, it is humane and fair to shift these losses to all consumers of the product. This can be done by imposing strict liability on manufacturers, and forcing them to raise prices enough to pay for the losses or insure against them.²¹

Deterrence is the second public policy justification advanced. Tort liability increases product costs, but business competition induces manufacturers to minimize costs. Imposing liability on manufacturers, therefore, provides them with an incentive to market safer products. Also, strict tort liability may create more deterrence than negligence-based liability since negligence imposes liability only if the defendant fails to take measures that a reasonable person would take. Strict liability, in contrast, induces the defendant to go beyond this if the cost of the added safety measures is less than the potential cost of liability for failing to take them.²²

Balancing the needs of consumers and manufacturers also justifies a strict liability tort remedy in product liability actions. Although compensation and deterrence are the most commonly cited bases for strict tort liability, no court has required manufacturers to pay for all harm caused by their products. To do so would place an unreasonable burden on manufacturers and discourage them from producing useful products. Therefore, over-deterrence is avoided by balancing the needs of the product manufacturer against the needs of the consumer.²³

The fourth public policy justification concerns problems of proof. Quite often, a manufacturer of a defective product is negligent. However, complexities of modern products technology often make it extremely difficult for the consumer to establish negligence, because the consumer is at a disadvantage as the manufac-

21. See Alden D. Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 82-84, 87-88 (1973); John W. Wade, *On the Nature of Strict Liability for Products*, 44 MISS. L. J. 825, 826 (1973).

22. Wade, *supra* note 17. Holford, *supra* note 21.

23. See, e.g., Richard A. Epstein, *Products Liability: The Search for a Middle Ground*, 56 N.C. L. REV. 643 (1978); David A. Fischer, *Products Liability — An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1628-29 (1981).

turer has greater access to expertise, information, and resources. Imposing strict liability in tort based upon the defective condition of the product, rather than trying to ascertain the negligent conduct of the defendant, relieves the consumer of this very difficult burden of proving the manufacturer's fault.²⁴ However, the consumer still must demonstrate that the product was in fact defective, that it was the actual and proximate cause of the injury or damage, and that there was no comparative fault, assumption of risk, or unforeseeable product misuse on the part of the consumer. Likewise, problems of proof with warranty disclaimers or limitations are avoided with a strict tort liability remedy.

Protection of consumer expectation is the final public policy justification advanced. Consumers should be protected from unknown, latent dangers in products. This is particularly true since modern advertising and marketing techniques induce American consumers to rely on product manufacturers to provide them with safe, high quality products.²⁵

The overwhelming majority of American jurisdictions have been persuaded by these interrelated public policy arguments supporting strict liability in tort and have adopted strict tort liability in products liability actions.²⁶ Of the forty-five states adopting such a strict tort liability remedy, thirty-nine states have adopted, in whole or in part, section 402A of the Second Restatement of Torts.²⁷

24. See, e.g., Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 34 (1973); Gary T. Schwartz, *Foreword: Understanding Products Liability* 67 CAL. L. REV. 435, 459-61 (1979).

25. See, e.g., Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

26. See, e.g., Richard W. Bieman, *Strict Products Liability: An Overview of State Law*, 10 J. PROD. LIAB. 111 (1987).

27. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides in part that:

(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

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(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 . . .

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A basic, glaring weakness of section 402A, however, is the now acknowledged fact that the authors of section 402A primarily focused on those problems relating to defective manufacture and generally did *not* focus on two other crucial areas of products liability law: defective design and defective warnings.²⁸ Consequently, American courts and legislatures grappled for over a quarter century with the crucial issue of whether defectively designed products, and products with defective warnings, should come under a strict liability “hindsight” rule as defectively manufactured products did, or whether they should come under a more realistic “foreseeability” rule.²⁹

From this long, and often torturous, evolutionary process, a surprising consensus of state products liability law has emerged which favors the latter approach for defective design and defective warning cases, separate and apart from any traditional section 402A analysis, and largely based upon state legislative tort reform.³⁰ In addition, an overwhelming consensus of case law now favors applying some kind of risk-utility balancing test to judge the adequacy or inadequacy of product design and marketing,³¹ even though sec-

28. See, e.g., WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96 (3d ed. 1964) (where Professor Prosser, who was instrumental in drafting the Restatement (Second) of Torts, envisioned Sec. 402A to have its primary effect on cases of manufacturing defects); see also George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

29. See, e.g., Shiela L. Birnbaum, *Unmasking the Test for a Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*, 56 N.C. L. REV. 625 (1978); James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265 (1990).

30. See generally James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332 (1991).

Design-defect litigation already has become more balanced. State-of-the-art statutes, or common-law defenses that are their functional equivalents, are already the law in most jurisdictions. Courts are demanding that experts demonstrate the feasibility of alternative designs. State court decisions calculated to expand the limits of liability have been subject to legislative override.

Id. at 1335.

Where state courts were initially in the forefront of American strict products liability law, much of this recent state tort reform has been enacted through legislative statutes in at least thirty-eight states. See, e.g., IOWA CODE ANN. § 668.12 (West 1987); KY. REV. STAT. ANN. § 411.310(2) (Michie/Bobbs-Merrill 1992); OHIO REV. CODE ANN. § 2307.75(F) (Anderson 1991).

31. See, e.g., *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987); *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830 (Iowa 1978); *Nichols v. Union Underwear Co.*, 602 S.W.2d 429 (Ky. 1980); *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666 (W. Va. 1979); see

tion 402A provides for a consumer expectation test.³² Likewise, many other products liability issues were either unresolved or totally unforeseeable at the time of drafting section 402A.³³

In short, a surprising consensus has now emerged in the majority of American jurisdictions involving a demonstrated shift of judicial and legislative attitudes in American products liability law, providing for a more balanced approach regarding the legal rights of the manufacturer and retailer vis a vis the consumer,³⁴ and resulting in state judicial decisions which once expanded the limits of strict liability in tort now being subject to legislative override.³⁵

also Dreisonstok v. Volkswagenwerk A.G., 489 F.2d 1066 (4th Cir. 1974) (applying Virginia law).

32. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

33. Such issues are discussed by the following authorities: *see, e.g.*, *Murray v. Fairbanks Morse*, 610 F.2d 149 (3d Cir. 1979) (analyzing the relationship between comparative fault and strict tort liability); *Huddell v. Levin*, 537 F.2d 726 (3d Cir. 1976) (discussing enhanced injuries, crashworthiness, or "second collision" liability). *Crandall v. Larkin and Jones Appliance Co.*, 334 N.W.2d 31 (S.D. 1983) (discussing liability for the sale of used products); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980); (focusing on whether liability will attach even if the manufacturer met state-of-the-art standards at the time of manufacture and sale); *Martin v. Abbott Laboratories*, 689 P.2d 368 (Wash. 1984) (discussing liability of successor corporations for product related injuries caused by their predecessor corporations).

34. *See supra* note 32 and accompanying text. *See also* Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992), James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990).

35. *See, e.g.*, James A. Henderson & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1315 (1991).

Statutory changes in American products liability law also may come at the federal level. *See, e.g.*, Products Liability Fairness Act of 1991, S. 640, 102d Cong. (1991); and the Fairness in Products Liability Act of 1991, H.R. 3030, 102d Cong. (1991). To date, however, such federal regulation in the products liability sector has not been enacted by Congress. Much of this current products liability tort reform has developed as a reaction to perceived "outrageous and unconscionable" damage awards in American products liability cases that detrimentally affect American competitiveness in the national and world market. *See*, Cortese & Blaner, *The Anti-Competitive Impact of U.S. Products Liability Law: Are Foreign Manufacturers Beating Us at Our Own Game?* 9 J.L. & COM. 167 (1989); and Stayin, *The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers*, 14 CANADA-U.S. L.J. 193 (1988). Other commentators, however, have disputed this assumption. *See*, Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1 (1990); Bill Wagner, *The Two Faces of Strict Liability: Strict Liability Isn't a Problem — It's a Solution*, 19 BRIEF 13 (1989). *See also* the 1992 Report by the non-partisan National Center for State Courts which found in its examination of the outcomes of 762 lawsuits in sixteen states that: (1) corporate and government defendants win more often than individuals do; and (2) that among automobile, medical malpractice, personal injury, and products liability suits, the two smallest categories in litigation are products liability, which accounts for 3% of the

Now the dust has settled. As products liability scholars James Henderson and Aaron Twerski aptly observe:

A quarter century has passed. The pace of American products liability litigation has been fast and furious. We can say with some confidence that if we have not yet seen all the problems raised in such litigation, we have seen most of them. It is also fair to say that although courts continue to differ on many issues, enormous consensus has evolved . . . regarding fundamental questions. In short, the time is ripe for a true restatement of products liability law.³⁶

Thus, those familiar with American products liability law agree that section 402A is outdated and requires major revision.

III. THE HENDERSON-TWERSKI PROPOSED REVISION OF SECTION 402A RESTATEMENT (SECOND) OF TORTS

Professor James Henderson of Cornell University Law School and Professor Aaron Twerski of Brooklyn Law School,³⁷ two nationally acknowledged experts and eminent scholars in the field of American products liability law, have proposed a viable, realistic, and objectively balanced revision of section 402A, Restatement (Second) of Torts, which reflects and codifies the current consen-

cases, and medical malpractice, accounting for 10% This conclusion "challenges the current perception that product liability and medical malpractice suits are rampant and that an overhaul of the civil justice system is needed." WALL ST. J., Oct. 8, 1992, at B10. See James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332 (1991).

36. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1528 (1992).

37. See, e.g., JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* (2d ed. 1992); James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332 (1991); James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982); Aaron D. Twerski et al., *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347 (1980); Aaron D. Twerski, et al., *The Use and Abuse of Warnings in Products Liability — Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495 (1976); James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973). Professors Henderson and Twerski recently have been named as the Reporters for the proposed RESTATEMENT (THIRD) OF THE LAW OF TORTS.

sus view of American products liability law.³⁸ This Henderson-Twerski Proposed Revision of 402A is an eminently sound and objective model for products liability legislation that should be adopted and enacted by the Virginia General Assembly in the near future.

Accordingly, the following excerpts from Professor Henderson's and Professor Twerski's Proposed Revision are reprinted below.³⁹

A REVISED SECTION 402A WITH REVISED COMMENTS

§ 402A SPECIAL LIABILITY OF ONE WHO SELLS A DEFECTIVE PRODUCT

(1) One who sells any product in a defective condition is subject to liability for harm to persons or property proximately caused by the product defect if the seller is engaged in the business of selling such a product.

(2) The rule stated in Subsection (1) applies in the case of a claim based on a

(a) manufacturing defect even though the seller exercised all possible care in the preparation and marketing of the product; or

(b) design defect only if the foreseeable risks of harm presented by the product, when and as marketed, could have been reduced at reasonable cost by the seller's adoption of a safer design; or

(c) warning defect only if the seller failed to provide reasonable instructions or warnings about nonobvious product-related dangers that were known, or should have been known, to the seller.

COMMENTS:

a. This section states a special rule of tort liability applicable to commercial sellers of products. The liability established in this sec-

38. James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992) [hereinafter *Proposed Revision*]. Henderson and Twerski state:

We began [these] revision efforts with the guiding principle that we would seek to write a Revised Restatement section that reflects those areas in which the courts by and large agree. We were pleased to discover that substantial agreement exists over much of the terrain of products liability law. Our Revised Restatement, together with our "official" comments, reflects this consensus.

Id. at 1546.

39. *Id.* at 1514-26. Copyright 1992. *Cornell Law Review*. Reprinted with permission.

tion draws on both warranty law and tort law. The provision holding a seller liable for harm caused by manufacturing defects even though the seller has exercised all possible care in the preparation and marketing of the product reflects the heritage of warranty. The provisions holding sellers liable for design and warning defects reflect the influence of tort law's traditional risk-utility balancing. The liability set forth in this section should not be confused with liability arising from abnormally dangerous activities, described in §§ 519-520 of the *Restatement of Torts, Second*. Unlike the strict liability set forth in those sections, under which defendants may be held liable even if their activities are socially useful and reasonably conducted, this section requires the plaintiff to establish that the product that caused the harm was defective in one or more of the manners prescribed herein.

b. *History*. As comment g explains in greater detail, manufacturing defects are dangerous departures from a product's intended design, and typically occur in only a small percentage of units in a product line. The imposition of liability for defectively manufactured products has a long history in the common law. As early as 1266, special criminal statutes were enacted in England imposing liability upon victualers, vintners, brewers, butchers, cooks, and other persons who supplied contaminated food or drink. In the early 1960s, American courts came to recognize that a seller of any product containing a manufacturing defect should be liable in tort for harm caused by the defect regardless of the plaintiff's ability to maintain a traditional negligence or warranty action. Liability would attach even if the manufacturer's quality control in producing the defective product was not negligent. Furthermore, the plaintiff need not be in direct privity with the defendant seller to bring an action. This cause of action for defectively manufactured products, recognized by American courts since the early 1960s, is a hybrid. It merges the no-negligence aspects of implied warranty with the no-privity aspects of tort.

Design and warning defects occur when the intended designs and/or modes of marketing are unreasonably dangerous; if the design or marketing of a product is defective, every unit in the product line is defective. See comment h. Liability for design and warning defects was a relatively rare phenomenon until the late 1960s and early 1970s. A host of limited-duty rules made recovery for such defects, especially design defects, difficult to obtain. Following the erosion of these rules, courts sought to apply the rule of tort liability without fault to design and warning defect cases. Although numerous courts, accepting the invitation of section 402A, held that the doctrine of strict liability applied with equal force to all types of product defects, it soon became evident that the rule created to deal with lia-

bility for manufacturing defects could not, without considerable difficulty, be applied to design and warning defect cases. With respect to manufacturing defects, no conceptual problems arise in identifying product defects. A product unit that fails to meet the manufacturer's own quality standard and thereby fails to perform its intended function is, almost by definition, defective. With regard to design and warning defects, however, the product unit meets the manufacturer's own standard of product quality; therefore, it is necessary to go outside the product unit itself to define "defect."

