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# COMMENT

## STRICTLY SPEAKING, WHAT NEEDS TO CHANGE? A REVIEW OF HOW STATUTORY CHANGES COULD BRING STRICT PRODUCTS LIABILITY TO VIRGINIA

### INTRODUCTION

Virginia remains one of five states that refuse to adopt strict products liability. To date, the Supreme Court of Virginia has declined to follow the path Justice Traynor set out nearly a century ago,<sup>1</sup> as its recent decisions confirm its resistance to strict liability. However, given the change in control of the General Assembly following the elections of 2017 and 2019, the General Assembly is in new hands and may remain that way for some time. This new legislative majority, among its plans for new policies, may soon consider establishing strict products liability by statute. In doing so, Virginia would not be alone. State legislation is the method that four states have already used to adopt strict liability.<sup>2</sup> Others have passed statutes to further limit or expand the reach of liability that their state courts established.<sup>3</sup> Legislation is thus a proven method

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1. Justice Traynor is the California Supreme Court Justice whose concurring opinion in *Escola v. Coca Cola Bottling Co.* popularized application of strict liability doctrine to products liability cases. 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

2. Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 578 n.161 (2014); ARK. CODE ANN. § 16-116-101 (2021); GA. CODE ANN. § 51-1-11.1 (2021); ME. STAT. tit. 14, § 221 (2020); S.C. CODE ANN. § 15-73-10 (2021).

3. CONN. GEN. STAT. § 52-572m(b) (2021) (superseding *Garthwait v. Burgio*, 216 A.2d 189, 191–92 (Conn. 1965)); IOWA CODE § 613.18 (2021) (superseding *Hawkeye-Sec. Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672, 683–84 (Iowa 1970)); KAN. STAT. ANN. § 60-3306 (2020) (superseding *Brooks v. Dietz*, 545 P.2d 1104, 1108 (Kan. 1976)); KY. REV. STAT. ANN. § 411.340 (LexisNexis 2021) (superseding *Dealers Transp. Co. v. Battery Distrib. Co.*, 402 S.W.2d 441, 446–47 (Ky. Ct. App. 1965)); MINN. STAT. § 544.41 (2020) (superseding *McCormack v. Hanksraft Co.*, 154 N.W.2d 488, 496 (Minn. 1967)); MONT. CODE ANN. § 27-1-719 (2019) (superseding *Brandenburger v. Toyota Motor Sales, U.S.A.*, 513 P.2d 268, 272–73 (Mont. 1973)); NEB. REV. STAT. § 25-21,181 (2021) (superseding *Kohler v. Ford Motor Co.*,

to adopt and manage strict liability should the General Assembly take up the effort.

Part I of this Comment briefly reviews the history of Virginia products liability law, and how small changes over centuries have put the Commonwealth on a long line trending slowly towards, but keeping a healthy distance from, modern product liability norms. Part II addresses where Virginia products liability law is today, and how that practically differs from strict liability. Part III explores how Virginia could adopt strict liability without unnecessarily disrupting established precedent and provides a sample statute to accomplish that end.

### I. BRIEF HISTORY OF VIRGINIA PRODUCTS LIABILITY LAW MILESTONES

Although the Supreme Court of Virginia has consistently declined to adopt strict liability in products liability cases, commonwealth law has made staggered lunges in that direction for the last seventy years. If this course continues at its current pace, decades will pass before Virginia's highest court adopts strict liability. Given that reality, it would expedite the matter if the General Assembly adopted strict liability as proposed in Part III.

One major pro-plaintiff development is that Virginia no longer has a privity requirement to advance a case in negligence or in many actions under a theory of warranty. However, Virginia was not an early adopter of this policy. Until 1951, Virginia required a showing of privity even in negligence cases.<sup>4</sup> Over time, the courts recognized this high bar as obsolete, and the privity requirement fell out of favor.<sup>5</sup> For claims of breach of express or implied

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191 N.W.2d 601, 607–08 (Neb. 1971)); N.J. STAT. ANN. § 2A:58C-9 (2021) (superseding *Santor v. A&M Karagheusian, Inc.*, 207 A.2d 305, 312 (N.J. 1965)); N.D. CENT. CODE § 28-01.3-04 (2021) (superseding *Johnson v. Am. Motors Corp.*, 225 N.W.2d 57, 66 (N.D. 1974)); OHIO REV. CODE ANN. § 2307.78 (LexisNexis 2021) (superseding *Lonzrick v. Republic Steel Corp.*, 218 N.E.2d 185, 188 (Ohio 1966)); OR. REV. STAT. § 30.920 (2019) (*Heaton v. Ford Motor Co.*, 435 P.2d 806, 807–08 (Or. 1967)); S.D. CODIFIED LAWS § 20-9-9 (2021) (superseding *Engberg v. Ford Motor Co.*, 205 N.W.2d 104, 108–09 (S.D. 1973)); TENN. CODE ANN. § 29-28-106 (2021) (superseding *Ford Motor Co. v. Lonon*, 398 S.W.2d 240, 249–50 (Tenn. 1966)); WASH. REV. CODE § 7.72.040 (2021) (superseding *Ulmer v. Ford Motor Co.*, 452 P.2d 729, 734–35 (Wash. 1969)). See generally CONG. RSCH. SERV., RL32560, SELECTED PRODUCTS LIABILITY ISSUES: A 50-STATE SURVEY (2005).

4. See, e.g., *Pierce v. Ford Motor Co.*, 190 F.2d 910, 914–15 (4th Cir. 1951).

5. See, e.g., *Gen. Bronze Corp. v. Kostopoulos*, 203 Va. 66, 69–70, 122 S.E.2d 548, 551

warranty, the privity requirement was rendered largely invalid in 1962 when Virginia adopted the Uniform Commercial Code (“U.C.C.”).<sup>6</sup>

A similar development occurred with respect to the coverage of warranties to leases. Prior to 1992, coverage of warranties was restricted to sales, which were defined as “the passing of title from the seller to the buyer for a price.”<sup>7</sup> In 1992, Virginia Code Title 8.2A took effect applying implied warranties to leases,<sup>8</sup> and because the Supreme Court of Virginia had twelve years earlier held that the warranties did not apply to leases,<sup>9</sup> this statute had a significant impact.

Although Virginia law does inch towards strict liability rules similar to those that forty-five other states have already adopted,<sup>10</sup> instituting the change by a single statute would accelerate the process by decades.

## II. NATURE OF VIRGINIA PRODUCTS LIABILITY LAW

Most of Virginia products liability law includes causes of action advanced in tort and in contract. Under tort law, a plaintiff may pursue a negligence action, which follows common law with some statutory limits. Under contract law, the warranty provisions of the U.C.C. adopted by Virginia would govern.<sup>11</sup>

In Virginia, the proof requirements to succeed in a product defect claim have the same basic elements whether arising from negligence or breach of warranty. To win a products liability case, the plaintiff must show: (1) that a product was unreasonably dangerous for either its intended or some other reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the product left the defendant’s control.<sup>12</sup>

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(1961); *Farish v. Courion Indus., Inc.*, 722 F.2d 74, 77–78 (4th Cir. 1983), *aff’d* 754 F.2d 1111 (4th Cir. 1985); *see also* *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1044 n.2 (4th Cir. 1983).

