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A Doctrine By Any Other Name: The Putative Rejection of "Crashworthiness" in Virginia Products Liability Law

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FEW issues in the modern law of products liability are as practically important and yet as conceptually confused as how to take product misuse into account when determining if a plaintiff may recover for a product-related injury. In some jurisdictions, misuse is treated as an affirmative defense,[1] while in others, a plaintiff must disprove misuse of the product as part of the prima facie case.[2] Even more troublesome is the variation among the states regarding what conduct by a product user constitutes misuse. The variables can include such matters as whether the use is one to which the product is intended to be put (e.g., are all unintended uses "misuses?"), whether the use is reasonably foreseeable (e.g., are reasonably foreseeable but unintended uses "misuses," or are they instead simply foreseeable uses?), whether the product has been put to its unintended use by the accident victim or a third party (e.g., does the "misuse" operate as a plaintiff's conduct defense, or as a matter of whether the product was defective, or as a matter of whether the defective condition is a proximate cause of the harm?), and whether the use is unreasonably dangerous (e.g., does the way the product was used have to constitute negligence before it is treated as a "misuse?").

Furthermore, the role that product misuse plays in any given case depends to a considerable extent on the kind of defectiveness allegation — a manufacturing flaw, a design defect, or a failure to instruct and warn adequately — that is being made. The obligation to design a product to be reasonably safe when misused in a foreseeable manner can be distinguished from the obligation to warn about use in an unintended but foreseeable manner. One might imagine, for instance, a products liability plaintiff being successful in establishing a design defect claim that a vehicle should provide greater protection in the event of a collision, but not being successful in establishing a marketing defect claim that the manufacturer should have warned against letting the vehicle become involved in a collision.

The strongest lesson that emerges from the product misuse cases is that the terminology that courts use can be an unreliable guide to the ways that the issues are resolved. In a recent case, *Slone v. General Motors Corp.*,[3] the Supreme Court of Virginia waded into the conceptual thicket of product misuse. The Court emerged with a doctrinal position about a product manufacturer's design defect liability that is sound as a matter of both law and policy, but that position needs to be carefully distinguished from the potentially misleading language in which it was announced.

The plaintiff, Dolor Slone, owned and operated a dump truck consisting of a cab and chassis manufactured by the defendant General Motors Corporation, a dump bed manufactured by the defendant Fontaine Body & Hoist Company, and an overhanging cab shield manufactured and installed by an unknown party. Mr. Slone was injured in an accident that occurred at a Virginia Department of Transportation depot, where he was dumping a load of gravel. Pre-trial discovery about the accident indicated that the ground at the edge of a ramp collapsed while the truck was still some distance from the edge, causing the truck to overturn in a backwards flip, and seriously injuring Mr. Slone as the cab of the truck was crushed. He settled his action against an employee of the depot, leaving the products liability claims against General Motors and Fontaine. The Circuit Court granted the defendants' motion for summary judgment. The Supreme Court of Virginia unanimously upheld the summary judgment in favor of Fontaine but, by a 5-2 vote, the Court reversed the summary judgment entered for General Motors and remanded the case for further proceedings.

In the context of design defectiveness litigation regarding motor vehicles, a well-established doctrine of "crashworthiness" requires that the manufacturer's design obligation includes taking reasonable efforts to protect a vehicle's occupants when the vehicle is involved in a collision. If that doctrine were to be articulated in the terminology of product misuse, it would simply reflect the undeniable reality that exposure to the risk of collision is an inevitable part of the environment in which vehicles are used, and thus involvement in a collision would be designated as a reasonably foreseeable misuse of the product for which reasonable design measures must be taken. After some initial hesitation,[4] the inclusion of a crashworthiness element in vehicle manufacturers' design obligations has been part of the law of products liability in this country for nearly thirty years.[5]

The *Slone* decision purported to reject a crashworthiness doctrine for Virginia. Writing for a majority of the Court, Justice Hassell stated that "[w]e find no reason to confuse our well-settled jurisprudence by injecting the doctrine of 'crashworthiness' and, therefore, we reject this doctrine."[6] If that language of the opinion were taken at face value, it could mean that occupants of vehicles involved in collisions were to be denied the benefit of safety precautions that reasonable care

on the part of manufacturers would require to be built into the design of the vehicles. Fortunately for Virginia consumers, the Court's decision in *Slone* actually operates in a much more reasonable fashion than the crashworthiness-rejecting language might indicate.