Subsections (2)(b) and (2)(c) reflect the view adopted by most courts that the rule developed for manufacturing defects is inappropriate for the resolution of design and warning defect cases. The governing standard of liability for design and warning defects requires a determination that a product's reasonably foreseeable risks outweigh its social utility. Although the phraseology of the tests for liability differs, at their core, subsections (2)(b) and (2)(c) both rely on traditional risk-utility balancing.

c. Policy justifications. The rule set forth in this section establishes different standards of liability for manufacturing defects and design and warning defects. Policy justifications that support a strict liability rule with respect to manufacturing defects do not support application of the same rule with regard to design and warning defects. In the case of manufacturing defects, courts have supported the rule imposing strict liability because it enhances social utility by satisfying four major objectives. Strict liability encourages manufacturer investment in product safety; discourages the consumption of defective products by causing the purchase prices of products to reflect the cost of defects; reduces the transaction costs involved in litigating manufacturer fault; and promotes risk spreading by ensuring that the full brunt of a product-related injury does not fall on the victim alone.

Several important fairness concerns also support strict liability for manufacturing defects. Consumers injured by flawed products argue that their fundamental expectations as to product performance have been disappointed. Their dissatisfaction is heightened because manufacturers invest in quality control at consciously chosen levels. The manufacturer's very knowledge that a predictable number of flawed products will enter the marketplace and cause injury, lends to the harm an element of deliberate infliction. Finally, it seems only just that consumers who benefit from products should share, through increases in the prices charged for those products, the burden of unavoidable injury costs that result from undetectable manufacturing defects. In contrast to manufacturing defects, design and warning defects require more flexible definitions. In the first place, one can-

not determine mechanically whether the design or marketing of a product is defective; some sort of risk-utility balancing is necessary. Products are not defective merely because their designs are dangerous. Users of such products must bear a substantial portion of the responsibility for managing generic product risks. Imposing the unyielding liability rule established for manufacturing defects on design risks would cause more careful product users to subsidize less careful users, a result that would be both inefficient and unfair. For many inherent product risks, therefore, users are the best risk minimizers. Risk-utility balancing is required to determine which risks are more fairly and efficiently borne by product sellers, and thus by users generally, and which should be borne by individual by product users who suffer injury.

Moreover, for the liability system to be fair and efficient, risk-utility balancing must be accomplished in light of the knowledge of risks and risk avoidance techniques reasonably available at the time of distribution. Application of a rule holding manufacturers liable for risks that were not foreseeable when the product was marketed might arguably foster increased manufacturer investment in safety. However, insurers cannot provide coverage for unforeseeable or indeterminable risks. Furthermore, to impose liability for unforeseeable and hence incalculable risks would violate a manufacturer's right to be held to a liability standard that it is capable of meeting. For these reasons, subsection (2)(b) applies risk-utility balancing to the product "when and as marketed," and subsection (2)(c) holds sellers liable for failing to warn of non-obvious risks "that were known, or should have been known, to the seller."

d. *One who sells any product.* The rule stated in this section applies only to those who distribute products in commercial markets. It does not impose strict liability on those who primarily distribute services even if, while performing their services, they cause damage through the use of defective products. For example, hospitals and physicians are not held strictly liable when defective instruments they have used to perform medical procedures cause injury. Often a commercial provider of services uses a product ancillary to the performance of a service, in a manner analogous to a sale. Thus, a product repairer may use a replacement part ancillary to the repair service, or a beauty parlor may provide a hair treatment product while performing the services of a beautician. Many courts have applied the rule of this section to cover such product-related transactions. Others have drawn a sharp distinction between sale and service, applying strict products liability only to the former and leaving the latter to be governed by the rules of negligence.

The rule stated in this section is not limited to traditional commercial sales of products. Other forms of mass-marketing are sufficiently sale-like that courts have treated them as the functional equivalent of product sales. Commercial lessors of products for consumer use are thus liable for injuries caused by defective products that they lease to consumers. Courts have also extended the rule of this section to include mass-produced housing marketed by developers, although sales of real property were not historically within the ambit of product sales. When courts find that the policy justifications set forth in Comment c are fully applicable to the enterprise in question, they tend to impose the rule stated in this section with little regard to the formal structure of the underlying transaction. By and large, the rule stated in this section leaves such decisions to the developing case law.

e. *Alternative liability.* For the most part, traditional principles of causation govern products liability litigation under the rule stated in this section. See comment 1. Thus, it is the plaintiff's burden in most cases to establish that a given product unit sold by a manufacturer or other seller caused or enhanced his injury. Notwithstanding this general rule, this section is not intended to limit the developing case law imposing alternative liability on manufacturers in special circumstances. A significant number of courts have applied various forms of alternative liability to drug manufacturers, almost exclusively in cases involving DES, even though no specific product unit can be shown to be directly responsible for the plaintiff's injury. The long latency period between exposure and manifest injury in such cases, coupled with the generic nature of the medication and the lack of recordkeeping necessary for defendant identification, has led some courts to set aside the traditional rules regarding causation. Other courts have failed to follow this lead. The rule stated in this section sets forth the traditional causation rule as the governing standard. This comment recognizes that digressions from the rule may be called for in unusual circumstances. However, when defendant identification is possible, courts should be reluctant to abandon traditional causation principles. For this reason, even courts that have embraced alternative liability in latent drug injury cases have not done so in asbestos injury cases.

f. *Business of selling such a product.* The rule stated in this section applies to anyone in the business of selling the type of product that injured the plaintiff. The seller's business need not be limited to the sale of such products. However, the rule does not cover occasional sales outside the regular course of business (frequently referred to as "casual sales"). Thus, a manufacturer who occasionally sells surplus or used equipment does not fall within the ambit of this rule.

Traditionally, intermediaries such as wholesalers, retailers and distributors have been held strictly liable as sellers. Their status under current law is less certain. Some courts continue to treat them as sellers within the scope of this section. However, a substantial number of states have enacted legislation absolving non-manufacturer sellers of strict liability if the manufacturer is subject to the jurisdiction of the court and is capable of paying a potential judgment. Other states have reached similar results through judicial interpretation of the strict liability doctrine. The rule in this section leaves such issues to developing case law and statutes.

The rule stated in this section applies primarily to sellers of new products. The liability of commercial sellers of used products has been widely debated in the courts. Every court agrees that such sellers are liable for their negligence, but whether they may be held strictly liable is disputed. A majority of courts take the position that imposing strict liability on commercial sellers of used products does not further the policies expressed in comment c. On this view, used product markets are open to such variation that consumers are better served by freeing the market of the strictures of strict liability. A minority of courts have held that imposing strict liability pressures such sellers to improve inspection of used goods before placing them on the market, thus enhancing the safety of such consumer goods. The rule stated in this section takes no position on this issue, leaving its resolution to developing case law.

g. Manufacturing defects. A product is defective under subsection (2)(a) if it fails to meet the manufacturer's internal quality standards. The plaintiff bears the burden of establishing that such a defect existed in the product when it left the hands of the defendant-seller. It is disputed whether the plaintiff must establish the specific defect that caused the harm. Some courts have held that reasonable inferences may support a finding of liability under subsection (2)(a). Whether a given factual record supports such an inference is an issue for the court to decide as a matter of law in the first instance. In cases in which reasonable persons could differ, the issue is for the trier of fact.

Courts have struggled with the application of this standard in cases regarding foodstuffs. Some have created a "foreign-natural" distinction, holding that foreign matter constitutes a defect whereas parts of the foodstuff that are natural to it, even if hazardous, do not. Thus, a fish bone in fish chowder has been held to be natural, whereas a chicken bone in a chicken sandwich has been held to be foreign matter. Courts have increasingly rejected this distinction, opting instead for a consumer-expectation test under which a foodstuff is defective if it contains matter not expected by a reasonable

consumer. Although the consumer-expectation test has been widely criticized when applied in generic defect cases (see comment *h*), it seems peculiarly adapted to cases involving manufacturing defects in foodstuffs.

h. Design defects. Courts have created several different tests to establish liability for design defects. A majority of courts use some version of a risk-utility balancing test, either by directly adopting a negligence approach or by adopting some version of the approach set forth in this section. Liability attaches only when the plaintiff proves that the defendant failed to adopt a safer, cost-effective design that would have prevented all or part of the plaintiff's harm. A significant number of courts, however, make recovery dependent on whether the product design fails to meet reasonable consumer expectations. Most of these courts also consider the availability of a reasonable-cost, safer alternative design in deciding whether the defendant's design is acceptable. Admittedly, the formal structure of the liability standard differs somewhat from one court to another. Whether the risk-utility balancing test is based on the view of the reasonable consumer or the reasonable product seller is a detail left to the various jurisdictions.

The requirement in subsection (2)(b) that the plaintiff demonstrates that a safer design could have been adopted at reasonable cost introduces an important element of materiality. The alternative design must be sufficiently safer than the actual design to have prevented or substantially reduced the harm for which the plaintiff seeks recovery. See comment *l*. Thus, in almost every case, the plaintiff must do more than merely show that the defendant's design could have been made "just a little safer."

At bottom, the "reasonable cost, safer design" approach discussed in this section is that taken by a majority of American courts. A few courts have adopted idiosyncratic tests for design defect. For example, one state court applies a standard whereby the manufacturer is the "guarantor" of the product's safety. Another appears to apply a consumer-expectation test that has no risk-utility component. These opinions are not consistent with the rule stated in this section.

i. Categorical design liability not recognized. By explicitly referring to risk reduction through the adoption of a reasonable cost, safer design, subsection (2)(b) makes clear that the social risk-utility balancing employed in judging the reasonableness of product designs will not be undertaken on a categorical basis. For the purpose of this analysis, product categories are relatively broad subsets of products for which, given their inherent design characteristics, no adequate alternatives are available. Examples include alcoholic beverages, tobacco products, handguns and above-ground swimming

pools. With respect to a product in such categories, plaintiffs are unable to prove the availability of a safer design that does not eliminate the inherent characteristic that renders the product and other similar products attractive in the marketplace. For example, removing the alcohol from an alcoholic beverage not only removes the product from the category of alcoholic beverages, but also renders it unattractive to most consumers of alcoholic beverages. Alcohol-free "alcoholic beverages" are not, therefore, available to most consumers at "reasonable cost." A plaintiff could attack such a product for its alcoholic quality only by attacking the larger category of alcoholic beverages as somehow per se unreasonably dangerous, something which subsection (2)(b) disallows.

Although courts in a few jurisdictions have purportedly allowed plaintiffs to condemn broad product categories as unreasonably dangerous, those decisions have been overturned by statute. The inherent risks associated with product categories are typically open and obvious, and can be adequately managed in the marketplace. Moreover, the legal and factual issues raised in categorical product design litigation are beyond the capacities of courts to resolve. Decisions regarding which product categories should generally be available to users and consumers are best left to the marketplace or, in rare instances, to governmental regulators other than courts.

Of course, when a plaintiff can establish that a manufacturing defect caused injury; or that a product unit could have been designed more safely without eliminating inherent characteristics that both define it categorically and make it desirable for use and consumption; or that a product unit could have been distributed with more adequate and useful instructions and warnings, then the rule stated in this Section supports liability. But judicial attacks on product categories, as such, are not recognized.

j. *Warning defects.* Subsection (2)(c) embraces a rule of liability long recognized by American courts: product sellers have a duty to provide reasonable instructions or warnings about nonobvious risks of injury associated with their products whenever a reasonable person in the seller's position would have, or reasonably should have, known of such risks of injury and could have supplied instructions or warnings to someone in a position to act effectively on such information. In most cases, the duty is based on the seller's knowledge at the time of sale, but under special circumstances post-sale duties to warn, based on later-acquired knowledge, may arise.

In any event, risks that should be obvious to reasonable persons need not be instructed about or warned against. In determining whether a risk is sufficiently obvious not to require a warning, judges have an important initial role to play in screening cases and keeping

clear cases from the jury. It is anticipated, however, that obviousness of risk will be assessed by the jury in all cases in which reasonable minds might differ.

Product warnings help to reduce risks when supplied to persons in positions to act effectively on that information. Thus, the persons to whom product warnings should be given typically include users and consumers, but also include anyone who a reasonable distributor should know is in a position to respond to the instruction or warning by reducing or eliminating the risk of injury. The requirement in subsection 402A(1) that the defective condition be shown to have "proximately caused" the harm to persons or property imposes on plaintiffs in warning cases the burden of proving that, if an adequate instruction or warning had been supplied, use and consumption would have been altered so as to reduce or eliminate the plaintiff's injury.

k. *Prescription drugs (first alternative)*. Subject to the limitation recognized in comment *i*, courts may legitimately entertain causes of action based on most claims of defective product design. Notwithstanding this general rule, the overwhelming majority of jurisdictions have taken the position that a court is not to substitute its judgment for that of the prescribing physician regarding the design of a prescription drug. As long as the drug is marketed with warnings that adequately inform the prescribing physician of the drug's foreseeable dangers, the manufacturer is not held to the risk-utility standard set forth in subsection (2)(b). The position stated in this Comment applies to all prescription drugs as a matter of law, requiring no case-by-case examination of the risks and benefits of individual prescription drugs that are the subject of litigation.

k. *Prescription drugs (second alternative)*. Subject to the limitation recognized in comment *i*, courts may legitimately entertain causes of action based on claims of inadequate design utilizing normal risk-utility standards. Notwithstanding this general rule, a majority of American jurisdictions recognize that special problems attend design defect litigation with respect to prescription drugs. Different drugs provide benefits to various subgroups of patients. It is normally the decision of the prescribing physician, who has received adequate warnings of the drug's benefits and detriments, whether or not to prescribe the drug. Thus, the only basis on which courts traditionally have held drug manufacturers liable is unreasonable failure to warn of known or knowable risks.