6. U.C.C. § 2-318 (AM. L. INST. & UNIF. L. COMM’N 1951); VA. CODE ANN. § 8.2-318 (Repl. Vol. 2015); *see* *Cook v. G.M. Diehl Mach. Works*, 563 F. Supp. 281, 282–83 (W.D. Va. 1983).

7. VA. CODE ANN. § 8.2-106(1) (Repl. Vol. 2015).

8. § 8.2A-101 (Repl. Vol. 2015).

9. *Leake v. Meredith*, 221 Va. 14, 17, 267 S.E.2d 93, 95 (1980).

10. *Graham*, *supra* note 2, at 579.

11. § 8.2-318 (Repl. Vol. 2015); *see* *Cook*, 563 F. Supp. at 282.

12. *Morgen Indus., Inc. v. Vaughan*, 252 Va. 60, 65, 471 S.E.2d 489, 492 (1996); *Slone*

A product may be considered unreasonably dangerous in three different ways: “if defective (1) in assembly or manufacture, (2) if imprudently designed, or (3) if not accompanied by adequate warnings about its hazardous properties.”<sup>13</sup>

### A. *Threshold Requirements of Negligence*

For a products liability action in tort to succeed, the plaintiff must provide evidence of the defendant’s negligence.<sup>14</sup> In addition to proving defect, causation, and damages as would be required from a plaintiff in a strict liability case, negligence requires that a defendant owe a duty to the plaintiff and that the defendant’s conduct breached its standard of care under this duty. Recent Supreme Court of Virginia rulings and observations of major Virginia holdings from federal courts indicate a diluted application of these requirements, but this pro-plaintiff trend, as much as it exists, has not been squarely affirmed by the Supreme Court of Virginia.<sup>15</sup> Establishing duty and proof of the defendant’s negligence are two critical burdens that the plaintiffs would not face under a strict liability regime.

#### 1. Duty

One obstacle negligence presents to the plaintiffs is establishing that a manufacturer or seller owes a duty to the plaintiff. To be held negligent, a defendant must create a recognizable risk of harm to the plaintiff individually or as a member of a class of persons.<sup>16</sup> The Supreme Court of Virginia has frequently required that a relationship between the defendant and the plaintiff must exist to

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v. Gen. Motors Corp., 249 Va. 520, 526, 457 S.E.2d 51, 54 (1995); Harris-Teeter, Inc. v. Burroughs, 241 Va. 1, 4, 399 S.E.2d 801, 802 (1991); Logan v. Montgomery Ward & Co., 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975).

13. Abbot v. Am. Cyanamid Co., 844 F.2d 1108, 1114 (4th Cir. 1988) (first citing *Bly*, 713 F.2d at 1043; and then citing *Lust v. Clark Equip. Co.*, 792 F.2d 436, 438 (4th Cir. 1986)).

14. See *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 968–69 (4th Cir. 1971); *Quisenberry v. Huntington Ingalls, Inc.*, 296 Va. 233, 242–43, 818 S.E.2d 805, 809–10 (2018); *RGR, L.L.C. v. Settle*, 288 Va. 260, 275–76, 764 S.E.2d 8, 16–17 (2014).

15. *Benedict v. Hankook Tire Co.*, 295 F. Supp. 3d 632, 640–41 (E.D. Va. 2018); *Quisenberry*, 296 Va. at 245, 818 S.E.2d at 811; see *Knapp v. Zoetis Inc.*, No. 20cv191, 2021 U.S. Dist. LEXIS 63783, at \*38–39 (E.D. Va. Mar. 31, 2021).

16. *RGR*, 288 Va. at 279, 764 S.E.2d at 19 (citing *Dudley v. Offender Aid & Restoration of Richmond, Inc.*, 241 Va. 270, 278, 401 S.E.2d 878, 882–83 (1991)).

establish duty.<sup>17</sup> In 2014, the Court clarified that this relationship could merely be “a sufficient juxtaposition of the parties in time and space to place the plaintiff in danger from the defendant’s acts.”<sup>18</sup> Then, in 2018, the Court appeared to expand the concept by holding in *Quisenberry v. Huntington Ingalls, Inc.* that no actual interaction of the parties was required to establish this relationship.<sup>19</sup> The *Quisenberry* Court applied this analysis to hold that duty extends to the children of a defendant’s employee.<sup>20</sup> The Court reasoned that knowingly releasing employees to their homes with hazardous asbestos fibers on their clothes created a “recognizable risk of harm” to the employees’ children “within a given area of danger” of the defendant’s conduct.<sup>21</sup>

This is a wide definition of duty which likely includes all potential products liability cases. So long as the plaintiffs purchase products in the ordinary chain of distribution, they will almost certainly have a common law relationship with the manufacturers under the court’s current definition. Further, this definition of duty is so broad that it likely covers bystanders and foreseeable consumers outside the direct chain of distribution as they are within the “given area of danger” of the manufacturer’s conduct in a similar fashion as the children of employees.<sup>22</sup>

However, the staying power of this doctrine is questionable. *Quisenberry* was decided by a narrowly divided four-to-three court with Senior Justice Millette substituting for Justice Goodwyn for the decision.<sup>23</sup> With no further comment by full voice of the active members of the court, and one active member having since been replaced, the future of this wide definition of relationship remains

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17. See, e.g., *Kent v. Miller*, 167 Va. 422, 426, 189 S.E. 332, 334 (1937) (“Negligence must be in relation to some person.”).

18. *RGR*, 288 Va. at 280, 764 S.E.2d at 19 (quoting CHARLES E. FRIEND, PERSONAL INJURY LAW IN VIRGINIA § 1.1.1 (3d ed. 2003)); see also *Rice v. Turner*, 191 Va. 601, 605, 62 S.E.2d 24, 26 (1950).

19. 296 Va. at 244, 818 S.E.2d at 806, 811 (“[J]uxtaposition of time and space’ does not require actual interaction between the parties, but sufficient relation to place plaintiff within reach of defendant’s conduct.”).

20. *Id.* at 246–48, 818 S.E.2d at 812–13.

21. *Id.* at 246, 818 S.E.2d at 812; see also *Dudley*, 241 Va. at 277–79, 401 S.E.2d at 882–83; *Parker v. Debose*, 206 Va. 220, 222–23, 142 S.E.2d 510, 512 (1965).

22. See *Quisenberry*, 296 Va. at 246, 818 S.E.2d at 812; *Dudley*, 241 Va. at 277–79, 401 S.E.2d at 882–83; *Parker*, 206 Va. at 222–23, 142 S.E.2d at 512.

23. See *Quisenberry*, 296 Va. at 238, 818 S.E.2d at 807; Michael Klebanov, *Supreme Court of Virginia Recognizes Employer Liability For “Take Home” Exposure*, JD SUPRA (Feb. 21, 2019), <https://www.jdsupra.com/legalnews/supreme-court-of-virginia-recognizes-60909/> [<https://perma.cc/S8SN-6UF7>].

unclear. Even if the court did act to solidify this lenient definition, the duty requirement presents a failure point that the plaintiffs could altogether avoid under a strict liability regime.