The quite unremarkable position taken by the majority in *Slone* is that a products liability plaintiff must prove that the product was "unreasonably dangerous either for the use to which [it] would ordinarily be put or for some other reasonably foreseeable purpose."[7] In previous cases, the Court said, it had "implicitly recognized that a manufacturer may be held liable for the foreseeable misuse of its product."[8] *Slone* makes explicit that earlier implicit recognition, but without stating that recognition in terms of a requirement that the vehicle must be reasonably crashworthy.

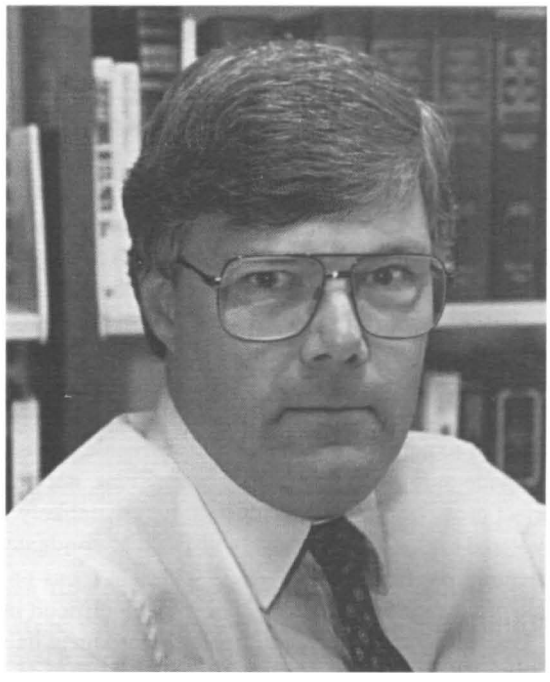
One might reasonably ask whether it makes any difference whether the language in which courts couch their decisions corresponds to the practical operation of those decisions. The suggestion that it ought to matter can be based on a number of grounds. For one thing, this is a court that has displayed considerable sensitivity to linguistic precision.[9] The notion of "crashworthiness" is sufficiently a matter of ordinary language meaning — and sufficiently distinguishable from a notion of "crash-proof" — that the Court might have conceded that a doctrine under that name is appropriately part of the law of products liability in this state. More significantly, perhaps, others may rely exclusively on the unqualified language about rejecting the crashworthiness doctrine and pay insufficient attention to the nuances of the more carefully constructed doctrine that is actually being applied. An example of this latter phenomenon occurred at the 1995 meeting of the American Law Institute, where Virginia was identified during the floor debate on the latest Tentative Draft of the Restatement (Third) of Torts: Products Liability as having just rejected crashworthiness. That statement is literally correct, but without considerable amplification, the statement offers a misleading impression of the state of design defectiveness litigation in Virginia.

The dissenting opinion in *Slone* offers a *reductio ad absurdum* argument against the recognition of a design obligation to make a vehicle reasonably safe in the event of a collision. Justices Compton and Whiting hypothesized that because "a truck could be negligently driven into water," a manufacturer might be required "to equip the vehicle with pontoons."[10] In the absence of buoyancy being precisely what was demanded of a vehicle manufacturer, as in the case of the armed forces contracting with a manufacturer to produce a vehicle that can be driven on land and also floated across bodies of water, one could conclude that an encounter between a vehicle and a body of water is something for which the manufacturer has no design obligation.

A slight variation of the dissenters' pontoon example will realistically illustrate the extent of the reasonable design obligation that is imposed on vehicle manufacturers. Suppose that a particular feature of a line of vehicles is the sudden and immediate inoperability of a seat belt release mechanism when the mechanism is submerged in water. It is, of course, not going to be true that the car has to be designed so that it will never be submerged. But could one responsibly suggest that a reasonable measure would not be demanded as part of the design obligation to identify and correct this design feature, recognizing that one of the foreseeable accident scenarios of vehicle use is the submersion of vehicles in water?

This illustration also supports another important lesson concerning contemporary products liability litigation. The defectiveness of a product is a necessary element in a products liability claim, but proving defectiveness is insufficient to impose liability. When the focus is on the defectiveness of a design feature, as it was in *Slone*, it is important to understand that defectiveness is only one of a number of critical elements in litigation that includes not only the rest of the plaintiff's prima facie case but also a range of affirmative defenses that look at the plaintiff's conduct.

For one thing, the defect must be causally related to the harm in a way that satisfies both cause-in-fact and proximate cause requirements. Suppose, for example, that the occupant of a car was rendered unconscious by an impact prior to the vehicle being submerged, and could not have tried to get the seat belt unfastened. The inoperability of the seat belt release mechanism would still be a product design defect, but in this scenario,



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it would be a defect that was not causally related to the harm to the occupant. Furthermore, affirmative defenses can come into play to reduce or (in this state) to bar a product victim's recovery. Even a defect that is a proximate cause of a plaintiff's harm would not be the basis of liability if the plaintiff was negligent and that negligence was a substantial factor in producing the injury.