On occasion, however, drug designs are attacked as unsound on the ground that the harms they cause outweigh their overall benefit to society. A majority of courts have taken the position that drug design litigation is unwise, and that a drug manufacturer has a duty

only to warn prescribing physicians of foreseeable risks. Other courts allow design defect cases against the manufacturer of a prescription drug, but only after the trial court has made an initial determination that the risk-utility design standard may have been needlessly violated. Even courts that allow design defect litigation involving prescription drugs recognize that risk-utility balancing can only be accomplished based on the knowledge that was or should reasonably have been available to the drug manufacturer. Thus, when a court declares that a prescription drug is not subject to a design defect action it has for all practical purposes eliminated actions based on both negligence and strict liability. Of course a drug manufacturer can always be held liable for failing to warn about risks associated with ingestion of the drug, pursuant to comment *j*.

1. *Proximate causation.* As subsection 402A(1) makes clear the product defect must have proximately caused the plaintiff's harm for liability to be imposed under the rule stated in this Section. Courts differ widely regarding how they talk about causation in products liability cases. Previous comments dealing with other provisions have referred to the causation issue. Regardless of the relevant terminology, causation presents four discrete factual issues in this context. Not every case involves all four; many cases are problematic with respect only to one or at most two such issues. And some courts merge these discrete causation issues under broader headings that tend to obscure the differences. But close analysis of decisions from many different jurisdictions suggests that, beneath the differing and often confusing rhetoric, products liability litigation presents these four basic factual issues.

First, the tribunal must determine whether the product unit (or in the case of alternative liability, a product unit in the product line — see comment *e*) was a but-for cause-in-fact of the plaintiff's harm. Second, the tribunal must determine (subject to the alternative liability exception discussed in comment *e*) whether the defendant commercially distributed the product unit. Third, the tribunal must determine whether the defective condition of the product unit was a but-for cause of the plaintiff's harm. And fourth, the court must determine whether the type of harm suffered by the plaintiff was among the types of harm reasonably foreseeable when the defendant distributed the defective product unit. In most cases courts place on the plaintiff the burden of proof regarding causation.

In connection with the third causation issue — whether the defective condition of the product was a but-for cause of the plaintiff's harm — the plaintiff bears three different burdens of proof, depending on the type of defect involved. In cases involving manufacturing defects, the plaintiff must prove that the same harm would not have

occurred had the product unit not contained the defect. In cases involving design defects, the plaintiff must prove that the same harm would not have occurred had the defendant adopted the safer design suggested by the plaintiff. And in cases involving warning defects, the plaintiff must prove that the same harm would not have occurred had the defendant provided adequate instructions or warnings.

Again, courts employ different terminology to describe these causation issues. Some courts refer to the first and second issues, taken together, as "cause-in-fact" and the third and fourth, taken together, as "proximate causation." Other courts refer to the first and third issues, taken together, as "cause-in-fact;" the second issue as "defendant identification;" and the fourth issue, taken alone, as "proximate cause." And some lump all four questions together under the broad umbrella terms "substantial factor," "legal cause," "superceding or intervening cause" or "proximate causation." The rule stated in this section leaves the nuances of causation terminology to the developing case law. Nevertheless, enhanced clarity would result if courts utilized the functional definitions set forth in this comment.

m. *Warranty*. Most jurisdictions apply the rule stated in this section under the rubric of tort. Admittedly, the same liability rules could emanate from the action for breach of implied warranty of merchantability under the Uniform Commercial Code. Numerous courts have held that the rule stated in this section and implied warranty of merchantability are virtually identical. Factors collateral to the basic liability rule in this section support the preference for the tort characterization over that of implied warranty. For example, if the warranty framework were utilized, defendants would contend that the U.C.C. statute of limitations, which runs from the time of sale, should govern, rather than the tort statute of limitations, which runs from the time of injury. Or it could be argued that privity limitations, which still retain considerable vigor under traditional contract law, should define the eligibility of parties to suit. Furthermore, courts might be more likely to recognize disclaimers or other contract-based limitations on recovery if the action were contract-based rather than rooted in tort law. Placing the rule stated in this section firmly within tort doctrine permits courts to sidestep these issues.

Nonetheless, several jurisdictions have insisted that products liability cases based on the rule stated in this section be prosecuted under the Uniform Commercial Code. For the most part, they have utilized creative statutory interpretations to reach results closely analogous to those reached by courts utilizing the implied warranty

doctrine. Occasionally, decisions utilizing “implied warranty strict liability” for product-related personal injury, reflecting the influence of contract doctrine. These nuances tend to be of minor importance. Courts generally have cut through to the bone to determine the essence of the cause of action. Even if the Uniform Commercial Code provides the label for the cause of action, tort doctrine defines the relevant issues for decision.

n. *Contributory fault.* The application of the contributory fault doctrine to products liability claims raises both serious policy issues and difficult questions of implementation. At the policy level, it has been argued that reducing the plaintiff’s recovery by the percentage of his fault compromises the policy decision to impose primary responsibility for such injuries on manufacturers to encourage them to produce safer products. At the level of practical implementation, courts have noted that comparing the fault of the plaintiff to a defect in the product is no easy task. This is especially true with regard to manufacturing defect cases in which no form of risk-utility balancing is utilized in establishing the defect. Notwithstanding these arguments, a majority of courts use comparative fault to reduce the recovery of a products liability plaintiff whose negligence has contributed to his injury. In cases involving design and warning defects, the issue takes on an added dimension because the defect is often the manufacturer’s failure to account for foreseeable (albeit arguably unreasonable) conduct on the part of the plaintiff. Thus, some courts hesitate to find plaintiffs contributorily at fault in design and warning defect cases. On the other hand, relieving consumers of all responsibility for safe product use defeats the objectives of products liability and runs against the grain of common sense. *See* comment c. The rule stated in this section accepts the majority view, allowing comparative fault to operate as a partial or total defense to a product liability claim depending on the general comparative fault rules in a given jurisdiction. This section takes no position on whether some forms of comparative fault should not be allowed as a defense or even partial mitigation; nor does it resolve the issue of whether assumption of the risk should operate as a total bar in some instances. This section leaves these issues for the developing case law.

o. *Misuse, alteration and modification.* Occasionally a product is subject to post-sale misuse, alteration or modification. When third persons engage in such conduct, its effects will be determined under the rules of proximate cause that govern products liability cases. *See* Comment 1. When plaintiffs engage in such conduct, its effects will ordinarily be determined by the rules of comparative fault set forth herein. *See* comment n. Occasionally plaintiff’s misconduct is so

egregious that it constitutes an intervening cause, eliminating the defendant's liability altogether.

p. *Pure economic loss*. The rule stated in this Section applies only to products that cause harm to persons or property. Where the plaintiff suffers only economic loss (e.g., loss of profits, costs of repair or replacement of the defective product), recovery is governed by the rules of the Uniform Commercial Code. The line of demarcation between physical damage to property and pure economic loss is not easy to draw. The courts appear intent on distinguishing between tort and contract, based on the nature of damages suffered. In doing so they generally pay little attention to whether the defective product had the inherent potential to cause serious physical harm to persons or property. This section leaves these issues for the developing case law.

IV. A COMPARISON OF CURRENT VIRGINIA PRODUCTS LIABILITY LAW WITH THE HENDERSON-TWERSKI PROPOSED REVISION OF SECTION 402A OF THE RESTATEMENT (SECOND) OF TORTS

A. *Introduction*

Virginia products liability law recognizes two major causes of action: a negligence action in tort, and a warranty action in contract.⁴⁰ The negligence action is based almost entirely on case law;⁴¹ and the warranty action rests on the Virginia version of the Uniform Commercial Code (U.C.C).⁴²

The overwhelming majority of states, however, have adopted a more unified approach to products liability law. At least thirty-four states have judicially adopted section 402A of the Second Restatement of Torts.⁴³ Five states have passed statutes adopting sec-

40. There is also a third, less utilized, products liability cause of action that is still recognized in Virginia: tortious misrepresentation. See *Glen Falls Ins. Co. v. Long*, 213 Va. 776, 195 S.E.2d 887 (1973); *Packard Norfolk, Inc. v. Miller*, 198 Va. 557, 95 S.E.2d 207 (1956). See ROBERT I. STEVENSON, *VIRGINIA AND WEST VIRGINIA PRODUCTS LIABILITY* 5-9 (1983) and SPAHN & DRAIM, *supra* note 9 at 96-98.

41. See, e.g., *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979); *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 219 S.E.2d 685 (1975).

42. See, e.g., VA. CODE ANN. §§ 8.2-313 to -316 (Repl. Vol. 1991) (defining and explaining three types of warranties: express warranties, implied warranties of fitness for a particular purpose, and the implied warranty of merchantability).

43. For comprehensive citations to case law, see *American Law of Products Liability* 3d, *supra* note 2, § 16:9 (1987).

tion 402A.⁴⁴ Eight states have adopted a strict liability in tort remedy that differs somewhat from section 402A.⁴⁵

Section 402A was promulgated by the American Law Institute in 1963, and nearly the entire body of modern American products liability case law has developed since that promulgation.

With an eye to revising section 402A to meet the current and future needs and the realities of American products liability law, Professors James Henderson and Aaron Twerski have developed a proposed revision to section 402A.⁴⁶ This proposed revision incorporates the current American consensus regarding the elements, defenses, and general application of American strict products liability law in tort.⁴⁷

The proposed revision, incorporating the modern national consensus in American products liability law, differs from existing Virginia law on some issues. Nevertheless, because the proposed revision provides a current, realistic, and unified version of American products liability law today, it provides an apt model for codification in Virginia.

It is the purpose of this section to note the similarities and differences between the proposed revision and existing Virginia products liability law, in order to explore the ramifications of adopting the proposed revision as Virginia law.

B. *Tort v. Warranty Actions*

The proposed revision sets out standards for strict tort liability. The commentary accompanying the revision recognizes that the history of products liability is closely tied to warranty law and to the Uniform Commercial Code.⁴⁸ Nevertheless, comment *m* makes it clear that the proposed revision only provides for a tort cause of action.⁴⁹ Accordingly, warranty actions still would constitute an independent cause of action under the U.C.C. when appropriate.⁵⁰

44. ARK. CODE ANN. § 4-86-102 (Michie 1991); IND. CODE ANN. § 33-1-1.5-3 (West 1992); ME. REV. STAT. ANN. tit. 14 § 221 (West 1991); OR. REV. STAT. § 30.920 (1991); and S.C. CODE ANN. § 15-73-10 (Law. Co-Op. 1991).

45. See, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) for a listing of these various strict liability in tort actions in each state.

46. See generally Part III of this Article *supra* notes 38-39 and accompanying text.

47. *Proposed Revision*, *supra* note 38.

48. *Id.* at 1514-16 cmt. a; 1524-26 cmts. a, b, c, m, p.

49. *Id.* at 1524-25 cmt.m.

50. See, e.g. at 1524 cmt. m (warranty).

1. The Proposed Revision, comments a-c, m, and p

The proposed revision provides a tort action only for personal injury and property damage. Its purpose in establishing such strict tort liability, according to the commentary, is to provide recovery for harm to person or property. Therefore, comment *p* confines recovery for purely economic loss to the warranty rules of the Uniform Commercial Code.⁵¹ The comment notes the difficulty of keeping economic loss distinct from property damage. Professors Henderson and Twerski, for example, offer the criticism that many courts have paid insufficient attention to a product's inherent potential to cause harm when distinguishing economic loss from property damage. Nevertheless, the authors leave such issues to the individual states.⁵²

Comment *m* addresses the differences of strict tort and warranty actions, providing as examples statutes of limitation, and problems with contractual privity.⁵³ Moreover, where warranty law recognizes the validity of contractual disclaimers limiting or abolishing liability, such disclaimers have no effect on tort actions under the proposed revision.⁵⁴

Therefore, the proposed revision adopts the higher strict liability standard for tort actions that most states, including Virginia, have already adopted for breach of implied or express warranties. By allowing liability under a strict tort theory, the proposed revision overcomes traditional warranty problems of privity, product disclaimers, limitation of damages, notice requirements, and limitations as to when an action accrues.

2. Existing Virginia Law

Under existing Virginia law, a breach of warranty action provides relief in situations where it might be unobtainable in a negligence action. For example, where contributory negligence bars a

Admittedly, the same liability rules could emanate from the action for breach of implied warranty of merchantability under the Uniform Commercial Code.

Id.

Actionable U.C.C. remedies would remain distinct from tort remedies in actions for pure economic loss, or in the sale of used products, for example.

51. *Id.* at 1526 cmt. p.

52. *Id.*

53. *Id.* at 1524-25 cmt. m.

54. *Id.*

tort product liability action under the negligence standard, contributory negligence will not defeat a warranty action.⁵⁵ The standard of product safety in each cause of action is similar, but the plaintiff's burden of proof in a negligence action is much greater than in a warranty action.

The elements of a products liability case in Virginia, whether sounding in negligence or based upon a breach of warranty, are said to be the "same" in both causes of action. The plaintiff 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 defendant's hands.⁵⁶ In reality, however, negligence and breach of warranty actions have important differences.