## 2. Standard of Care

The Virginia Model Jury Instructions state that a defendant is “negligent,” or breaches its standard of care, “if the plaintiff proves by a preponderance of the evidence that the product was unreasonably dangerous either for the use to which it would ordinarily be put or for some other reasonably foreseeable purpose” and that condition existed when it left the defendant’s hands.<sup>24</sup> This appears to attach liability for the act of selling a defective product alone, despite any quality control measures or due care taken by the defendant. However, this is not the way standard of care is often described.

Virginia cases state that manufacturers must exercise due care to ensure that a product is reasonably safe for its intended purpose.<sup>25</sup> The Supreme Court of Virginia does not want the standard of care in products liability to encompass “every conceivably foreseeable accident, without regard to common sense or good policy.”<sup>26</sup> Government requirements, industry standard practices, and consumer expectations are said to largely influence the standard of care.<sup>27</sup> The test is an objective assessment of whether the manufacturer exercised ordinary prudence.<sup>28</sup>

Although Virginia cases frequently describe standard of care in this manner, application appears to fall short of these words. Beyond producing a defective product, Virginia does not always

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24. VA. MODEL JURY INSTRUCTIONS - CIVIL, 34.075 (2021).

25. See *Dorman v. State Indus.*, 292 Va. 111, 123, 787 S.E.2d 132, 139 (“The manufacturer is under a duty to exercise ordinary care to design a product that is reasonably safe for the purpose for which it is intended.” (quoting *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975))).

26. *Holiday Motor Corp. v. Walters*, 292 Va. 461, 478, 790 S.E.2d 447, 455 (2016) (emphasis omitted) (quoting *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 149, 501 S.E.2d 393, 397 (1998)).

27. See *Evans v. NACCO Materials Handling Grp.*, 295 Va. 235, 247, 810 S.E.2d 462, 469–70 (2018) (“Governmental safety standards and industry practices are highly relevant on the question of whether the manufacturer’s design was negligent because they permit an inference that the manufacturer exercised (or failed to exercise) ordinary prudence.”).

28. *E.g., Va. Elec. & Power Co. v. Dungee*, 258 Va. 235, 252, 520 S.E.2d 164, 174 (1999) (“The test for negligence is always objective.”).

require a plaintiff to demonstrate a defendant's violation of the standard of care. In *Slone v. General Motors Corp.*, the Supreme Court of Virginia held that summary judgment was improper where the plaintiff pleaded that "the truck cab was unreasonably dangerous, that the unreasonably dangerous condition existed when it left General Motors' possession, and that the possibility of a 'rollover,' a misuse, was reasonably foreseeable on the part of General Motors."<sup>29</sup> This is the basic product defect framework.<sup>30</sup> Breach of the standard of care does not appear as a unique element, but rather is "bound up" within this framework.<sup>31</sup> Under this interpretation, top-of-the-line protections, quality control, or any other careful conduct is insufficient to avoid liability for harm caused by a defective product. The *selling* of a defective product would generate liability, not failing to exercise due care while creating it.

The bound up principle is not recognized by the Supreme Court of Virginia, and many federal court decisions deviate from the trend.<sup>32</sup> Further, while this "bound up" principle observed by the Eastern District appears consistent with holdings of the Supreme Court of Virginia, it conflicts with the state court's language.<sup>33</sup> This conflict could be efficiently resolved by establishing standard of care by statute, or more simply (and to the plaintiff's benefit) by adoption of a strict liability regime.

So long as the absorption of standard of care into the basic product defect framework is not absolute, the plaintiffs must be

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29. 249 Va. 520, 526, 457 S.E.2d 51, 54 (1995); *see also* *Benedict v. Hankook Tire Co.*, 295 F. Supp. 3d 632, 640–41 (E.D. Va. 2018).

30. *See infra* section II.E.

31. *Benedict*, 295 F. Supp. 3d at 640. Recognized by the Eastern District of Virginia, the federal court's observations do not establish Virginia law, but provide a valuable perspective on the trend of the Supreme Court of Virginia's holdings. *Id.* at 640–41; *Aboushaban v. Am. Signature, Inc.*, No. 20-cv-00018, 2021 U.S. Dist. LEXIS 42807, at \*5 (E.D. Va. Feb. 1, 2021) ("[A] defendant manufacturing and selling goods is thought to have violated the standard of care if it 'produces an unreasonably dangerous product that causes injury.'" (quoting *Benedict*, 295 F. Supp. 3d at 640)); *see Benedict*, 295 F. Supp. 3d at 637 ("The basic analytical framework applicable to products liability claims in Virginia is the same whether a plaintiff is bringing a negligence or breach of implied warranty action." (citing *Jeld-Wen*, 256 Va. at 148, 501 S.E.2d at 396 (1998))).

32. *Benedict*, 295 F. Supp. 3d at 644–45 (citing *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 968–69 (4th Cir. 1971)); *see also* *Ball v. Takeda Pharms. Am., Inc.*, 963 F. Supp. 2d 497, 505 (E.D. Va. 2013), *aff'd*, 587 F. App'x 78, at \*78 (4th Cir. 2014) (per curiam); *Young v. J. I. Case Co.*, No. 90CV00630, 1991 U.S. Dist. LEXIS 15816, at \*8 (E.D. Va. June 3, 1991).

33. *Benedict*, 295 F. Supp. 3d at 646–47.



prepared to present evidence of a defendant's conduct that violates ordinary care. In product defect cases this can be difficult and financially demanding. The compiling of the evidence can be prohibitively expensive, the plaintiff may not have access to the necessary facts, or as the Supreme Court of Wyoming explained when it adopted strict liability, in some cases negligence is simply inadequate.<sup>34</sup> Under a negligence theory, if a manufacturer follows due care at every stage of production, it cannot be held liable even if it produces a defective product that causes substantial injury.<sup>35</sup> Finally, negligence actions may be barred by defenses which would not be available to a defendant under a breach of warranty or strict liability claim.<sup>36</sup> Even under the Eastern District's interpretation of Virginia product liability law, tort claims are more expensive, the standard uncertain, and the defenses more daunting than under strict liability.

### B. *Key Characteristics of Virginia Warranty Claims*

The plaintiffs in warranty actions face hurdles that allow manufacturers to avoid liability in many cases if they act in advance. A manufacturer may avoid liability by disclaiming the implied warranties of merchantability and fitness for a particular purpose.<sup>37</sup> Manufacturers may even disclaim express warranties.<sup>38</sup> The U.C.C. permits manufacturers to exclude or modify express or implied warranties.<sup>39</sup>

In some cases, *how* a manufacturer can disclaim warranties is an open question. One conflict is revealed by the Supreme Court of Virginia's holding that a seller can exclude implied warranties of fitness and merchantability in a suit for rescission of an automobile sales contract.<sup>40</sup> However, those disclaimers or limitations are

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34. Ogle v. Caterpillar Tractor Co., 716 P.2d 334, 342 (Wyo. 1986).

35. *Id.*

36. *See infra* section II.F.

37. VA. CODE ANN. §§ 8.2-314 to -316 (Repl. Vol. 2015).

38. *Id.*

39. *See* U.C.C. § 2-316 (AM. L. INST. & UNIF. L. COMM'N 1951); VA. CODE ANN. § 8.2-316 (Repl. Vol. 2015); *see, e.g.*, Twin Lakes Mfg. Co. v. Coffey, 222 Va. 467, 472-73, 281 S.E.2d 864, 867 (1981).