An examination of *Slone* reveals a clear and a limited point. The clear point is this: Manufacturers of motor vehicles have to take into account the environment in which their products will be used, and in a society in which fifty thousand people die each year in traffic accidents, that environment unquestionably includes involvement in collisions. The limited point is this: The design obligation to protect occupants of vehicles — whether it is described as crashworthiness or simply as a requirement to anticipate reasonably foreseeable misuses — is to provide only reasonable safety precautions, not to build in perfect protection from risks that are highly unlikely to be encountered or that are excessively difficult to eliminate.

Litigating products liability cases with that focus on reasonable protection should not be conceptually difficult in this state. Over the last thirty years, while the products liability train around the nation has roared off down the tracks of strict liability in tort, Virginia has remained on the fault-based tort platform. Now, given the reform measures that have been adopted by many state legislatures, proposed in Congress, and are being written into the latest version of the Restatement of Torts, it is evident that the momentum toward strict liability has diminished. Indeed, it appears that the strict liability train that Virginia refused to board seems to be limping back into the fault-based liability station.

The most important defining characteristic of the newly-emerging national consensus on design defect determinations is that those determinations should consider whether a reasonable alternative design for the product would have eliminated foreseeable risks.[11] That characteristic of a design defect is virtually impossible to distinguish from a determination that the product was negligently designed.[12]

The decision in *Slone* simply acknowledges that a legitimate issue in a products liability case is whether reasonable care was exercised in the design of a vehicle to protect an occupant from an unreasonable risk of harm in the event of a reasonably foreseeable accident. That is not to say that the cab of this dump truck must have been strong enough to withstand the crushing force that it was subjected to in this accident — that is a matter of proof for the plaintiff to offer.[13] It is to say, however, that the structural integrity of the cab does not disappear from the manufacturer's design responsibility simply because the truck was involved in an unintended flip. The *Slone* decision is comfortably located, historically and conceptually, within this state's long-standing refusal to apply strict liability in tort, and is perfectly consistent with a commitment to recognizing manufacturer liability for culpable design choices.

ENDNOTES

1. *See, e.g.*, Bowling v. Heil Co., 31 Ohio St. 3d 277, 282, 511 N.E.2d 373, 377 (1987): "Currently, two affirmative defenses based upon a plaintiff's misconduct are recognized. ... [A] defendant is provided with a complete defense if the plaintiff misused the product in an unforeseeable manner."

2. *See, e.g.* Hughes v. Magic Chef, Inc., 288 N.W.2d 542, 545 (Iowa 1980): "Misuse is not an affirmative defense but rather has to do with *an element of the plaintiff's own case.*" (emphasis in original).

3. 249 Va. __, 457 S.E.2d at 51 (1995).

4. Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), *cert. denied,* 385 U.S. 836 (1966).

5. The leading case adopting a crashworthiness requirement is Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). The Evans case cited in the previous note was overruled in Huff v. White Motor Corp., 565 F.2d 104 (7th Cir. 1977).

6. 249 Va. at __, 457 S.E.2d at 53.

7. Id. at __, 457 S.E.2d at 54, quoting from Logan v. Montgomery Ward, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975).

8. *Id.* at __, 457 S.E.2d at 54.

9. *See, e.g.,* Merillat Industries, Inc. v. Parks, 246 Va. 429, 436 S.E.2d 600 (1993) (employee's injury resulting from repetitive stress was neither an "injury by accident" nor a "disease" and thus was not within the scope of the workers' compensation system).

10. 249 Va. at __, 457 S.E.2d at 56 (dissenting opinion).

11. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (Tentative Draft No. 2, 1995): "A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design ... and the omission of the alternative design renders the product not reasonably safe."

12. Some strictness could be retained under the proposed Restatement provision if liability were to be extended to sellers other than the party whose conduct was actually negligent in the design of the product.

13. The dissenting opinion illustrates the critical importance of how the misuse is described. The dissenters focused on the collapse of the ramp, and treated that as an event that was not foreseeable to the manufacturer of the truck.

The more appropriate question to ask, however, is whether the forces to which the cab of the truck was subjected were similar to those that would be encountered in a collision that involved a rollover. If that question is answered in the affirmative, then the allegedly surprising nature of the sequence of events in the instant case would not relieve the manufacturer of the obligation to take reasonable measures to protect the occupants from those forces.