For both tort and warranty actions, the plaintiff must demonstrate the existence of a product defect. These product defects fall into one of three categories: (1) manufacturing defects; (2) design defects; and (3) warning defects. Part D of this Section discusses these product defect categories at length.⁵⁷

In Virginia, the manufacturer's liability under a breach of warranty theory is said to be "akin to strict liability" in contract.⁵⁸ In an existing tort action, however, the plaintiff needs to show further

55. For example, in *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979), the plaintiff operated a pressure regulator after a locknut had been removed. The purpose of this locknut had been to ensure an upper limit to the amount of pressure the regulator could allow. Use of the regulator without the locknut was misuse of the product, but because it was foreseeable that someone might remove the locknut, this foreseeable misuse did not provide a defense to the warranty suit. *Id.* See also *White Consolidated Indus. Inc. v. Swiney*, 237 Va. 23, 29-30, 376 S.E.2d 283, 285-86 (1989) (discussing product misuse and assumption of the risk, but refusing to discuss contributory negligence because the issues were in warranty); *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 143 S.E.2d 897 (1965) (considering on appeal only the warranty aspects of the case because the trial court verdict for the defendants on the issue of contributory negligence settled the negligence issues).

56. *Harris-Teeter, Inc. v. Burroughs*, 241 Va. 1, 4, 399 S.E.2d 801, 802 (1991) (quoting *Logan v. Montgomery Ward*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975)). This test arguably adopts the language of § 402A, RESTATEMENT (SECOND) OF TORTS, subjected to the defense of contributory negligence.

57. See *infra* notes 114-79 and accompanying text. See generally SPAHN & DRAIM, *supra* note 9; STEVENSON, *supra* note 40.

58. See *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1045-46 (4th Cir. 1983) (comparing warranty analysis to strict tort liability analysis and noting the difference between them and negligence).

that the manufacturer's conduct was negligent.⁵⁹ The negligence cause of action imposes a higher standard of proof on the plaintiff than does the breach of warranty action.⁶⁰ As a corollary, the warranty theory imposes liability on the defendant more readily than does the negligence theory. The difference between the actions is that a warranty action properly focuses on the defective condition of the product, where a negligence action focuses instead on the conduct of the manufacturer or seller.

Many products liability suits are brought under warranty theory in Virginia precisely because the elements of the action are easier to prove. Additionally, there is no contributory negligence bar in warranty actions.⁶¹ Nevertheless, there may be a disadvantage to warranty actions insofar as the manufacturer or seller may attempt to disclaim the implied warranties of merchantability⁶² and fitness for a particular purpose,⁶³ and arguably even disclaim express warranties.⁶⁴

Exactly how a manufacturer or seller may disclaim warranties or limit damages is still an open question in Virginia. The Supreme Court of Virginia has held that a seller can exclude implied warranties of fitness and merchantability in a suit for rescission of a sales contract without running afoul of state public policy.⁶⁵ But the United States Court of Appeals for the Fourth Circuit, purportedly applying Virginia law, has stated that such disclaimers or limitations are presumptively unconscionable when an action is for personal injuries.⁶⁶ Therefore, it is not clear under present Virginia

59. *Abbott v. Am. Cyanamid Co.*, 844 F.2d 1108, 1115 (4th Cir. 1988), *cert. denied*, 488 U.S. 908 (1988); *accord Bly v. Otis Elevator Co.*, 713 F.2d at 1044.

60. *See Chestnut v. Ford Motor Co.*, 445 F.2d 967, 968-69 (4th Cir. 1971) (stating that negligence adds an additional element to strict liability in that the product defect must result from the defendant's failure to exercise due care).

61. *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 463, 143 S.E.2d 897, 902 (1965).

62. For the definition and effects of the implied warranty of merchantability, see VA. CODE ANN. § 8.2-314 (Repl. Vol. 1991).

63. For the definition and effects of the implied warranty of fitness for a particular purpose, see *id.* § 8.2-315 (Repl. Vol. 1991).

64. *Id.* § 8.2-316 (Repl. Vol. 1991).

65. *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 977-78, 154 S.E.2d 140, 144-45 (1967).

66. *Matthews v. Ford Motor Co.*, 479 F.2d 399 (4th Cir. 1973) (relying on VA. CODE ANN. § 8.2-719 (Repl. Vol. 1991), which brands limitation of consequential damages for personal injury as prima facie unconscionable and distinguishing *Marshall v. Murray Oldsmobile Co.*, 207 Va. 972, 154 S.E.2d 140 (1966) (holding that a disclaimer of implied warranties was not contrary to public policy) as involving rescission, not personal injuries, and as having been

law whether a seller can or cannot disclaim warranties or limit damages where there are personal injuries involved.

The issue of privity, however, does not differ in Virginia between negligence and warranty causes of action for damages resulting from personal injury. Lack of privity is not a defense "in any action . . . against the manufacturer or seller . . . for breach of warranty . . . or for negligence . . . if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods. . . ." ⁶⁷

This privity relaxation appears to extend to property loss as well. Virginia has recognized the distinction between pure economic loss and harm to person or property, and has relegated claims for pure economic loss suits only to the warranty cause. In *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.*,⁶⁸ the Supreme Court of Virginia recognized various definitions of purely economic loss. These included disappointed economic expectation, damage only to the product itself by the product, and damage to expectations based on duties created by bargaining. The court appears to have adopted the theory that pure economic loss results when the product defect causes only diminution in its own value.⁶⁹ The court noted that plaintiffs may avail themselves to the relaxation of privity requirements associated with tort actions only when negligence constitutes a danger to safety of person or property.⁷⁰ However, the court also curiously affirms the position that, for expectation loss caused by a breach of contracted-for duties, the privity rules of contract law still govern.⁷¹

Regarding other limitations of actions, where there is personal injury, the general rule is that "every action for personal injuries, whatever the theory of recovery . . . shall be brought within two years after the cause of action accrues."⁷² Personal injury accrual

decided under the U.C.C., whereas the Matthews facts occurred prior to Virginia's adoption of the U.C.C.).

67. See VA. CODE ANN. § 8.2-318 (Repl. Vol. 1991).

68. 236 Va. 419, 374 S.E.2d 55 (1988).

69. *Id.* at 425, 374 S.E.2d at 58 (holding that because a leak in a pool installed as part of new home construction damaged part of the home, and the defect in the pool was a defect in the whole package, the harm, as a harm by the product to itself, was a purely economic loss giving rise only to a warranty cause of action).

70. *Id.* at 422, 374 S.E.2d at 57.

71. *Id.* at 425, 374 S.E.2d at 58.

72. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1992).

occurs on the date the injury occurs.⁷³ For property damage the period is five years,⁷⁴ but accrual occurs "when the breach of contract or duty occurs" in warranty and negligence suits respectively.⁷⁵ This starts the statute running at the time of sale, rather than at the time of injury for both actions.

3. Comparison of Virginia Law and the Proposed Revision

Both existing Virginia law and the proposed revision confine recovery for purely economic loss to warranty actions. The Supreme Court of Virginia has defined purely economic loss,⁷⁶ and the proposed revision does not purport to disturb the court's definition.

Nevertheless, the proposed revision imposes a higher standard of product safety on manufacturers and sellers than the Virginia negligence standard. Arguably, it also proposes a product safety standard equivalent to the present Virginia warranty standard.⁷⁷ Therefore, adoption of the proposed revision would establish a tort standard of product safety in Virginia, currently available only in warranty. Also, the proposed revision is realistically and properly based upon the defective condition of the product itself, rather than the questionable conduct of the defendant.

Similarly, the proposed revision would remove the seller's ability to avoid liability under warranty disclaimers or limitations in strict tort liability actions.

C. *Limitations to Merchants and Sales*

Generally speaking, products liability law establishes liability for manufacturers and other sellers. The subject matter of a products liability suit is an injury to persons or property caused by a defective product. But the question arises whether non-manufacturer sellers who are not responsible for the product defects should nevertheless be held liable. Some states have passed legislation limiting retailer liability.⁷⁸ However, a majority of states presently hold retailers and other sellers liable under strict tort products liability

73. *Id.* § 8.01-230.

74. *Id.* § 8.01-243(B) (Repl. Vol. 1992).

75. VA CODE ANN. § 8.01-230 (Repl. Vol. 1992).

76. *See supra* notes 68-71 and accompanying text.

77. *See supra* notes 38-39 and accompanying text.

78. *E.g.*, COLO. REV. STAT. § 13-21-402(1)(1987); KY. REV. STAT. ANN. § 411.340 (Michie/Bobbs-Merrill 1992); TENN. CODE ANN. § 29-28-106 (1980).

law, although such sellers would still have indemnity or contribution actions against the manufacturer.

1. The Proposed Revision

The black letter portion of the proposed revision extends liability only "if the seller is engaged in the business of selling such a product" as the defective product that caused the harm.⁷⁹ According to the commentary, this rule imposes liability on any commercial seller unless the sale is occasional or casual.⁸⁰ As an example, the commentary notes that a manufacturer occasionally selling surplus or used equipment is not engaged in the business of selling that product.⁸¹

Comment f of the proposed revision notes, but leaves to developing case law or state statutes, the question of whether to hold non-manufacturing sellers strictly liable in tort if the court has jurisdiction over the product manufacturer and if the manufacturer is capable of paying the potential judgment. The proposed revision commentary also takes no position whether to hold used product sellers to a strict liability or to a negligence standard.⁸²

The black letter proposed revision imposes liability on "[o]ne who sells."⁸³ The emphasis on sellers, however, is to distinguish sales from services. The proposed revision does not impose strict liability on service providers.⁸⁴ The commentary notes the treatment courts have given hybrid sales/service transactions, but "does not impose strict liability on those who distribute primarily services."⁸⁵

The commentary also notes that courts have held commercial lessors of consumer products and developers marketing mass-produced housing to product liability standards.⁸⁶ The commentary recommends that courts evaluate these and other sale-like mass-marketing under the proposed revision standards, if to do so will fulfill the policies behind those standards. For example, if product liability analysis of an injury resulting from a sale-like transaction

79. *Proposed Revision*, *supra* note 38, at 1514.

80. *Id.* at 1518 cmt. f.

81. *Id.*

82. *Id.* at 1519 cmt. f.

83. *Id.* at 1514.

84. *Id.* at 1517 cmt. d.

85. *Id.* at 1516-17 cmts. c, d.

86. *Id.*

will encourage safety or promote proper risk spreading, the transaction would arguably be a sale for the purposes of the Proposed Revision.⁸⁷

2. Existing Virginia Law

Warranty and tort products liability actions differ in Virginia as to who may be liable and what transactions are covered. On the warranty side, Virginia arguably would adhere to the sales/services distinction.⁸⁸ By contrast, the negligence standard extends in a continuum from generalized duties regarding conduct toward business invitees or the general public to duties based on product manufacturing or sale.⁸⁹ This means that existing Virginia products liability law sounding in negligence may still involve provision of services and leases, because all are still subject to a negligence analysis.

By adopting the Uniform Commercial Code (U.C.C.), Virginia has adopted three warranties that apply to sales. Express warranties arise when "sellers" agree to them in the bargaining process.⁹⁰ The implied warranty of merchantability "is implied in a contract for . . . [the] sale [of goods] if the seller is a merchant with respect to goods of that kind."⁹¹ The warranty of fitness for a particular purpose arises with respect to "seller[s] at the time of contracting."⁹²

Of these three warranty actions, the implied warranty of merchantability is the most commonly used in product liability actions.⁹³ The fitness warranty applies only if the seller knows of a specific use the buyer plans to make of the product.⁹⁴ The merchantability warranty, however, applies if the goods are not of average quality.⁹⁵ The usual warranty case therefore alleges that the goods are defective because they are not of average quality. In most circumstances, this argument is easier to make than one under the remaining warranty actions.

87. *Id.*

88. See *Stevenson, supra* note 40, at 110-12; SPAHN & DRAIM, *supra* note 9, at 165-67.

89. *Stevenson, supra* note 40, at 13-17; SPAHN & DRAIM, *supra* note 9, at 75-80.

90. VA. CODE ANN. § 8.2-313 (Repl. Vol. 1991).

91. *Id.* § 8.2-314(1).

92. *Id.* § 8.2-315.

93. SPAHN & DRAIM, *supra* note 9, at 83.

94. VA. CODE ANN. § 8.2-315 (Repl. Vol. 1991).

95. *Id.* § 8.2-314(2)(b).

Until 1992, all three warranties were restricted to sales, which were defined as "the passing of title from the seller to the buyer for a price."⁹⁶ In 1992, the three warranties became effective for leases when Title 8.2A of the Code of Virginia took effect.⁹⁷ Prior to that adoption, the Supreme Court of Virginia had held that the implied warranty of fitness for a particular purpose did not apply to leases.⁹⁸

As to services, there appear to be no Virginia warranty cases dealing with the sales/services dichotomy.⁹⁹ Virginia has, however, passed a "blood shield" statute, removing the distribution of blood products from implied warranties analysis.¹⁰⁰ The legislature's attention to this issue implies that it believed that hybrid sales/service contracts could fall under warranty analysis where a sale of a product is involved in a service-oriented transaction. Moreover, a federal district court decision has noted that, even after passage of the U.C.C., the underlying common law warranties, which need not be confined to sales contracts, still apply in Virginia.¹⁰¹

Thus, Virginia law is somewhat ambiguous as to whether or not a warranty analysis applies only to sales of goods. The statutes expressly indicate that this is true, but implicitly indicate otherwise. The case law from at least one federal court in Virginia indicates otherwise as well.

As to the issue of whether casual or occasional sales fall outside a warranty analysis, the implied warranty of merchantability is limited to "merchant[s] with respect to goods of that kind," as noted above, but there is no such limitation on the other two warranties. The supreme court has stated that there is no implied warranty in the sale of a used car.¹⁰²

On the tort side of Virginia products liability actions, because Virginia presently adheres to a negligence standard, the line of de-

96. *Id.* § 8.2-106(1).

97. The warranties are provided and explained in VA. CODE ANN. §§ 8.2A-210 to -213 (Repl. Vol. 1991).

98. *Leake v. Meredith*, 221 Va. 14, 267 S.E.2d 93 (1980). For an argument that *Leake* is really concerned with merchantability, see STEVENSON, *supra* note 40, at 10 n.12.