40. Marshall v. Murray Oldsmobile Co., 207 Va. 972, 976-78, 154 S.E.2d 140, 144-45 (1967).

presumptively unconscionable when the case involves a personal injury.<sup>41</sup>

Another hurdle for the plaintiffs in warranty actions may be privity. In most cases, this will not apply because the lack of privity defense is not valid with respect to damages to people or personal property.<sup>42</sup> As stated in the Virginia Code, “Lack of privity between the plaintiff and defendant shall be no defense . . . if the plaintiff was a person whom the manufacturer or seller might reasonably have expected to use, consume, or be affected by the goods.”<sup>43</sup> However, this language does not cover all potential products liability cases. For example, it does not cover pure economic loss where the lack of privity defense may still be available.<sup>44</sup>

In Virginia, pure economic loss results if a product defect only causes a loss in value to itself.<sup>45</sup> In *Sensenbrenner v. Rust*, the Supreme Court of Virginia defined pure economic loss to include economic expectation, damage only to the product itself by the product, and damage to expectations based on duties created by bargaining.<sup>46</sup> Although straightforward, in that same opinion the court confirmed that the privity rules of contract apply for expectation loss caused by breach of contracted-for duties.<sup>47</sup>

### C. *Types of Warranties*

Virginia has adopted provisions of the Uniform Commercial Code and its statutory definitions of three main warranties: express warranties, and the implied warranties of merchantability and fitness for a particular purpose.<sup>48</sup> Under these provisions, an express warranty arises when a “seller” agrees to a bargained-for

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41. *Matthews v. Ford Motor Co.*, 479 F.2d 399, 402 (4th Cir. 1973) (relying on § 8.2-719 (Added Vol. 1965)).

42. VA. CODE ANN. § 8.2-318 (Repl. Vol. 2015); *Sensenbrenner v. Rust, Orling & Neale, Architects, Inc.*, 236 Va. 419, 423, 374 S.E.2d 55, 57 (1988).

43. *See* § 8.2-318.

44. *See Blake Constr. Co. v. Alley*, 233 Va. 31, 33–34, 353 S.E.2d 724, 725–26 (1987) (finding that lack of privity being no defense in cases of injury to person or property does not necessarily suggest a lack of privity defense in cases for pure economic loss). *See generally* *Tingler v. Graystone Homes, Inc.*, 298 Va. 63, 100, 100 n.23, 834 S.E.2d 244, 265, 265 n.23 (2019).

45. *Sensenbrenner*, 236 Va. at 425, 374 S.E.2d at 58.

46. *Id.*

47. *Id.*

48. U.C.C. §§ 2-313 to -315 (AM. L. INST. & UNIF. L. COMM’N 1951); VA. CODE ANN. §§ 8.2-313 to -315 (Repl. Vol. 2015).

warranty provision.<sup>49</sup> 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.”<sup>50</sup> This is the most commonly used warranty in part because it applies if the goods are not of average quality, which is a broad characterization, and is typically the easiest one to argue.<sup>51</sup> Warranty of fitness for a particular purpose arises at the time of contracting only if the seller knows of a specific use the buyer plans to make of the product.<sup>52</sup>

The language from the statute, “merchant with respect to goods of that kind,” implies that these warranties do not apply to casual or occasional sellers.<sup>53</sup> The Supreme Court of Virginia appears to support the notion that the language is narrow, holding in *Smith v. Mooers* that the sale of a used car does not create an implied warranty.<sup>54</sup>

In the case of an implied warranty of fitness for use, evidence that a manufacturer properly exercised due care along every step of production will not allow it to escape liability if the product otherwise breaches the warranty.<sup>55</sup>

Regular wholesalers, distributors, and retailers could also be held liable. For manufacturing defects, a “seller [who] is a merchant with respect to goods of that kind” is held to the implied warranty of merchantability, and thus intermediate sellers can be held liable.<sup>56</sup> This is in part because warranty actions, like strict liability, are focused on the condition of the product, not the conduct of the defendant.<sup>57</sup>

#### D. Causation Requirements

In Virginia, proximate cause means “that act or omission which, in natural and continuous sequence, unbroken by an efficient intervening cause, produces the event, and without which that event

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49. VA. CODE ANN. § 8.2-313 (Repl. Vol. 2015).

50. *Id.* § 8.2-314(1) (Repl. Vol. 2015).

51. GARY J. SPAHN, ROBERT E. DRAIM, DABNEY J. CARR IV, STEPHEN D. OTERO & MELISSA ROBERTS LEVIN, *VIRGINIA LAW OF PRODUCTS LIABILITY* 101–02 (2d ed. 2002).

52. *Id.* at 102; VA. CODE ANN. § 8.2-315 (Repl. Vol. 2015).

53. SPAHN ET AL., *supra* note 51, at 102; VA. CODE ANN. § 8.2-314(1) (Repl. Vol. 2015).

54. 206 Va. 307, 312, 142 S.E.2d 473, 477 (1965).

55. *Brockett v. Harrell Bros.*, 206 Va. 457, 459–60, 143 S.E.2d 897, 900 (1965).

56. § 8.2-314 (Repl. Vol. 2015).

57. SPAHN ET AL., *supra* note 51, at 35.

would not have occurred.”<sup>58</sup> This definition includes cause-in-fact as an element of proof for product liability claims.<sup>59</sup>

For a design defect claim, the plaintiff must show that the injury would not have happened without the defendant’s choice of inferior product design.<sup>60</sup> For a warning defect claim, the plaintiff must show that injury could have been avoided had there been a proper warning.<sup>61</sup> For a manufacturing defect claim advanced under a negligence theory, the plaintiff encounters two “but for” causation issues: the defendant’s negligence must have caused the defect<sup>62</sup> and the defect must have caused the injury.<sup>63</sup> Breach of implied warranty of merchantability merely requires the latter.<sup>64</sup>

A plaintiff must also demonstrate that the defect was the proximate cause of the injury.<sup>65</sup> The Supreme Court of Virginia defines this 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.”<sup>66</sup> In Virginia, this involves considerations of logic, common sense, justice, policy, and precedent.<sup>67</sup> In products liability cases, courts will evaluate whether the injury was foreseeable given the defect.<sup>68</sup> For

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58. *Williams v. Cong Le*, 276 Va. 161, 167, 662 S.E.2d 73, 77 (2008) (quoting *Beverly Enters.-Va. v. Nichols*, 247 Va. 264, 269, 441 S.E.2d 1, 4 (1994)).

59. *See Banks v. City of Richmond*, 232 Va. 130, 135–36, 348 S.E.2d 280, 282–83 (1986) (questioning whether a city’s failure to turn off a gas line was any cause of an explosion given a repairman’s negligent intervention); *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975) (finding that a jury could reasonably conclude 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, 51 S.E.2d 250, 253–54 (1949).

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

61. *See Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 966, 252 S.E.2d 358, 369 (1979).

62. *See, e.g., S. States Coop., Inc. v. Doggett*, 223 Va. 650, 656–57, 292 S.E.2d 331, 335 (1982).

63. *See, e.g., Middlesboro Coca-Cola Bottling Works, Inc. v. Campbell*, 179 Va. 693, 701–02, 20 S.E.2d 479, 482 (1942).

