University of Richmond Law Review

Volume 26 | Issue 1 Article 9

1991

Virginia Law of Products Liability

Thomas W. Williamson Jr.

BOOK REVIEW

VIRGINIA LAW OF PRODUCTS LIABILITY. By Gary Spahn and Robert Draim. GA.: Harrison Company, 1990. 321 pages. $74.95.

*Reviewed by Thomas W. Williamson, Jr.**

When the history of Twentieth Century America's jurisprudence is chronicled, a prominent chapter will be devoted to the rise of product liability law. At the beginning of the century, a person injured by a defective product usually had no recourse against either the product's seller or manufacturer. By 1970, the barriers obstructing recovery had been dismantled and it was generally accepted that a seller or manufacturer of a product would be strictly liable to anyone injured by the defective condition of the product.

Several factors account for this imposition of liability onto product manufacturers and sellers. First and foremost, the abrogation of the requirement that the injured person be in privity of contract with the product seller dramatically broadened the scope of liability by permitting any user of a product or any "bystander" injured by the product to recover for harm inflicted by the product. Concurrently with the fall of privity, the doctrine of strict liability arose from the common law of warranty. Strict liability eliminated the onerous burden of proving that the defendant was negligent in distributing a defective product.

In addition to the substantive changes in the law of product liability, procedural changes have also affected the product liability plaintiff. Adoption of liberal discovery rules has given the plaintiff access to the files and employees of the manufacturer. The broadening breadth of personal jurisdiction and the ensuing enactment

* Partner, Emroch & Williamson; B.S., 1972, Virginia Military Institute; J.D., 1976, The T.C. Williams School of Law, University of Richmond.

of long arm statutes require a manufacturer and seller to defend cases in states far removed from their base of operations. Increasing judicial acceptance of expert testimony and the bar's enterprise in locating and presenting effective expert witnesses have enhanced the plaintiff's ability to prove that a product defect caused the mishap which injured the plaintiff.

Virginia participated in the product liability revolution. Yet, the path chosen by Virginia diverged from the one chosen by most other states. The vast majority of states adopted the doctrine of strict liability in tort. Justice Traynor, in writing the opinion *Greenman v. Yuba Power Products, Inc.*,[1] drew upon the common law of warranty to create a rule that one who placed a product in the stream of commerce was strictly liable for any harm caused by the product. In 1965, section 402(A) Restatement (Second) of Torts adopted *Greenman* and made clear that, unlike warranty, strict liability in tort could not be disclaimed by a product seller, and lack of privity would be no defense.

Virginia has never made the leap from warranty principles of the law of sales to a free standing tort remedy of strict liability. Contractual issues such as disclaimer continue to cloud the Virginia plaintiff's efforts to impose strict liability on the purveyors of defective products. This distinction, as well as Virginia's stubborn refusal to adopt comparative fault in negligence actions, creates a unique environment in Virginia for product liability litigation. As a result, a special need has existed for a product liability treatise specifically addressing Virginia law on the subject.

Virginia Law of Products Liability authored by Gary Spahn and Robert Draim ably fills this void. Spahn and Draim, who are both experienced in the defense of product liability claims in Virginia, have produced a primer which is both user friendly and thorough. It addresses not only the substantive law but also the procedural and evidentiary issues which recur frequently in product liability actions. These issues include the admissibility of post-accident product modifications and recalls, personal jurisdiction, successor liability, and offensive collateral estoppel.

The discussion of the doctrine of offensive collateral estoppel bears special comment. Virginia strictly adheres to the requirement of mutuality of parties thus effectively preventing application

1. 59 Cal. 2d 57, 377 P.2d 897 (1962).

of offensive collateral estoppel. The authors alert the practitioner to the choice of law rules which may require a court in Virginia to preclude a defendant from relitigating issues determined adversely to the party in a jurisdiction which has adopted the doctrine of offensive collateral estoppel.

Whenever lawyers write books, the danger exists that the litigation stance of their clients will color the presentation. Spahn and Draim largely avoided this pitfall and have produced an objective, neutral analysis of the status of product liability law in Virginia. In only a few instances, can one question the authors' exposition of the state of the law in Virginia.

Relying on *Featherall v. Firestone*,[2] the authors erroneously suggest that the implied warranty of merchantability requires a product to be reasonably fit only for intended use and "reasonably foreseeable appropriate uses" but not reasonably foreseeable misuses of the product. *Featherall* does not support the suggested three part dichotomy. Instead, *Featherall* holds that warranty liability will be imposed if the product is unreasonably dangerous either for the use to which it "would ordinarily be put or some other reasonably foreseeable purpose."[3] Warranty liability will be absent when "there has been an unforeseen misuse of the product."[4] In *White Consolidated Industry v. Swiney*,[5] the Supreme Court of Virginia again clearly announced that misuse is a defense to a warranty claim only when it is an "unforeseen misuse."[6]

Spahn and Draim devote considerable effort to discussing what they label "the knowledgeable purchaser" defense to a failure to warn claim. Drawing upon *Marshall v. H.K. Ferguson Co.*,[7] the authors contend that if the purchaser has knowledge of a product's design or dangers, the product supplier has no duty to warn the nonpurchaser of a product. This defense is frequently asserted in the context of a sophisticated employer who purchases a product for the use of employees who may have little knowledge of the product's hazards.

Spahn and Draim downplay the critical factor in whether the

2. 219 Va. 949, 252 S.E.2d 458 (1979).
3. *Id.* at 965, 252 S.E.2d at 367.
4. *Id.* at 966, 252 S.E.2d at 367.
5. 237 Va. 23, 376 S.E.2d 283 (1989).
6. *Id.* at 29, 376 S.E.2d at 286 (quoting Featherall v. Firestone, 219 Va. 949, 964, 252 S.E.2d 358, 367 (1979)).
7. 623 F.2d 582 (4th Cir. 1980).

knowledge of a purchaser will be a viable defense to the failure to warn claim of an injured user employed by the purchaser: Was it feasible to directly warn the nonpurchaser user? In *Marshall*, the product was a complex industrial system which had been designed and constructed with the participation of the purchaser-employer's engineers. A direct warning to the employees operating the system was unfeasible, and no duty to warn was imposed on the manufacturer.

When the product is a less sprawling and more self-contained unit (of the type involved in most product liability cases), the result is different. For example, in *Willis v. Raymark Indus., Inc.*,[8] the knowledgeable purchaser defense asserted by an asbestos manufacturer was rejected where it was not unduly burdensome to have placed warnings on the product itself.

One of the strengths of Spahn and Draims's treatise is its avoidance of merely being a parochial review of the substantive law of Virginia. The authors are cognizant of the advancing federalization of products liability law. Accordingly, Spahn and Draim give the reader succinct discussions of federal preemption and its offspring, the government contractor defense. Due to the vast panoply of federal regulatory schemes, a multitude of products are the subject of federal regulation. This may provide grist for an assertion that a jury determination under state law that a product is defective would be preempted by federal law.

The clamor loudest heard today in the product liability arena is to cast aside completely the role of states in fashioning the rights of persons injured by products to recover damages from the product manufacturers and sellers. Legislative proposals to this effect are under active consideration by Congress.[9] However, until federal legislation completely supplants the state law in the balancing of rights and liabilities between product suppliers and persons injured by products, Spahn and Draims's *Virginia Law of Products Liability* will be a valuable reference work for any attorney involved in Virginia product liability litigation.

8. 905 F.2d 793 (4th Cir. 1990).
9. S. 640, 102J Cong., 1st Sess. (1991).