99. See STEVENSON, *supra* note 40, at 110 (stating that there are no post-U.C.C. goods/services cases in Virginia as of 1983).

100. VA. CODE ANN. § 32-1-297 (Repl. Vol. 1992).

101. *Harris v. Aluminum Co. of Am.*, 550 F. Supp. 1024, 1027 (W.D. Va. 1982) (referring to *Swift & Co. v. Wells*, 201 Va. 213, 110 S.E.2d 203 (1959)).

102. See *Smith v. Mooers*, 206 Va. 307, 313, 142 S.E.2d 473, 477 (1965) (refusing to apply the implied warranty of merchantability to a bailment).

marcation between products liability imposition of duty and service-oriented duty is not sharp, nor does it need to be. This negligence standard applies equally to provision of services¹⁰³ and to any sale of a product.¹⁰⁴

Regarding the issue of whether non-manufacturing sellers are liable, because the negligence standard requires evaluation of the defendant's conduct, any seller, including the manufacturer, must have acted in such a way as to breach a duty to the consumer. If a seller did not participate in causing injury to the consumer, he or she is not liable under the law of negligence.¹⁰⁵

This is not the case in warranty actions, however, where a court analyzes the condition of the product for defects, rather than the conduct of the defendant.¹⁰⁶ Thus, in the case of manufacturing defects, since an implied warranty of merchantability applies to any "seller [who] is a merchant with respect to goods of that kind,"¹⁰⁷ intermediate sellers also can be liable. Since design and warning defect liability depends on foreseeability of the injury, and on the availability of a better design,¹⁰⁸ non-manufacturing sellers are arguably not liable for these defects. There appears to be no Virginia law expressly on this subject.¹⁰⁹

3. Comparison of Virginia Law and the Proposed Revision

Virginia warranty law and the proposed revision both limit liability to those "engaged in the business of selling such a product"¹¹⁰ or "merchant[s] with respect to goods of that kind."¹¹¹ It is

103. See, e.g., *Philip Morris, Inc. v. Emerson*, 235 Va. 380, 368 S.E.2d 268 (1988) (holding a waste disposal company liable for negligence in handling toxic waste); *Amusement Slides Corp. v. Lehman*, 217 Va. 815, 232 S.E.2d 803 (1977) (finding the operation of a slide in an amusement park to be negligent).

104. See, e.g., *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 297 S.E.2d 675 (1982) (validating a jury finding of negligence in a manufacturer's design of a transmission).

105. See generally *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979).

106. See, e.g., VA. CODE ANN. § 8.2-313 to -315 (Repl. Vol. 1991); See also *supra* note 12 and accompanying text.

107. VA. CODE ANN. § 8.2-314 (Repl. Vol. 1991).

108. See *infra*, footnotes 139-78 and accompanying text (discussing design and warning defects).

109. See SPAHN & DRAIM, *supra* note 9, at 164 (citing no Virginia cases in discussion of wholesalers, distributors, and retailers, but noting the proposition that every seller gives implied warranties).

110. *Proposed Revision supra* note 38, at 1514.

111. VA. CODE ANN. § 8.2-314 (Repl. Vol. 1991).

true that Virginia law may not limit express warranties or warranties of fitness for a particular purpose to these sellers, but it does so with regard to the implied warranty of merchantability, and this warranty is most frequently utilized in product liability suits.

Virginia negligence tort law applies wherever the plaintiff can impute a breached duty to the plaintiff. Although there are standard product liability duties imposed on manufacturers with respect to product defects,¹¹² the negligence standard still exists for services and for other non-manufacturing relationships involving a duty to the consumer.

Therefore, the proposed revision would clarify who is subject to strict tort products liability actions by codifying the parties' liability in a strict tort action.

The proposed revision leaves the question of non-manufacturer seller liability to developing state law, and the proposed Virginia legislation would follow the precedents of Colorado, Kentucky, and Tennessee in *not* holding a non-manufacturing seller strictly liable in tort unless that seller knew or should have known of the product defect.¹¹³

D. *Product Defects*

Products liability law identifies three separate categories of injury-causing product defects: (1) manufacturing defects; (2) design defects; and (3) warning defects.

1. Manufacturing Defects

A manufacturing defect exists when a manufacturing or assembly process causes a particular example of an otherwise non-defective product line to be defective.¹¹⁴ The proposed revision defines manufacturing defects as "dangerous departures from a product's intended design"¹¹⁵ and as "fail[ing] to meet the manufacturer's own internal quality standards."¹¹⁶

112. See, e.g., footnotes 114-78, *infra*, and accompanying text.

113. See generally discussion *infra* part IV.

114. See STEVENSON, *supra* note 40, at 13.

115. *Proposed Revision supra* note 38, at 1515 cmnt. b.

116. *Id.* at 1519 cmt. g.

a. The Proposed Revision

The black letter portion of the proposed revision imposes liability for manufacturing defects regardless of the level of care the seller used in preparation or marketing.¹¹⁷ The only mitigation of this liability is the requirement that the plaintiff establish that the defect existed when the product left the hands of the seller.¹¹⁸

Placing such a burden on the plaintiff raises two issues. The first issue is the evidentiary problem that arises when a product has been destroyed: the plaintiff cannot point to the specific defect, or show a finite causal connection between his harm and a defect in the product. The proposed revision appears to establish liability if "reasonable inferences support the conclusion that the defective product caused the plaintiff's harm and that such a defect was present . . . when [the product] left the hands of the defendant seller."¹¹⁹

The second issue is a special extension to foodstuff defects. The proposed revision adopts the test for such defects that "a foodstuff is defective if it contains matter not expected by a reasonable consumer."¹²⁰

Comment c outlines the policy justifications that support a strict liability rule in manufacturing defect cases.¹²¹ Such a rule encourages manufacturers to create safe products and ensures that the market price reflects what would otherwise be the hidden costs associated with consumer injuries. These costs, rather than accruing to individual consumers, are charged to the entire class of consumers. In addition, a strict liability rule lowers litigation costs.¹²² In short, manufacturing defect injuries are random and relatively rare events. Imposing strict tort liability would achieve all the public policy benefits described in comment c,¹²³ with virtually no downside costs.

117. *Id.* at 1514.

118. *Id.* at 1519 cmt. g.

119. *Id.*

120. *Id.*

121. *Id.* at 1516-17 cmt. c.

122. *Id.*

123. *See id.*

b. Existing Virginia Law

To establish liability for a manufacturing defect in Virginia, a consumer-plaintiff must meet a two-pronged burden. First, the plaintiff must show that the goods were unreasonably dangerous for ordinary use or for a reasonably foreseeable purpose. Second, he or she must show that the unreasonably dangerous condition existed when the goods left the defendant's hands.¹²⁴

This standard of safety is said to be the same for both negligence and warranty causes of action.¹²⁵ Nevertheless, the standard of proof required for a negligence action is much greater than for a warranty action. According to the United States Court of Appeals for the Fourth Circuit, a negligence action requires evidence of an additional element: that the defect resulted from the defendant's failure to exercise due care.¹²⁶ Such a distinction between these causes of action, however, may be misleading since most manufacturing defect cases involve both negligence and warranty claims.¹²⁷ But this duality of actions clouds the issue of exactly what standard of proof a negligent manufacturing defect case, by itself, would require.

For example, the Supreme Court of Virginia has made the following observation where evidence to substantiate a defect was scarce: "[i]t is not necessary that the circumstances establish negligence as the proximate cause with such certainty as to exclude every other possible conclusion. . . . All that is required is that a jury be satisfied with proof which leads to a conclusion with probable certainty where absolute logical certainty is impossible."¹²⁸ Adopting this reasoning, coupled with allowing expert testimony regarding the probable defect in a burnt-out stove to go to the jury as evidence of negligence, arguably approaches the leniency of a warranty standard of proof.¹²⁹ The standard for a warranty cause of action based on manufacturing defect, then, if not strict liability in tort, is very much like it.¹³⁰

124. *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 427, 219 S.E.2d 685, 687 (1975).

125. See *Harris-Teeter, Inc. v. Burroughs*, 241 Va. 1, 399 S.E.2d 801 (1991); *Logan*, 216 Va. at 427, 219 S.E.2d at 687 (1975).

126. *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 968-69 (4th Cir. 1971).

127. See SPAHN & DRAIM, *supra* note 9, at 48-49.

128. *White Consol. Indus. v. Swiney*, 237 Va. 23, 28, 376 S.E.2d 283, 286 (1989).

129. See *id.* at 27-28, 376 S.E.2d at 285-86.

130. *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1114 (4th Cir. 1988); accord SPAHN & DRAIM, *supra* note 9, at 47.

This "probable certainty" test speaks directly to the issue of what sort of inferential evidence will support a manufacturing defect case. The general rule in Virginia is that where the product has been destroyed, or testing it directly for a defect is impossible, then circumstantial evidence will suffice to complete a *prima facie* case if a jury could reasonably infer from that evidence that a defect existed when the product left the defendant's hands.¹³¹ Courts limit evidence admissibility, however, in negligence cases invoking a *res ipsa loquitur* theory unless evidence of negligence is under the exclusive control of the defendant and unavailable to the plaintiff.¹³² While expert witness testimony may contribute to the probable certainty with which a jury must draw its conclusions,¹³³ expert testimony based on experimentation will be carefully scrutinized where the actual product has been destroyed.¹³⁴ As to the special treatment of cases involving foodstuffs, the supreme court has said that the plaintiff must show that the suspect food contained a foreign substance.¹³⁵

c. Comparison of Virginia Law and the Proposed Revision

The proposed revision would introduce a less stringent standard of proof for the plaintiff to demonstrate in manufacturing defect cases sounding in tort. Where Virginia tort law now requires a showing of negligent conduct on the defendant's part, the proposed revision would not because like warranty law, it properly deals with the defective condition of the product itself, rather than the questionable conduct of the defendant.

The proposed revision also imposes liability where a foodstuff contains matter that a reasonable consumer would not expect it to contain. Presently existing Virginia law imposes liability where a foodstuff contains a foreign substance.

131. See *Swiney*, 237 Va. at 23, 376 S.E.2d at 283; *Southern States Coop. v. Doggett*, 223 Va. 650, 292 S.E.2d 331 (1982) (breach of warranty).

132. See *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 219 S.E.2d 685 (1975).

133. See *Swiney*, 237 Va. at 27-28, 376 S.E.2d at 285.

134. See *Horton v. W.T. Grant Co.*, 537 F.2d 1215 (4th Cir. 1976).

135. *Harris-Teeter, Inc. v. Burroughs*, 241 Va. 1, 399 S.E.2d 801 (1991). In *Harris-Teeter*, the court applied a negligence standard assessing the defendant's behavior to find that although a duty existed, placing white plastic birds on a white cake was not a breach of that duty. Arguably, however, the standard was applied as though the case were a negligent design case. The court compared *Harris-Teeter's* behavior with that of other cake bakers and decorators. See *id.* at 4, 399 S.E.2d at 802-03.

In *Brockett v. Harrell Bros.*,¹³⁶ the Virginia Supreme Court recognized that in a breach of warranty action a manufacturer should bear losses that he is in the best position to prevent.¹³⁷ This is also the realistic and objective tort goal of the proposed revision's public policy rationale.

2. Design Defects

Under the proposed revision a design defect occurs when there is a deficiency in a product line that is made exactly as the manufacturer intended.¹³⁸

a. The Proposed Revision

The proposed revision adopts a risk/utility balancing test to determine liability in defective design cases.¹³⁹ One element to be balanced is the availability, at the time of marketing, of an alternative, safer design, given the foreseeable risk of harm. The court must also balance the reasonableness and cost of adopting such an alternative safer design.¹⁴⁰

A corollary to this risk/utility test is that liability does not attach to inherently dangerous categories of products where no safer design alternatives exist that would accomplish the utilitarian purpose of such products.¹⁴¹ For example, as long as sufficient warnings accompany prescription drugs marketing, the risk/utility balancing test for defective design will not apply.¹⁴² The proposed revision specifically rejects the consumer expectation test for design defect liability.¹⁴³

b. Existing Virginia Law

The United States Court of Appeals for the Fourth Circuit construing Virginia law, has set out a similar risk/utility balancing test

136. 206 Va. 457, 143 S.E.2d 897 (1965) (implied warranty case).

137. *Id.* at 460, 143 S.E.2d at 900.

138. SPAHN & DRAIM, *supra* note 9, at 18.

139. Henderson & Twerski, *supra* note 38 at 1514; *id.* at 1520 cmt. h.

140. *See id.* at 1514 (§ 402A(2)(b)).

141. *Id.* at 1520-21 cmt. i.

142. *Id.* at 1522-23 cmt. k.

143. *Id.* at 1520 cmt. h.

for design defect liability.¹⁴⁴ Factors to be considered are the likelihood of harm caused by the design, the gravity of such harm, and the burden of effective precautions. Specifically, if the cost to redesign a safer product is low, the manufacturer has a duty to do so.¹⁴⁵

The Supreme Court of Virginia has neither expressly adopted nor rejected such a risk/utility test in defective design cases.¹⁴⁶ However, it recognizes that a product must be designed so as not to be unreasonably dangerous for its intended use, or for a reasonably foreseeable use.¹⁴⁷ The supreme court has utilized such factors as the comparison of a product's design with industry standards¹⁴⁸ and expert opinion as to a product design's safety.¹⁴⁹

The supreme court has noted various factors that are common in risk/utility balancing. For example, in *Turner v. Manning, Maxwell & Moore, Inc.*,¹⁵⁰ the court noted the availability of safety devices costing one dollar and sixty cents each as optional equipment on suspension device.¹⁵¹ However, the court decided the case on the ground that the plaintiff had misused the hoist.¹⁵²

c. Comparison of Virginia Law and the Proposed Revision

The proposed revision adopts a risk/utility balancing test for design defect liability in accordance with most other American jurisdictions.¹⁵³ Although the Supreme Court of Virginia has not expressly adopted this test, the Court of Appeals for the Fourth Circuit, construing Virginia law, has already done so. Moreover, existing Virginia law does not conflict with the proposed revision recommendation to analyze defective design product liability by

144. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071 (4th Cir. 1974); *see also* *Lust v. Clark Equip. Co.*, 792 F.2d 436 (4th Cir. 1986).