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

65. *Banks v. Richmond*, 232 Va. 130, 135–36, 348 S.E.2d 280, 282–83 (1986).

66. *Williams v. Cong Le*, 276 Va. 161, 167, 662 S.E.2d 73, 77 (2008) (quoting *Beverly Enters.-Va. v. Nichols*, 247 Va. 264, 269, 441 S.E.2d 1, 4 (1994)).

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

68. *See R.B. Hazard, Inc. v. Panco*, 240 Va. 438, 444, 397 S.E.2d 866, 869 (1990); *Swiney*, 237 Va. at 29, 376 S.E.2d at 286. *But see Brockett v. Harrell Bros.*, 206 Va. 457, 459–60, 143 S.E.2d 897, 900 (1965) (considering whether liability should be assigned to the party best situated to prevent the injury).

negligence, what must be foreseeable is that *some* injury would probably occur, not the precise injury that occurred in fact.<sup>69</sup>

Similarly, unforeseeable alternative uses or misuses by the plaintiff might displace the product defect as the proximate cause of injury.<sup>70</sup> The question is whether the plaintiff's behavior is an intervening, superseding cause. If the act supersedes, the defect is not a proximate cause of the injury,<sup>71</sup> unless the defendant should have foreseen a plaintiff intervening in this manner.<sup>72</sup> To constitute a superseding cause, the act must displace any other, such that the plaintiff's act is the only proximate cause of the injury.<sup>73</sup>

### E. *Types of Defects*

#### 1. Manufacturing Defects

For product defect cases in Virginia, the plaintiff must satisfy a two-pronged burden: (1) that the goods were unreasonably dangerous for ordinary use or for a reasonably foreseeable purpose, and (2) that the unreasonably dangerous condition existed when the goods left the defendant's hands.<sup>74</sup> One way a product could be unreasonably dangerous is by a failure in its assembly or manufacture—that is, a manufacturing defect.<sup>75</sup> A manufacturing defect generally exists when a completed product does not conform to its intended design or plan.<sup>76</sup> If such a defect causes injury to a person or property, it creates a cause of action for a breach of an implied warranty of merchantability or for negligence.<sup>77</sup>

An implied breach of warranty can be shown by facts “sufficient to establish that the result alleged is a probability rather than a

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69. Va. Elec. & Power Co. v. Winesett, 225 Va. 459, 468, 303 S.E.2d 868, 874 (1983) (citing VEPCO v. Savoy Const. Co., 224 Va. 36, 46, 294 S.E.2d 811, 818 (1982)).

70. See, e.g., *Swiney*, 237 Va. at 29, 376 S.E.2d at 286.

71. See *Banks v. Richmond*, 232 Va. 130, 136, 348 S.E.2d 280, 283 (1986).

72. See *R.B. Hazard, Inc.*, 240 Va. at 443, 397 S.E.2d at 869; *Scott*, 188 Va. at 817–18, 51 S.E.2d at 253–54.

73. *Kellermann v. McDonough*, 278 Va. 478, 494, 684 S.E.2d 786, 794 (2009).

74. *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975) (first citing *Turner v. Manning, Maxwell & Moore*, 216 Va. 245, 217 S.E.2d 863 (1975); and then citing *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 968 n.1 (4th Cir. 1971)).

75. *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1114 (4th Cir. 1988).

76. 2 LOUIS R. FRUMER & MELVIN I. FRIEDMAN, PRODUCTS LIABILITY § 11.02 (2021).

77. See *Abbot*, 844 F.2d at 1114.

mere possibility.”<sup>78</sup> This may be supported by inferential evidence.<sup>79</sup>

As discussed previously, a case in negligence will encounter a higher burden of proving the defendant’s negligence.<sup>80</sup> A jury may be satisfied that the proof “leads to a conclusion with probable certainty where absolute logical certainty is impossible.”<sup>81</sup> As some authorities have commented, the lighter the certainty of actual negligence required, the closer this standard resembles strict liability tort.<sup>82</sup> However, any requirement of the defendant’s conduct falls short of the standard.

## 2. Design Defects

Under Virginia law, a product is considered defective, or unreasonably dangerous, when the design is done imprudently.<sup>83</sup> This situation may support a claim for breach of implied warranty of merchantability or a tort claim of negligent design.<sup>84</sup> The warranty claim, like strict liability, focuses on the product attributes, while a negligence claim is said to focus on the defendant’s conduct.<sup>85</sup>

In assessing whether a design is defective, the Supreme Court of Virginia assesses whether it conforms to “(1) a government standard, (2) an industry standard, or (3) the reasonable expectations of consumers.”<sup>86</sup> This structure warrants industries some influence over whether their products will be considered defectively designed. However, violation of any of these standards can be sufficient to find a product defective.<sup>87</sup> Complying with all these standards is also not dispositive for the defendant, for instance, if the industry or government rules are nonexistent, or the court determines they are antiquated or do not contribute to increased

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78. *White Consol. Indus., Inc. v. Swiney*, 237 Va. 23, 28, 376 S.E.2d 283, 285 (quoting *S. States Coop. v. Doggett*, 223 Va. 650, 657, 292 S.E.2d 331, 335 (1982)).

79. *See Horton v. W.T. Grant Co.*, 537 F.2d 1215, 1218 (4th Cir. 1976).

80. *See supra* section II.A.

81. *Bly v. S. Ry. Co.*, 183 Va. 162, 176, 31 S.E.2d 564, 570 (1944).

82. *See Abbot*, 844 F.2d at 1114; SPAHN ET AL., *supra* note 51, at 57.

83. *Abbot*, 844 F.2d at 1115.

84. *Id.*; *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 961–65, 252 S.E.2d 358, 366–68 (1979).

85. *Abbot*, 844 F.2d at 1115–16.

86. *Norris v. Excel Indus.*, 139 F. Supp. 3d 742, 747–48 (W.D. Va. 2015); *Evans v. NACCO Materials Handling Grp., Inc.*, 295 Va. 235, 247, 810 S.E.2d 462, 469–70 (2018).

87. *Norris*, 139 F. Supp. 3d at 747–48.

safety.<sup>88</sup> The plaintiff may also present expert testimony to establish the existence of an industry standard.<sup>89</sup> Checks like these are important to protect public safety when industry standards lag behind.

In comparison, the Fourth Circuit, construing Virginia law, sets out a risk/utility balancing test similar to that applied by many courts that have adopted strict liability.<sup>90</sup> Factors considered include: likelihood of harm caused by the design, gravity of such harm, and the burden of effective precautions.<sup>91</sup> If the cost to redesign a safer product is low, the manufacturer has a duty to do so.<sup>92</sup> The Supreme Court of Virginia has neither challenged nor adopted the Fourth Circuit's application of this balancing test.

In summary, the Fourth Circuit's risk/utility balancing test does not harmonize with Virginia law. The Supreme Court of Virginia could, but has chosen not to, adopt this additional avenue to recovery itself.<sup>93</sup> A risk/utility balancing test not only incentivizes manufacturers to engage in the safest design practices, but also incentives against introducing grossly dangerous products into the market at all. If adopted by Virginia, the Fourth Circuit's risk/utility balancing test could provide Virginians the protection of incentivizing industry to engage in best design practices.

### 3. Warning Defects

The Supreme Court of Virginia has adopted section 388 of the Restatement (Second) of Torts as the standard for when a product is defective for lack of a warning.<sup>94</sup> This rule holds that a

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88. *Evans*, 295 Va. at 247, 810 S.E.2d at 469–70.

89. *See* *Holiday Motor Co. v. Walters*, 292 Va. 461, 481, 790 S.E.2d 447, 457 (2016); *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 430, 297 S.E.2d at 675, 679 (1982).

90. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071–73 (4th Cir. 1974) (considering price, type of vehicle, utility, market audience, and increased safety of an alternative design as factors for whether a manufacturer had a duty to adopt such a design); *see also* *Lust v. Clark Equip. Co.*, 792 F.2d 436, 439–40 (4th Cir. 1986).

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

92. *Bly*, 713 F.2d at 1043; *Dreisonstok*, 489 F.2d at 1073.

93. *Norris v. Excel Indus.*, 139 F. Supp. 3d 742, 754 (W.D. Va. 2015); *Evans*, 295 Va. at 246–48, 810 S.E.2d at 469–70.

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

manufacturer or seller of a good is subject to liability for personal injury to foreseeable consumers if the manufacturer or seller

- (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.<sup>95</sup>

The seller has a duty to warn if it knows or should know of a risk of danger and/or if it foresees that users might misuse a product with its attendant unknown risks.<sup>96</sup> Essentially, the duty to warn triggers when the manufacturer or seller is aware of a hidden risk.<sup>97</sup> One example is *Featherall v. Firestone Tire & Rubber Co.*, in which the Supreme Court of Virginia held that a manufacturer of pressure regulators should have foreseen that consumers might remove a detachable locknut.<sup>98</sup> The Court found that the manufacturer knew the danger that removing the locknut posed, this danger was not obvious, and users were unlikely to understand that danger.<sup>99</sup> Therefore, the manufacturer had a duty to warn against the locknut's removal.<sup>100</sup>

Unavoidably hazardous products are considered unreasonably dangerous if not supplied with "adequate warnings about its hazardous properties."<sup>101</sup> A warning is adequate if reasonable, which is a question submitted to the jury.<sup>102</sup> In *McClanahan v. California Spray-Chemical Corp.*, where a statute required a warning on insecticides, the Supreme Court of Virginia stated that a warning or instruction had to describe the danger well enough to promote its safe use, not just explain how to use it.<sup>103</sup>

In *Spruill v. Boyle-Midway, Inc.*, a case limited to inherently dangerous products, the Fourth Circuit issued a two-part test for what constitutes an adequate warning: (1) that it is conspicuous in

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95. § 388.

96. 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.

97. See *Featherall*, 219 Va. at 966, 252 S.E.2d at 369.

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

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

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

101. *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1115 (4th Cir. 1988).

102. See *Pfizer, Inc. v. Jones*, 221 Va. 681, 683–84, 272 S.E.2d 43, 44–45 (1980); *Abbot*, 844 F.2d at 1115.

103. 194 Va. 842, 850, 861, 75 S.E.2d 712, 717, 723 (1953).



form to catch the attention of the user, and (2) that it communicates the extent and nature of the danger.<sup>104</sup> However, there is no requirement to warn of obvious dangers in warranty<sup>105</sup> or “open and obvious” danger in negligence.<sup>106</sup> Moreover, if the ultimate buyers or users are sophisticated users (experienced or knowledgeable of the dangers associated with the product), there is no duty to warn.<sup>107</sup>

#### F. *Defenses in Negligence and Warranty*

The primary defenses provided in Virginia law to products liability claims are assumption of risk, contributory negligence, lack of privity, and unforeseeable product misuses.

##### 1. Implied Assumption of Risk

The Supreme Court of Virginia has held implied assumption of risk to be a valid defense in negligence actions.<sup>108</sup> The Fourth Circuit has gone further and applied it to warranty actions.<sup>109</sup> Assumption of risk is conduct that is venturous—that of a bold character or daredevil—and is assessed on a subjective basis.<sup>110</sup> This is distinct from contributory negligence, which is carelessness judged under the objective standard of a prudent person.<sup>111</sup> Two elements are required to prove assumption of risk: (1) that the plaintiff fully appreciated the nature and extent of risk, and (2) that the plaintiff voluntarily incurred that risk.<sup>112</sup> It is not enough for a plaintiff to know that a product is defective, they must also comprehend the

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104. 308 F.2d 79, 83–84 (4th Cir. 1962); *see* Spangler v. Kranco, Inc., 481 F.2d 373, 374 (4th Cir. 1973).

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

106. *See, e.g.*, Artrip v. E.E. Berry Equip. Co., 240 Va. 354, 358, 397 S.E.2d 821, 823 (1990).

107. CHARLES E. FRIEND & KENT SINCLAIR, PERSONAL INJURY LAW IN VIRGINIA § 22.3 (4th ed. 2020) (citing *Marshall v. H.K. Ferguson Co.*, 623 F.2d 882 (4th Cir. 1980)).

108. *See* *White Consol. Indus., Inc. v. Swiney*, 237 Va. 23, 29–30, 376 S.E.2d 283, 286 (1989).

109. *Lust v. Clark Equip. Co.*, 792 F.2d 436, 439 (4th Cir. 1986) (citing RESTATEMENT (SECOND) OF TORTS § 388 (AM. L. INST. 1965)). *But see Swiney*, 237 Va. at 29–30, 376 S.E.2d at 286–87.

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

111. *Id.*, at 818–19, 232 S.E.2d at 805.

112. *See* *Nelson v. Great E. Resort Mgmt.*, 265 Va. 98, 103–04, 574 S.E.2d 277, 280 (2003); *Landes v. Arehart*, 212 Va. 200, 202–03, 183 S.E.2d 127, 129 (1971).

danger involved in using the product in its defective condition.<sup>113</sup> The burden is on the defendant to prove assumption of the risk, but whether the defense applies is a question of law, and whether the plaintiff fully appreciated the nature and extent of the risk is usually a question of fact for the jury.<sup>114</sup>

To avoid losing on a strong assumption of risk case, a plaintiff may show that they did not know of or understand the risk, rendering assumption of the risk impossible.<sup>115</sup> It appears that assumption of risk has not been used in any defective design case, but it may be an unspoken factor in the risk/utility balancing standard applied by the Fourth Circuit.<sup>116</sup>

## 2. Contributory Negligence

Contributory negligence is a complete bar to recovery in negligence actions.<sup>117</sup> “A defendant is not liable if the plaintiff was guilty of negligence which proximately contributed to his injury.”<sup>118</sup> While contributory negligence does not apply in warranty actions, such conduct may be raised as evidence that the plaintiff did not rely on the warranty.<sup>119</sup>

Unlike assumption of risk, contributory negligence is usually found when a plaintiff “overlooks an obvious danger or misuses the product in some manner.”<sup>120</sup> Whether a plaintiff was negligent enough to have proximately contributed to the injury is a decision for the judge.<sup>121</sup> However, if reasonable minds could differ, the question goes to the jury.<sup>122</sup>

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113. See *Swiney*, 237 Va. at 30, 376 S.E.2d at 286 (quoting *Amusement Slides*, 217 Va. at 819, 232 S.E.2d at 805).