145. *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1043 (4th Cir. 1983); *Dreisonstok*, 489 F.2d at 1073.

146. *See generally* SPAHN & DRAIM, *supra* note 9, at 29.

147. The Virginia Supreme Court uses the language of the two-pronged *Logan* test to frame the test for defective design liability. *See Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 963-64, 252 S.E.2d 358, 367 (1979) (quoting *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975)).

148. *See R.B. Hazard, Inc. v. Panco*, 240 Va. 438, 443, 397 S.E.2d 866, 869 (1990); *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975).

149. *See Ford Motor Co. v. Bartholomew*, 224 Va. 421, 429-30, 297 S.E.2d 675, 678-80 (1982); *Turner*, 216 Va. at 250, 217 S.E.2d at 867-68.

150. 216 Va. 245, 217 S.E.2d 863 (1975).

151. *Id.* at 248, 217 S.E.2d at 866-67.

152. *Id.* at 252, 217 S.E.2d at 869.

153. *See supra* note 31 and accompanying text.

utilizing a risk/utility balancing test. Indeed, the proposed revision risk/utility foreseeability test for defective design cases is similar to the negligence test for defective design that Virginia already recognizes.¹⁵⁴

3. Warning Defects

Products with hidden or latent dangers may be defective if no warning of such dangers is given to the consumer by the manufacturer.¹⁵⁵ Therefore, actions maintained on the theory that a seller failed to give an adequate product warning to the consumer constitute a third type of product defect.¹⁵⁶

a. The Proposed Revision

The proposed revision advocates a standard of liability for warning defects that again relies on a risk/utility balancing test.¹⁵⁷ Product instructions or warnings need to be reasonable, but are required only for non-obvious dangers.¹⁵⁸ Like Virginia defective design cases, the proposed revision holds the seller to a foreseeability standard regarding knowledge of the product's dangers. If the seller knew, or should have known, of the product's latent dangers, and failed to warn or instruct the consumer, then the seller is subject to liability.¹⁵⁹ The time at which the seller's knowledge is at issue is normally at the time of sale. However, post-sale duties to warn may also arise.¹⁶⁰

While the seller need not warn of obvious risks of danger, when risks cannot be eliminated, as with inherently dangerous products,

154. See, e.g., JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1334 (1991) ("Risk-utility, without doubt, will emerge victorious as the liability standard in generic [design] defect cases. And we might as well acknowledge that once risk-utility becomes the operative theory in generic litigation, negligence will reign supreme."); see also *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 186 (Mich. 1984) ("We adopt, forthrightly, a pure negligence risk-utility test in products liability actions against manufacturers of products, where liability is predicated upon defective design").

155. STEVENSON, *supra* note 40, at 25.

156. See SPAHN & DRAIM, *supra* note 9, at 53.

157. *Proposed Revision supra* note 38, at 1515-16 cmt. b.

158. *Id.* at 1514 (§ 402A (2)(c)).

159. *Id.*

160. *Id.* at 1521-22 cmt. j.

the seller is required to warn in order that users may make informed decisions regarding the product's use.¹⁶¹

b. Existing Virginia Law

The Supreme Court of Virginia has expressly adopted Restatement (Second) of Torts Section 388 as its standard for liability in defective warning cases.¹⁶² Under this standard, the seller's duty to warn is triggered if he knows, or should know, of a risk of danger. A seller also has a duty to warn if he should foresee that users might misuse a product with its attendant unknown risks.¹⁶³ For example, in *Featherall v Firestone Tire & Rubber Co.*,¹⁶⁴ the Supreme Court of Virginia held that a pressure regulator manufacturer should have recognized the possibility that users would take off an easily removable locknut.¹⁶⁵ Because the manufacturer understood the danger in removing the locknut and users were unlikely to recognize that danger, the manufacturer had a duty to warn.¹⁶⁶

The Court of Appeals for the Fourth Circuit, in *Spruill v. Boyle-Midway, Inc.*,¹⁶⁷ established a two-part test to determine what constitutes an adequate warning. A warning must be in a conspicuous form so as to catch the attention of the user and the warning must convey the nature and extent of the danger.¹⁶⁸ *Spruill* may have

161. *Id.*

162. See *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 962, 252 S.E.2d 358, 366 (1979) (quoting RESTATEMENT (SECOND) OF TORTS § 388 (1965)).

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier

(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

(b) has no reason to believe that those for whose use the chattel 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.

RESTATEMENT (SECOND) OF TORTS § 388 (1965).

163. See *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 83-84 (4th Cir. 1962); *Featherall*, 219 Va. at 966, 252 S.E.2d at 369.

164. 219 Va. 949, 252 S.E.2d 358 (1979).

165. *Id.* at 966, 252 S.E.2d at 369.

166. *Id.*

167. 308 F.2d 79 (4th Cir. 1962).

168. *Id.* at 85.

been limited to inherently dangerous products.¹⁶⁹ However, in a case where a statute required a warning on fungicide, the supreme court stated that warnings or instructions must do more than explain how to use the product, describing the danger adequately enough to promote safe use.¹⁷⁰

Under presently existing Virginia warranty law, it is not necessary to warn of obvious dangers.¹⁷¹ However, Virginia negligence law also recognizes an "open and obvious danger" exception to this rule.¹⁷² Moreover, assumption of the risk is a valid defense in both warranty and negligence actions.¹⁷³ Because the elements of an assumption of the risk defense are proof that plaintiff fully appreciated and voluntarily incurred the danger, one reasonably assumes that an opportunity for the defense is available when the danger is open and obvious.

In Virginia a manufacturer has a duty to warn the ultimate consumer as well as the immediate buyer in those circumstances dictated by comment n of the Restatement (Second) of Torts section 388.¹⁷⁴ In 1990, the United States Court of Appeals for the Fourth Circuit noted six factors to be balanced in ascertaining liability for failure to warn: (1) the dangerous condition of the product, (2) the purpose for which the product is used, (3) the form of the warning actually given, (4) the reliability of the party warned as to whether he will warn others, (5) the magnitude of the risk involved, and (6) the extent of the burden placed on a manufacturer by forcing him to warn the ultimate user directly.¹⁷⁵ In the case of prescription

169. See *Spangler v. Kranco, Inc.*, 481 F.2d 373 (4th Cir. 1973) (absolving a manufacturer of liability in an employee injury, where the manufacturer could expect the employer/buyer to understand the nature of the risk).

170. *McClanahan v. California Spray-Chemical Corp.*, 194 Va. 842, 75 S.E.2d 712 (1953).

171. See *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 463, 143 S.E.2d 897, 902 (1965) ("[I]f the condition . . . of which the plaintiff complains was known, visible or obvious to her, there was no liability on an implied warranty of fitness.").

172. See *Artrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 397 S.E.2d 821 (1990); *Clark v. Chapman*, 238 Va. 655, 385 S.E.2d 885 (1989); *Runyon v. Geldner*, 237 Va. 460, 377 S.E.2d 456 (1989); *Tate v. Rice*, 227 Va. 341, 315 S.E.2d 385 (1984).

173. See *Lust v. Clark Equip. Co.*, 792 F.2d 436 (4th Cir. 1986) (construing assumption of the risk as a defense to warranty actions). *But see White Consol. Indus. v. Swiney*, 237 Va. 23, 29, 376 S.E.2d 283, 286 (1989) (refusing to decide whether assumption of the risk is a valid defense to a warranty action).

174. *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 373 (4th Cir. 1983).

175. *Willis v. Raymark Indus.*, 905 F.2d, 793, 796-97 (4th Cir. 1990), *citing Oman v. Johns-Manville Corp.*, 764 F.2d 224, 233 (4th Cir.), *cert. denied*, 474 U.S. 970 (1985).

medicine, the manufacturer has a duty to warn prescribing physicians of risks under the learned intermediary doctrine.¹⁷⁶

c. Comparison of Virginia Law and the Proposed Revision

The proposed revision requirement of reasonable instructions or warnings for non-obvious, foreseeable dangers agrees with Virginia law. The proposed revision and current Virginia law both trigger a duty to warn when the seller knows, or should know, of a hidden risk. Neither the proposed revision nor current Virginia law imputes liability if the risk was obvious to the user. Moreover, Virginia's current standards for adequacy of a warning fit within this reasonable warning or instruction requirement.

Likewise, in the areas of inherently dangerous products and post-sale duty to warn, the proposed revision and current Virginia law do not noticeably conflict. Virginia already recognizes a heightened liability for inherently dangerous products.¹⁷⁷ Although the supreme court has not directly considered a post-sale duty to warn, it has mentioned that such a duty might arise.¹⁷⁸

E. Causation

Traditional causation analysis involves two elements. First, the plaintiff must show that the defendant factually caused a harm; "but for" the product defect the injury would not have occurred. Secondly, the plaintiff must show that the defendant should legally be held liable for that harm, largely as a matter of policy.¹⁷⁹ These two causation elements are considered as cause-in-fact and proximate cause respectively.¹⁸⁰ However, the proposed revision treats both elements as a part of general proximate causation.¹⁸¹

176. See *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1115 (4th Cir.) cert. denied, 488 U.S. 908 (1988); see also *Pfizer, Inc. v. Jones*, 221 Va. 681, 684, 272 S.E.2d 43, 44 (1980).

177. *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 83 (4th Cir. 1962); *McClanahan v. California Spray-Chem. Corp.*, 194 Va. 842, 852, 75 S.E.2d 712, 718 (1953).

178. *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 252, 217 S.E.2d 863, 869 (1975).

179. STEVENSON, *supra* note 40, at 33.

180. SPAHN & DRAIM, *supra* note 9, at 108.

181. *Proposed Revision*, *supra* note 38, at 1523 cmt. 1.

1. The Proposed Revision

The black-letter portion of the proposed revision imposes liability for harm "proximately caused by the product defect."¹⁸² The accompanying commentary explains that there cannot be liability without proximate cause and recommends that the plaintiff continue to have the burden of proof on this issue.¹⁸³ Recognizing that causation terminology differs from state to state, the commentary defines proximate cause as embracing all of the traditional causation issues including defendant identification, cause-in-fact, intervening cause, superseding cause, substantial factor, and traditional proximate cause.¹⁸⁴

On the issue of defendant identification, the proposed revision commentary recognizes that alternative liability case law is developing where traditional fault-based liability may be inadequate.¹⁸⁵ The commentary recommends a traditional causation analysis whenever possible, but also recommends alternative liability in "unusual cases."¹⁸⁶

Comment o of the Proposed Revision specifically addresses intervening causes. Here, third party product misuse or alteration of the product is to be analyzed as part of the foreseeability element of proximate cause. The commentary also considers product misuse or alteration as part of the comparative fault analysis, but further notes that plaintiff's conduct can be so egregious as to become an intervening, superceding cause.¹⁸⁷

Proximate causation in the proposed revision requires proof of four elements: (1) but for the product, there would have been no injury, (2) the defendant commercially distributed the product, (3) but for the product's defective condition such as a manufacturing defect, choice of an inadequately unsafe design, or failure to warn of a danger, the harm would not exist, and (4) the harm was reasonably foreseeable when the defendant sold the product.¹⁸⁸

182. *Id.* at 1514.

183. *Id.* at 1523 cmt. l.

184. *Id.*

185. *Id.* at 1518 cmt. e. (giving the DES cases as an example of what is meant by alternative liability, thus possibly including market share liability, enterprise liability, and "concert in action" liability analyses).

186. *Id.*

187. *Id.* at 1525 cmt. o.

188. *Id.* at 1523 cmt. l.

2. Existing Virginia Law

The Supreme Court of Virginia defines proximate cause as "that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event would not have occurred."¹⁸⁹ This definition includes cause-in-fact as an element of proof.¹⁹⁰

The supreme court has made an issue of cause-in-fact, or "but for" causality, in cases involving each of the three categories of product defectiveness. In design defect cases, the plaintiff must show that his or her injury would not have happened without the defendant's choice of an inferior product design.¹⁹¹ In warning defect cases, the plaintiff must show that the injury could have been avoided had there been a proper warning.¹⁹² Because of the negligence standard used in manufacturing defect cases in Virginia, there are two "but for" causation issues. The plaintiff must show that the defendant's negligence caused the defect¹⁹³ and that the defect caused his or her injury.¹⁹⁴

Under Virginia warranty law, the plaintiff bears the same cause-in-fact burden in design and warning defects cases as in negligence actions. In the case of a manufacturing defect, however, the plaintiff need only show that, but for the defect, he or she would not have been injured.¹⁹⁵

189. *Banks v. City of Richmond*, 232 Va. 130, 135, 348 S.E.2d 280, 282 (1986) (quoting *Coleman v. Blankenship Oil Corp.*, 221 Va. 124, 131, 267 S.E.2d 143, 147 (1980) (quoting *Beale v. Jones*, 210 Va. 519, 522, 171 S.E.2d 851, 853 (1970))).

190. *See Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 250-51, 217 S.E.2d 863, 868 (1975) (finding that if a hook holding a hoist had not been open throated, an accident might not have happened); *Scott v. Simms*, 188 Va. 808, 817-18, 51 S.E.2d 250, 253-54 (1949) (stating that whether a negligently parked car proximately caused a pedestrian death in the course of an automobile collision was a question for the jury).

191. *See Ford Motor Co. v. Bartholomew*, 224 Va. 421, 432, 297 S.E.2d 675, 680 (1992) (finding that a faulty transmission design "enhanced danger of misuse").

192. *See Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 965-66, 252 S.E.2d 358, 369 (1979) (finding that a warning of the danger of removing a locknut could have prevented the injury).

193. *See, e.g., Southern States Co-Op., Inc. v. Doggett*, 223 Va. 650, 292 S.E.2d 331 (1982) (plaintiff carried the burden of proof by a chain of circumstantial evidence showing that defendant had sold cattle feed with poison in it).

194. *See, e.g., Middlesboro Coca-Cola Bottling Works v. Campbell*, 179 Va. 693, 20 S.E.2d 479 (1942) (plaintiff showed that the defective Coca-Cola caused his injury by the fact that three people ate exactly the same food he did, but he alone drank Coca-Cola).

195. *Compare White Consol. Indus. v. Swiney*, 237 Va. 23, 376 S.E.2d 283 (1989) (confusing warranty and negligence principles to arrive at the conclusion that the defect probably did cause a fire) *with Logan v. Montgomery Ward & Co.*, 216 Va. 425, 219 S.E.2d 685 (1975)

However, even a plaintiff's conclusive showing of "but for" causality is not enough to establish liability without proof of proximate cause.¹⁹⁶ A finding of proximate cause in Virginia is based upon "mixed considerations of logic, common sense, justice, policy, and precedent."¹⁹⁷

In at least one case, the supreme court advocated assigning liability to the party in the best position to prevent the injury.¹⁹⁸ However, the usual consideration is whether the injury was foreseeable given the defect.¹⁹⁹ Under the negligence standard, proof of foreseeability of the precise occurrence is not required. Only proof that some injury would probably occur is required.²⁰⁰ Under warranty theory, Virginia courts phrase the issue in terms of whether the use, or an intervening misuse, was foreseeable or unforeseeable. The courts assign liability where the use or misuse, and thus the injury, was foreseeable.²⁰¹

Virginia courts apply a misuse analysis in warranty cases to determine whether plaintiff's behavior is an intervening, superseding cause. In negligence cases, the courts consider a plaintiff's behavior under a contributory negligence analysis.

An intervening cause analysis addresses third party acts, which may have superseded the defendant's behavior, or the product defect, in causing the injury. Where a third party action supersedes, the defect is not the proximate cause of the injury.²⁰² Usually, if the defendant should have foreseen the possibility of the third party intervening act, that act does not supersede.²⁰³ On the other

(refusing to allow the doctrine of *res ipsa loquitur* to establish a cause-in-fact without evidence that the product was under the exclusive control of the defendant in a stove fire case).

196. *Banks v. City of Richmond*, 232 Va. 130, 135, 348 S.E.2d 280, 283 (1986).

197. *Scott v. Simms*, 188 Va. 808, 816, 51 S.E.2d 250, 253 (1949).

198. *Brockett v. Harrell Bros., Inc.*, 206 Va. 457, 460, 143 S.E.2d 897, 900 (1965).

199. *See R.B. Hazard, Inc. v. Panco*, 240 Va. 438, 444, 397 S.E.2d 866, 869 (1990) (stating that righting and re-use of a broken, defective gate is foreseeable); *White Consol. Indus. v. Swiney*, 237 Va. 23, 29, 376 S.E.2d 283, 286 (1989) (finding that plaintiff's failure to unplug a stove because the clock and some of the controls had malfunctioned was foreseeable).

200. *Virginia Elec. & Power Co. v. Winesett*, 225 Va. 459, 468, 303 S.E.2d 868, 874 (1983).

201. *See, e.g., Swiney*, 237 Va. at 29, 376 S.E.2d at 286 (foreseeable misuse does not bar a claim of reliance or warranty).

202. *See Banks v. City of Richmond*, 232 Va. 130, 136, 348 S.E.2d 280, 283 (1986) (holding the city's assumed negligence did not proximately cause a fire where an apartment maintenance man struck a match while looking for a gas leak).

203. *See R.B. Hazard, Inc.* 240 Va. at 444, 397 S.E.2d at 869 (finding that the fixing of a fallen, broken gate was foreseeable by the negligent constructor of the gate, and that fixing the gate was therefore not a superseding cause); *Scott v. Simms*, 188 Va. 808, 818-19, 51 S.E.2d 250, 254 (1949) (finding that an automobile collision, which caused the death of a

hand, unforeseeable third party actions will normally constitute a superseding cause.²⁰⁴

3. Comparison of Virginia Law and the Proposed Revision

Virginia law and the proposed revision both require proof of "but for" causation, as well as proximate causation, before imposing liability. "But for" causation follows the same analysis under both Virginia law and the proposed revision, except in manufacturing defect cases. In manufacturing defect cases, because of Virginia's negligence law, an additional element of proof that the manufacturer's negligence caused the defect is required. However, a plaintiff can avoid this legal hurdle in Virginia by proceeding under a warranty action, which, like the proposed revision, does not require this additional causation element.

Traditional proximate cause analysis is based upon a foreseeability test under Virginia law as well as the proposed revision. Under both theories, intervening causes will supersede the product defect as the proximate cause of the injury only if such causes were unforeseeable.²⁰⁵

F. *Contributory or Comparative Fault*

The behavior of the consumer-plaintiff with regard to a defective product also plays an important role in determining whether or not a court will impose liability on the seller or manufacturer. If the plaintiff's behavior to some extent caused the injury, a small minority of states will absolve the defendant from all liability. However, the overwhelming majority of other jurisdictions will distribute the liability between the plaintiff and the defendant proportionally.²⁰⁶ Traditionally, plaintiff misconduct falls into one

pedestrian child who was forced to stand in the street because of an improperly parked car, did not as a matter of law supersede the negligent parking as a proximate cause of the child's death, because a jury could find the injury was foreseeable given the negligent parking).

204. See *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 250, 217 S.E.2d 863, 868 (1975) (holding that unforeseeable misuse of a hoist caused the plaintiff injury, not the open-throated design of the hook from which the hoist was suspended).

205. *But see* the discussion on comparative fault, *infra* notes 206-38 and accompanying text.

206. Forty-five states recognize comparative fault. Only Alabama, Maryland, North Carolina, South Carolina, and Virginia have not enacted some form of comparative fault. See generally HENRY WOODS, *COMPARATIVE FAULT* § 1:11 (2d ed. 1987 & Supp. 1992).

of three affirmative defenses: contributory or comparative fault, unforeseeable product misuse,²⁰⁷ and assumption of the risk.²⁰⁸

1. The Proposed Revision

The black letter portion of the proposed revision makes no express mention of plaintiff misconduct. The seller is liable for injuries proximately caused by product defects.²⁰⁹

However, comment n of the proposed revision recognizes the disparity among states in the treatment of plaintiff misconduct as a factor in assigning liability. According to comment n, the proposed revision takes no position as to whether fault on the part of the plaintiff should mitigate the seller's liability or provide an affirmative defense; nor does the proposed revision address whether assumption of the risk should bar defendant's liability. The proposed revision leaves these issues for the developing case and statutory law of the various states.²¹⁰

Comment n notes, however, that a vast majority of states currently reduce recovery based upon the plaintiff's comparative fault. The choice the comment offers in manufacturing defect cases is between offering no reduction in damages regardless of the plaintiff's fault, and offering some proportional reduction under comparative fault principles.²¹¹

Regarding design and warning defects, the commentary implies that, since an analysis of whether or not there is a defect hinges on the foreseeability of the plaintiff's conduct, there may be no need

207. Unforeseeable product misuse is an affirmative defense in some jurisdictions. *See, e.g.,* *Perfection Paint Co. v. Konduris*, 258 N.E.2d 681 (Ind. App. 1970). However, unforeseeable product misuse can also negate a claim of product defectiveness or proximate cause. *See, e.g.,* *Rogers v. Toro Mfg. Co.*, 522 S.W.2d 632 (Mo. App. 1975). The plaintiff, therefore, would have the burden of proof in product misuse issues involving defectiveness and causation, and the defendant would have the burden of proof in product misuse issues as affirmative defenses.

208. The assumption of risk defense has been abolished in a majority of states. Other states have merged the defense into the state's comparative fault laws. *See* CONN. GEN. STAT. ANN. § 52-572h(c) (West 1991); *Wilson v. Gordon*, 354 A.2d 398, 401-02 (Me. 1976); *Wentz v. Deserth*, 221 N.W.2d 101, 104-05 (N.D. 1974).

Other states, however, continue to deny all recovery in products liability cases based upon the assumption of risk defense. *See* *Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 105 (Minn. Ct. App. 1991); *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986); *see generally* Woods, *supra* note 206, § 6:1-6:9.

209. *Proposed Revision, supra* note 38, at 1514 (§ 402A(1)).

210. *Id.* at 1525 cmt. n.

211. *See id.*

to further consider the plaintiff's comparative fault.²¹² The commentary does note, however, that totally ignoring the plaintiff's conduct "runs against the grain of common sense,"²¹³ and that the plaintiff's conduct may be "so egregious that it works as an intervening cause, cutting off defendant's liability altogether."²¹⁴

2. Existing Virginia Law

In Virginia, there are presently three products liability defenses based on the plaintiff's conduct: contributory negligence; unforeseeable product misuse; and assumption of the risk. A plaintiff's contributory negligence is a complete bar to recovery in a negligence action,²¹⁵ but does not effect recovery in a warranty action.²¹⁶ Unforeseeable plaintiff misuse of the product will also bar recovery in a negligence or warranty action.²¹⁷ Apparently the assumption of the risk defense also applies to both negligence and warranty actions in Virginia.²¹⁸

a. Contributory Negligence Under Virginia Law

In Virginia, a plaintiff is barred from recovery in a negligence action where his own negligence proximately contributes to the injury.²¹⁹ Whether the plaintiff's negligence rises to the level of proximately contributing to the injury can be a matter of law decided by the judge.²²⁰ Where reasonable minds could differ, however, the issue goes to the jury with the other issues in the case.²²¹

212. *See id.*

213. *Id.*

214. *Id.* at 1525-26 cmt. o (discussing unforeseeable product misuse, alteration, and modification).

215. *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 373 (4th Cir. 1983).

216. *See Brockett v. Harrell Bros.*, 206 Va. 457, 463, 143 S.E.2d 897, 902 (1965).

217. *See White Consol. Indus. v. Swiney*, 237 Va. 23, 29, 376 S.E.2d 283, 286 (1989).

218. *Lust v. Clark Equip. Co.*, 792 F.2d 436, 439 (4th Cir. 1986). *But cf. White Consol. Indus.*, 237 Va. at 29, 376 S.E.2d at 286-87 (1989) (refusing to decide whether assumption of the risk is a defense to a warranty action).

219. *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 432, 297 S.E.2d 675, 680-81 (1982).

220. *See Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1042 (4th Cir. 1983) (stating that the lower court had held that the conduct of a lift truck driver, who drove in reverse without looking behind him, barred recovery as a matter of law).

221. *See Antrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 397 S.E.2d 821 (1990) (plaintiff injured while crossing a snow bank created by defendant's clearing a parking lot); *Virginia Elec. & Power Co. v. Winesett*, 225 Va. 459, 303 S.E.2d 868 (1983) (plaintiff's decedent was electrocuted while trimming a tree when a branch struck a naked high voltage wire); *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979) (remanding the issue of contributory negligence for jury consideration).

In design defect and warning defect cases, an analysis of the plaintiff's conduct is separate from a determination of whether or not the product is defective. For example, in *Featherall v. Firestone Tire & Rubber Co.*, the Supreme Court of Virginia determined that, although the manufacturer had failed to warn, the jury could nevertheless find that the conduct of the plaintiff constituted contributory negligence.²²² In *Ford Motor Co. v. Bartholomew*, the court concluded that the design of a car transmission could have been found defective. However, the court also considered the plaintiff's conduct in failing to take steps to assure herself that the transmission was in "park."²²³

As to manufacturing defect cases, Virginia courts usually analyze them according to warranty theories.²²⁴ Nevertheless, under a negligence theory, contributory negligence could also bar recovery.²²⁵

b. Product Misuse Under Virginia Law

Because contributory negligence is not a defense to a breach of warranty cause of action, defendants will often argue that the plaintiff's misuse of the product is a defense against any breach of implied warranty claim.²²⁶ Defendants utilize this defense in two ways. First, foreseeability of harm is an element of the prima facie design or warning defect case, and defendants may therefore argue that the plaintiff has not sustained his burden of proof on this element.²²⁷ Second, the defendant may attempt to argue that product misuse bars a plaintiff's claim of reliance on the warranty.²²⁸ The defense that the plaintiff failed to carry his burden of proof on foreseeability of harm is by far the most commonly used defense.

222. *Featherall*, 219 Va. at 967, 252 S.E.2d at 370.

223. *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 431-33, 297 S.E.2d 675, 680-81 (1982).

224. See generally SPAHN & DRAIM, *supra* note 9, at 48-49.

225. See *White Consol. Indus. v. Swiney*, 237 Va. 23, 29-30, 376 S.E.2d 283, 286-87 (1989) (discussing product misuse and assumption of the risk with regard to a defect in a stove, contributory negligence, and the case as being decided under a warranty theory).

226. See, e.g., *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975) (plaintiff's misuse of a hoist was held to excuse a duty to warn, and to supersede a design defect as the cause of the injury).

227. See, e.g., *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 962, 252 S.E.2d 358, 366-67 (1979) (holding there was no failure to warn of the danger of using a Cornelius brand lid with a Firestone brand tank because the use of these products as a cleaning machine constituted unforeseeable product misuse).

228. See *Swiney*, 237 Va. at 29, 376 S.E.2d at 286 (discussing the use of a product with a known defect as product misuse barring a claim of reliance, but finding against the defendant on the facts).