114. *Lust*, 792 F.2d at 440.

115. See *McClanahan v. Cal. Spray-Chem. Corp.*, 194 Va. 842, 863, 75 S.E.2d 712, 724–25 (1953).

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

117. *Jones v. Meat Packers Equip. Co.*, 723 F.2d 370, 373 (4th Cir. 1983); *FRIEND & SINCLAIR*, *supra* note 107, § 22.6.

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

119. *FRIEND & SINCLAIR*, *supra* note 107, § 22.6; *White Consol. Indus., Inc. v. Swiney*, 237 Va. 23, 24, 376 S.E.2d 283, 283–84 (1989); *Jones*, 723 F.2d at 373; *Brockett v. Harrell Bros.*, 206 Va. 457, 462–63, 143 S.E.2d 897, 902 (1965).

120. *FRIEND & SINCLAIR*, *supra* note 107, § 22.6.

121. See *Bly v. Otis Elevator Co.*, 713 F.2d 1040, 1042 (4th Cir. 1983).

122. See *Antrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 397 S.E.2d 821 (1990).

The jury typically decides whether contributory negligence was present in a case.<sup>123</sup> This decision is analyzed differently depending on the type of defect in question. For design and warning cases, the court looks at the plaintiff's conduct separately—the warning may be defective, but the jury is still permitted to find that the plaintiff's conduct constitutes contributory negligence.<sup>124</sup> For manufacturing defects, Virginia usually analyzes cases under a warranty theory, and thus, contributory negligence would not apply.<sup>125</sup>

Regardless of whether a plaintiff's behavior ultimately constitutes contributory negligence or assumption of the risk, if a danger is "known, visible, or obvious" to the plaintiff, liability does not attach in negligence or implied warranty cases.<sup>126</sup>

### 3. Product Misuse

Manufacturers generally cannot be held liable if a product was misused—that is, used in some way other than what the makers intended or in an incorrect manner.<sup>127</sup> Manufacturers will only be held liable in misuse cases if the unintended use is reasonably foreseeable.<sup>128</sup> This can include modification of a product if it is foreseeable<sup>129</sup> and a proximate cause of the injury.<sup>130</sup> Unforeseeable the plaintiff misuse of a product bars recovery in both negligence and warranty actions.<sup>131</sup> When the defense of misuse applies, it is

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123. FRIEND & SINCLAIR, *supra* note 107, § 22.6; *see Bartholomew*, 224 Va. at 432, 297 S.E.2d at 681; *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979); *Rome v. Kelly Springfield Tire Co.*, 217 Va. 943, 234 S.E.2d 277 (1977).

124. *Featherall*, 219 Va. at 967–68, 252 S.E.2d at 370; *Bartholomew*, 224 Va. at 432–33, 297 S.E.2d at 680–81.

125. *See generally* SPAHN ET AL., *supra* note 51, at 58–59.

126. *See, e.g.*, *Wood v. Bass Pro Shops*, 250 Va. 297, 300–01, 462 S.E.2d 101, 103 (1995) (quoting *Brockett v. Harrell Bros.*, 206 Va. 457, 463, 143 S.E.2d 897, 902 (1965)).

127. *See, e.g.*, *Dorman v. State Indus.*, 292 Va. 111, 124, 787 S.E.2d 132, 140 (2016); *Cooper Indus., Inc. v. Melendez*, 260 Va. 578, 590, 537 S.E.2d 580, 587 (2000); *White Consol. Indus., Inc. v. Swiney*, 237 Va. 23, 29, 376 S.E.2d 283, 286 (1989); *Featherall*, 219 Va. at 964, 252 S.E.2d at 367; *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 251, 217 S.E.2d 863, 868 (1975); *Layne-Atlantic Co. v. Koppers Co.*, 214 Va. 467, 473–74, 201 S.E.2d 609, 614 (1974).

128. *See Logan v. Montgomery Ward & Co.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975).

129. *Morgen Indus. v. Vaughan*, 252 Va. 60, 65–66, 471 S.E.2d 489, 492–93 (1996).

130. *See id.*

131. *See Swiney*, 237 Va. at 29, 376 S.E.2d at 286.

usually raised under a contributory negligence defense<sup>132</sup> or independently in a breach of an implied warranty case.<sup>133</sup>

The product misuse defense can be used in two ways. First, a defendant can raise the misuse as a proximate cause issue in that the plaintiff has not been harmed by the *defect*, but by their own actions (although, this essentially constitutes either a proximate cause or contributory negligence defense).<sup>134</sup> This is the most commonly used method because the burden of proof remains with the plaintiff.<sup>135</sup> Second, a defendant may argue that misuse of a product bars a plaintiff's claim because it shows they did not rely on the warranty.<sup>136</sup>

### III. IMPLEMENTING STRICT LIABILITY IN VIRGINIA

#### A. *Virginia Products Liability Law Requires Reform*

Several major uncertainties persist in Virginia products liability law that are covered in greater detail throughout this Comment:

1. the expansion of duty under *Quisenberry v. Huntington Ingalls, Inc.*, appears broad enough to cover any person who receives a defective product in the ordinary chain of distribution, even bystanders, but this case was decided by a narrowly divided four-to-three court that has since changed composition;

2. heightened proof requirements are often recited in Virginia negligence cases, but are less frequently applied; and

3. federal and state courts apply different standards in cases with similar facts even though both purport to apply Virginia law.<sup>137</sup>

These issues can be resolved by a narrow statute. Strict liability may not be necessary to resolve each one. However, resolution of

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132. See *Wood v. Bass Pro Shops*, 250 Va. 297, 300–01, 462 S.E.2d 101, 103 (1995) (citing *Brockett v. Harrell Bros.*, 206 Va. 457, 462–63, 143 S.E.2d 897, 902 (1965)).

133. See, e.g., *Wood*, 250 Va. at 301, 462 S.E.2d at 103; *Ford Motor Co. v. Bartholomew*, 224 Va. 421, 432, 297 S.E.2d 675, 680–81 (1982); *Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 964, 252 S.E.2d 358, 367 (1979) *Layne-Atlantic Co. v. Koppers Co.*, 214 Va. 467, 473, 201 S.E.2d 609, 614 (1974).

134. See, e.g., *Featherall*, 219 Va. at 962, 252 S.E.2d at 366–67.

135. SPAHN ET AL., *supra* note 51, at 156.

136. See *Swiney*, 237 Va. at 28, 376 S.E.2d at 286.

137. *Supra* Part II.

these uncertainties would increase the efficiency of Virginia law, and strict liability is the most comprehensive solution for each issue.<sup>138</sup> Even if these concerns were resolved in isolation, the proof requirement for negligence may close the door on some plaintiffs who cannot pursue their claims under a warranty theory.<sup>139</sup> Although the gap may be covered by stretching breach of warranty doctrine or using the “bound up” application of negligence, such a result might be better addressed in the open.<sup>140</sup>

### B. *Strict Liability is a Comprehensive Solution*

The highest courts and legislatures in forty-five states adopted strict liability for a variety of public policy reasons. Many of these were initially addressed by Justice Traynor in his revered concurring opinion in *Escola v. Coca Cola Bottling Co.* and were ultimately adopted in *Greenman v. Yuba Power Products, Inc.*<sup>141</sup> Strict liability places responsibility at the feet of manufacturers because they can best bear it. Manufacturers are best situated to mitigate the harm defective products create.<sup>142</sup> They can better anticipate the danger and spread the costs of injury through increased prices for their products.<sup>143</sup> In the years since the publication of the Restatement (Third) of Torts in 1998, and the renewed push for strict liability, insurer surpluses first stalled, but eventually levelled out.<sup>144</sup> This manageable reaction indicates that insurers are not feeling an unwieldy growth in tort expenses from the expansion of strict liability. Manufacturers have better expertise, and under strict liability, an incentive to strike the practical balance between creating products consumers want and including more safety precautions.