However, some commentators state that unforeseeable product misuse is not a "true" affirmative defense, as the burden of proof remains with the plaintiff rather than the defendant.²²⁹

From the defendant's standpoint, placing the burden of proof on the plaintiff does not obviate the necessity for the defendant to raise this product misuse issue whenever possible. However, regardless of whether product misuse is characterized as a defectiveness issue, a proximate cause issue, or an affirmative defense issue it is an important obstacle that the plaintiff must overcome.

c. Assumption of the Risk Under Virginia Law

The United States Court of Appeals for the Fourth Circuit, purportedly applying Virginia law, has held that assumption of the risk is a valid defense in Virginia to breach of warranty actions.²³⁰ The Supreme Court of Virginia has not decided that issue, but it has held that assumption of the risk is a valid defense in a negligence action.²³¹

Plaintiff conduct that constitutes an assumption of the risk defense differs from conduct which constitutes contributory negligence conduct. Virginia courts analyze carelessness as contributory negligence under a reasonably prudent person standard and venturousness as assumption of the risk under a subjective standard.²³²

Thus, there are two elements necessary to prove assumption of the risk. First, the plaintiff must have understood the nature and extent of the risk. Second, the plaintiff must have voluntarily incurred that risk.²³³ The defendant can assert assumption of the risk in a manufacturing defect case. It is not enough, however, that the plaintiff knows that the product is defective. He must also understand the danger involved in using the product in its defective state.²³⁴

229. SPAHN & DRAIM, *supra* note 9, at 124. See also *supra* note 207 and accompanying text.

230. *Lust v. Clark Equip. Co.*, 792 F.2d 436, 439-40 (4th Cir. 1986).

231. *Id.* at 440; see *Swiney*, 237 Va. at 29-30, 376 S.E.2d at 286.

232. *Amusement Slides Corp. v. Lehmann*, 217 Va. 815, 818-19, 232 S.E.2d 803, 805 (1977).

233. *Id.*

234. See *Swiney*, 237 Va. at 30, 376 S.E.2d at 206 (disallowing the defense that plaintiff knew that a switch and the clock of a stove were broken, because plaintiff could not have

In defective warning case, a showing by the plaintiff that the defendant breached a duty to warn is tantamount to proving that plaintiff did not know of the risk. Thus a prima facie warning defect case often renders an assumption of the risk defense impossible.²³⁵ Assumption of the risk does not appear to have been used as a defense in any Virginia defective design case. However, it may be an indirect factor in the court of appeal's risk/utility balancing test.²³⁶

3. Comparison of Virginia Law and the Proposed Revision

The proposed revision would change Virginia products liability negligence law into a modified strict liability in tort law. Therefore, a contributory negligence defense has no place under the proposed revision, just as contributory negligence is not a defense to a breach of warranty action. However, the behavior or conduct of the consumer-plaintiff with regard to a defective product still plays an important role in determining whether or not a court will impose liability on the product manufacturer or seller.

The proposed revision takes no position as to whether or not a comparative fault defense should be adopted, and leaves that issue to developing state law. As drafted below, the proposed Virginia Products Liability Act would adopt a "modified" comparative fault statute for products liability actions, and bring Virginia into a modern consensus with forty-five other states that have already enacted some form of comparative fault law.²³⁷

Unforeseeable product misuse and assumption of risk are defenses that currently exist under present Virginia law, and would continue to exist under the proposed Virginia Products Liability Act.²³⁸

known that these defects made the stove a fire hazard even when not in use (quoting *Amusement Slides v. Lehman*, 217 Va. 815, 819, 232 S.E.2d 803, 805 (1977)).

235. See *McClanahan v. California Spray-Chem. Corp.*, 194 Va. 842, 864, 75 S.E.2d 712, 725 (1953) (stating that there could not be assumption of the risk because the plaintiff had not been warned of the risk).

236. See *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071-73 (4th Cir. 1974).

237. See, e.g., *Woods*, *supra* note 206, § 1:11.

238. See *infra* art. III, Proposed Virginia Products Liability Legislation.

G. Conclusion

The proposed revision provides thoughtful, experienced, and objective new legislation which imposes strict liability in tort for manufacturing defects, and a risk/utility foreseeability test for design and warning defects. Each of these three categories of product defectiveness is presently recognized as grounds for recovery under Virginia's negligence and breach of warranty law. However, serious legal flaws in negligence and warranty actions exist in Virginia products liability law. Important countervailing public policy considerations now mandate that Virginia products liability law join a more modern, balanced, and objective consensus. The proposed revision, which is incorporated into the Virginia Products Liability Act, is the proper vehicle for this much needed change.

VI. PROPOSED VIRGINIA PRODUCTS LIABILITY LEGISLATION

Although many states have adopted a strict liability in tort action by judicial enactment, it is more appropriate in Virginia to adopt any new law in derogation of the common law by legislative enactment from the Virginia General Assembly.²³⁹ Accordingly, the author respectfully proposes the following new Virginia products liability legislation:

THE VIRGINIA PRODUCTS LIABILITY ACT

Article I: Purpose

The purpose of the Virginia Products Liability Act is to create a new strict liability in tort action in Virginia products liability law. However, this Act is not intended to limit or change existing Virginia law in negligence, tortious misrepresentation, or breach of warranty actions.

Comment: The purpose of the Virginia Products Liability Act is to create a new strict liability in tort action in Virginia products liability law, which currently exists in the overwhelming majority

239. See, e.g., VA. CODE ANN. § 1-10 (Repl. Vol. 1987) ("The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly"). In addition, at least 38 other states have recently enacted products liability tort reform by legislative statute. See *supra* note 30 and accompanying text.

of other American states, and thus bring Virginia into the modern consensus of American products liability law. However, traditional tort and warranty actions in Virginia may still be pled when appropriate. For example, negligence actions may be appropriate in situations where the defendant is not a seller of goods, or when the negligent conduct of the defendant is reasonably ascertainable. Tortious misrepresentation actions may be pled in cases of negligent or deceitful misrepresentation, or in consumer fraud cases. And breach of warranty actions may be appropriate for pure economic loss. These examples are by way of illustration and not limitation. Other negligence and warranty actions may also be pled where appropriate.

Article II: Liability of a Seller of Defective Products

(1) One who sells any product in a defective condition is subject to liability for harm to persons or property proximately caused by the product defect if the seller is engaged in the business of selling such a product.

(2) The rule stated in Subsection (1) applies in the case of a claim based on:

(a) a manufacturing defect even though the seller exercised all possible care in the preparation and marketing of the product; or

(b) a design defect only if the foreseeable risks of harm presented by the product, when and as marketed, could have been reduced at reasonable cost by the seller's adoption of a safer design; or

(c) a warning defect only if the seller failed to provide reasonable instructions and warnings about non-obvious product-related dangers that were known, or should have been known, to the seller.

(3) A seller — other than a seller of foodstuffs not sold in a sealed container — who has not designed, manufactured, tested, or assembled the product or any of its component parts, shall not be liable under this Section unless the product-related dangers were known, or should have been known, to that seller.

Comment: Subsections (1) and (2) of this Provision are adopted from James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed*

Revision of Section 402A of the Restatement (Second) of Torts, 77 CORNELL L. REV. 1512, 1514 (1992). Subsection (3) is intended to protect most retailers and other sellers who are not product manufacturers from the application of strict tort liability. Some other states have enacted similar statutes protecting retailers and other sellers from strict tort liability. *See, e.g.*, COLO. REV. STAT. § 13-21-402(1) (1987). Sellers of foodstuffs, however, are held to a higher legal standard both under the Proposed Revision comment g, and under existing Virginia law. *See, e.g., Harris-Teeter, Inc. v. Burroughs*, 241 Va. 1, 399 S.E.2d 801 (1991).

Article III: Seller's Affirmative Defenses

(1) The defense of contributory negligence is not recognized under this Act. However, the comparative fault of the plaintiff which exceeds the fault of the defendant seller or sellers shall constitute an absolute bar to the plaintiff's recovery.

(2) Plaintiff's voluntary and unreasonable assumption of a known risk shall also constitute an absolute bar to the plaintiff's recovery.

(3) Plaintiff's unforeseeable product misuse shall also constitute an absolute bar to the plaintiff's recovery, as well as impacting on issues of product defectiveness and causation.

Comment: The abolition of a contributory negligence defense and the adoption of a "modified" comparative fault defense under the Virginia Products Liability Act are consistent with products liability law in forty-five other states that have adopted a "pure" or "modified" comparative fault defense based upon plaintiff's conduct. *See, e.g.*, VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 1.1 (2d ed. 1986), and HENRY WOODS, *COMPARATIVE FAULT* § 1:11 (2d ed. 1987 & Supp. 1992). Although various states have abolished or incorporated assumption of risk within their comparative fault statutes, the Virginia Products Liability Act still maintains the plaintiff's voluntary assumption of a known risk as a separate absolute defense. Consistent with products liability law in all states, including Virginia, unforeseeable product misuse may also constitute an absolute defense where the defendant has the burden of proof. In addition, unforeseeable product misuse can be a crucial element in determining product defectiveness and proximate causation where the plaintiff has the burden of proof.

[*Optional Provision: Noneconomic Damages*]

[*Comment:* Although the Virginia Products Liability Legislation neither proposes nor rejects a cap on noneconomic damages, this concept remains a very controversial area of the law that the Virginia General Assembly must address as an important public policy issue.

According to Professors Henderson and Twerski, "the modern trend is to limit noneconomic damages in products liability actions" and several states have enacted legislative caps for noneconomic losses. *See, e.g.*, ALASKA STAT. § 9.17.1(b) (1988) (cap of \$500,000 per incident for noneconomic damages); COLO. REV. STAT. § 13-21-102.5(3)(a) (1987) (cap of \$500,000 with clear and convincing evidence, otherwise \$250,000); *see generally* Scott D. Goetsch & Dominick M. Valencia, Jr., *Constitutional Challenges to Limitations on Noneconomic Damages*, 57 DEF. COUNS. J. 51, 60 (1990); *see also* James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1339-1341 (1991); ("Approximately a third of the states have enacted statutes that expressly limit recovery of noneconomic damages, but these caps have faced a number of state and federal constitutional challenges").

Other commentators, however, have flatly opposed and rejected the concept of any cap on damages based upon constitutional grounds. *See* James R. Andersen, *Blasting the Cap: Constitutional Issues Arising from Maryland's Limitation of Noneconomic Damages in Personal Injury Claims*, 16 U. BALT. L. REV. 327 (1987); Marco de Sae Silva, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 WASH. L. REV. 653 (1988); *But see* Keri L. Ellison, *Noneconomic Damage Cap*, 23 WILLAMETTE L. REV. 215 (1987); R. Kyle Gavin, Note, *The Constitutionality of Florida's Cap on Noneconomic Damages in the Tort Reform and Insurance Act of 1986*, 39 U. FLA. L. REV. 157 (1987). For further analysis of the noneconomic damages cap, *see* Brian R. Peacy, Comment, *The Constitutionality of Wisconsin's Noneconomic Damage Limitation*, 72 MARQ. L. REV. 235 (1988); Janai M. Powell, *Challenging the Constitutionality of Noneconomic Damage Caps: Boyd v. Bulala and the Right to a Trial by Jury*, 24 WILLAMETTE L. REV. 821 (1988).

Some caps on noneconomic damages have not withstood a constitutional challenge in court. *See, e.g.*, *Brannigan v. Usitalo*, 587 A.2d 1232, 1233 (N.H. 1991). But other caps on noneconomic dam-

ages have survived a constitutional challenge in the courts. *See, e.g., Samsel v. Wheeler Transp. Serv. Inc.*, 789 P.2d 541, 558 (Kan. 1990); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1330-32, 1336-38 (D. Md. 1989).]

V. CONCLUSION

Virginia should have adopted strict tort liability in products liability actions decades ago. The rationale for enacting such a law, based upon interrelated social, legal, economic, and public policy grounds, has been well demonstrated in the overwhelming majority of American jurisdictions over the past thirty years. Today strict liability in tort is firmly established in American products liability law, and is firmly rooted within American jurisprudence.

The Virginia General Assembly therefore should enact realistic and objective strict liability in tort legislation that will allow Virginia to join the broad consensus in American products liability law. Moreover, with the Henderson-Twerski Proposed Revision of Section 402A, Virginia can be a leader in the field of products liability tort reform.

An analogy to Virginia Domestic Relations Law is also appropriate. Virginia was one of the last states to adopt an equitable distribution statute²⁴⁰ dealing with the division of marital property on divorce. However, based upon careful analysis of the experiences of our sister states, and weighing the strengths and weaknesses of the various state approaches, Virginia was able to draft an equitable distribution statute that has been lauded by a national authority as being one of the most comprehensive and best-drafted equitable distribution statutes in the nation.²⁴¹

Now Virginia has the same opportunity to enact a model products liability statute based on thirty years of experience in Virginia and in other American states. In proposing such legislation, the author is aware that reasonable people, groups, and interests, both within and without the Virginia General Assembly, may differ regarding certain provisions in the proposed Virginia Products Liability Act, and that some legislative changes and fine tuning are no

240. VA. CODE ANN. § 20-107.3 (Cum. Supp. 1992).

241. *See, e.g., LAWRENCE J. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY* (1983 & Supp. 1992) (supplement authored by Brett R. Turner).

doubt inevitable. Nevertheless, this proposed products liability legislation is a realistic and objective way to protect the legal rights and obligations of *all* parties within the Commonwealth — the Virginia consumer, the Virginia manufacturer, and the Virginia retailer — without consciously favoring any special interest groups.

Accordingly, I will endeavor to reach and inform all interested parties within the Commonwealth regarding the crucial need for this proposed legislation. I solicit your comments, suggestions, and support.