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138. See Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2513–14 (2013).

139. See *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 342 (Wyo. 1986).

140. *Benedict v. Hankook Tire Co.*, 295 F. Supp. 3d 632, 640–41 (E.D. Va. 2018); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

141. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (citing *Escola*, 150 P.2d at 440–41 (Traynor, J., concurring)).

142. *Escola*, 150 P.2d at 440–41 (Traynor, J., concurring).

143. *Id.*

144. See J. ROBERT HUNTER & JOANNE DOROSHOW, AMS. FOR INS. REFORM, REPEAT OFFENDERS: HOW THE INSURANCE INDUSTRY MANUFACTURES CRISES AND HARMS AMERICA 3 (2011), <https://centerjd.org/content/study-repeat-offenders-how-insurance-industry-manufactures-crisis-and-harms-america> [<https://perma.cc/9BWN-Y2JE>].

Modern consumers do not always possess the means or knowledge to test products, let alone the fact that products are often sold in sealed containers.<sup>145</sup> Consumers rely on the trademark and reputation of the manufacturer.<sup>146</sup> High courts and legislatures in forty-five other states generally agree that it is better to protect consumers from injury even if the cost is tighter margins for manufacturers and fewer products on the market.<sup>147</sup> Further, strict liability also deters manufacturers, to some extent, from putting dangerous products on the market at all.<sup>148</sup> Overall, the doctrine both reduces the risk that a consumer will ever encounter a defective product and protects a consumer's ability to recover if they are harmed.

### C. Proposed Strict Liability Statute for Virginia

Of the strict liability constructions, section 402A of the Restatement (Second) of Torts presents language that is similar to Virginia's basic products liability framework.<sup>149</sup> Further, 402A offers a simple platform that can evolve as necessary while allowing attorneys to litigate the cause of action with some measure of confidence.<sup>150</sup> As an example, I have drafted a sample statute below with language modeled after 402A that would adopt strict liability:

- (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) the product 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 its product, and

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145. *Escola*, 150 P.2d at 443 (Traynor, J., concurring).

146. *See Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 149–50 (N.J. 1979); *Escola*, 150 P.2d at 443 (Traynor, J., concurring).

147. *See Escola*, 150 P.2d at 440–43 (Traynor, J., concurring); Graham, *supra* note 2, at 578 n.161.

148. *See Escola*, 150 P.2d at 440 (Traynor, J., concurring).

149. *See* RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST. 1965).

150. *See Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 341 (Wyo. 1986) (citing § 402A).

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

(3) A product may be demonstrated to be in a defective condition unreasonably dangerous in its design when the foreseeable risk of harm could have been reduced or avoided by:

(a) compliance with:

- (i) statutes or regulations,
- (ii) industry standards, or
- (iii) reasonable consumer expectations;

(b) adoption of a reasonable alternative design; or

(c) not selling the product if the product's risks outweigh its utility.

(4) The rule stated in subsection (1) does not apply if:

(a) the product is reasonably safe for its intended or a reasonably foreseeable purpose; or

(b) the injured individual assumed the risk by:

- (i) gaining a full appreciation for the nature and extent of risk, and
- (ii) voluntarily incurring that risk.

(5) No part of this section shall be construed to limit a person's right to pursue product defect claims under a theory of breach of contract.

This language adopts strict liability in Virginia. It removes duty and standard of care as any obstacle to the plaintiff's recovery. The main work of the bill is accomplished by the elimination of the proof requirement otherwise required in negligence claims.<sup>151</sup> This statute does not modify the definition of a manufacturing defect or change when a warning is required because they are not matters of concern. There is no need to adopt the Restatement (Third) of Torts definition of a manufacturing defect that already differs little from Virginia's.<sup>152</sup> The Third Restatement's defective warning test would also cause disruption without clear evidence of any payoff.

The first of the additions to section 402A's basic construction is subsection (3), which defines the avenues by which a plaintiff can demonstrate a product is defective in its design. Current methods recognized by the Supreme Court of Virginia are maintained. Violation of any of the standards under subsection (3)(a) is sufficient to attach liability. The addition of reasonable alternative design

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151. See *Dorman v. State Indus.*, 292 Va. 111, 124, 787 S.E.2d 132, 140 (2016). *But see* *Benedict v. Hankook Tire Co.*, 295 F. Supp. 3d 632, 640–41 (E.D. Va. 2018).

152. RESTATEMENT (THIRD) OF TORTS § 2 (AM. L. INST. 1998).

and risk/utility language present a plaintiff with more opportunity to win meritorious claims. This incorporates the innovative potential of reasonable alternative design into Virginia law.<sup>153</sup>

Overall, this subsection creates a hybrid of the methods adopted by other states.<sup>154</sup> The main impact is that manufacturers would have incentive to innovate product safety measures. The government, industry, and consumer expectation standards Virginia currently uses could quickly become outdated. Once a manufacturer believes they are within the standard, there is little incentive to innovate. Reasonable alternative design and a risk/utility analysis may both provide a check on industry to push the safety standards of their products.

Subsection (4) maintains the defenses of implied assumption of risk and product misuse but does not recognize contributory negligence or comparative fault. If a manufacturer created a defective product, a plaintiff's foreseeable behavior should not bar their recovery. Of course, so far as a plaintiff's negligence amounts to one of the two valid defenses or otherwise undermines the elements of the plaintiff's own claim, the defendants will be protected from liability.

Subsection (5) is a provision to avoid subsuming warranty claims. Strict liability should present an easier avenue for the plaintiffs to recover damages than breach of warranty, but a plaintiff may have their own reasons not to pursue a strict liability cause of action. One incentive is Magnuson-Moss, a federal statute that attaches to certain state warranty claims and allows a plaintiff to recover attorney's fees from a defendant.<sup>155</sup> A new Virginia statute should not restrict a plaintiff's current options for recovery.

## CONCLUSION

Over decades, Virginia products liability law has taken some steps that edge closer toward a strict liability standard. With the removal of privity, adoption of the Uniform Commercial Code, and broad expansion of duty, Virginia is gradually falling in line with modern norms of product liability law. Adopting a statute would

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153. *See supra* Part II.

154. Graham, *supra* note 2, at 578 n.161.

155. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 2310(d); *see also* *Iuorno v. Ford Motor Co.*, 40 Va. Cir. 387, 387 (1996).



accelerate this process and clarify the disparities that have arisen between the Supreme Court of Virginia and the federal courts' application of Virginia law. The General Assembly has drastically shifted and is eager to make changes. If the General Assembly implements a narrow statute, or even comprehensively adopts strict liability by statute, it would not be alone. Virginia would join forty-five sister states in adopting strict liability.

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