REPORT OF THE JOINT SUBCOMMITTEE

OF THE HOUSE AND SENATE COMMITTEES FOR

COURTS OF JUSTICE ON PRODUCTS LIABILITY

TO

THE GOVERNOR

AND

THE GENERAL ASSEMBLY OF VIRGINIA

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Report of the Joint Subcommittee

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Courts of Justice on Products Liability

To

The Governor and the General Assembly of Virginia

Richmond, Virginia

December, 1979

To: Honorable John N. Dalton, Governor of Virginia
and
The General Assembly of Virginia

It being the judgment of the General Assembly that a study on matters pertaining to the laws of products liability was necessary and prudent, the 1977 General Assembly adopted House Joint Resolution No. 239, establishing the Joint Subcommittee on Products Liability to be composed of members of the House and Senate Committees for Courts of Justice.

Pursuant to the Resolution, the Chairman of the House Committee on Courts of Justice, Delegate George E. Allen, Jr., appointed himself and Delegates Joseph a. Leafe, Norfolk, C. Hardaway Marks, Hopewell, Theordore V. Morrison, Jr., Newport News and A. L. Philpott, Henry. Senator William F. Parkerson, Jr., Chairman of the Senate Committee appointed himself and Senators Herbert H. Bateman, Newport News, Frederick C. Boucher, Abingdon, Joseph V. Gartlan, Jr., Alexandria and Dudley J. Emick, Jr., Fincastle. At its organizational meeting, the Joint Subcommittee elected Delegate Philpott as Chairman. The Joint Subcommittee has held hearings in Richmond, explored the matters assigned to it, and now makes this report.

The Clerks of the House of Delegates and of the Senate furnished staffing and support for the Joint Subcommittee. The Division of Legislative Services also furnished support and furnished counsel to the Committee.

GENERAL CONCLUSION

The Joint Subcommittee was enjoined to determine "what action is necessary to alleviate unreasonable and inequitable burdens being imposed on manufacturers and sellers of products resulting from excesses in the application of the theories of liability and the products liability reparation system. xxx"

The finding of the Joint Subcommittee, generally, is that whatever excesses may exist in other jurisdictions, the reparation system in the Commonwealth of Virginia is in good health, both from the standpoint of the manufacturer, seller at retail and wholesale, and the consumer. Virginia has not adopted the doctrine of strict liability in tort, which places liability, without proof of negligence, upon a manufacturer or seller of a product when he places a product on the market, knowing it is to be used without inspection for defects, and the product proves to have a defect which causes injury.

The Joint Subcommittee finds that this doctrine is the root from which excesses, if any, grow. Since, as stated, Virginia's courts have not adopted this concept, most of the concerns expressed do not apply in the Commonwealth. These concerns will be dealt with in this report, seriatim .

CONGRESSIONAL ACTION

Although, tort law and insurance regulation have traditionally been subject to state regulation, the problem of products liability assumes national proportions. It is the rare instance in which a damage suit brought as a result of a failure of a product is not interstate in nature, and in which a plaintiff may not easily seek a forum most favorable to him, in the state which has the more liberal laws weighted in favor of the plaintiff.

Changes in tort law in one state do nothing to lower a manufacturer's liability on the sales of his products in another state. Insurance rates are now set to reflect the highest level of liability to which a product could be subjected, regardless of where the product is manufactured.

A number of measures have been introduced in the Congress proposing solutions to the products liability problem. These include reinsurance programs, tax relief deductions, tort reforms, workman's compensation measures, product testing and certification and federal chartering of captive insurance companies.

Since federal pre-emption appears likely in the near future, upon some, if not all of the proposed solutions to the problem, the Joint Subcommittee feels that it should be cautious in proposing any changes in Virginia law which might be short-lived.

PRESENT VIRGINIA LAW

As stated above, strict liability in tort does not exist in Virginia, except in certain cases when direct damage has resulted from blasting operations. A plaintiff proceeding in tort against a manufacturer or seller of a product must prove negliegence and the damage resulting therefrom by a prepondence of the evidence. The Joint Subcommittee is reluctant to recommend a departure from this basic tenet of anglo-saxon law. Moreover, the common-law defenses of contributory negligence, assumption of the risk and the like are available to manufacturers or sellers of the product in Virginia in an action brought for negligence.

Virginia law does provide the consumer with other substantial remedies, in cases in which a defective product causes property damage, personal injury or death.

Virginia adopted the Uniform Commercial Code in 1964. In addition to certain express warranties created by contract, and provided for in the Code, § 8.2-215 provides as follows:

§ 8.2-315. Implied warranty: Fitness for particular purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section [§ 8.2-316] an implied warranty that the goods shall be fit for such purpose.

§ 8.2-715 provides that:

§ 8.2-715. Buyer's incidental and consequential damages. (1) Incidental damages resulting from the seller's breach include expenses reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges, expenses or commissions in connection with effecting cover and any other reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include

(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach of warranty.

Thus, under these sections, a buyer of a product need prove:

(1) That the goods were not fit for the purpose which sold; and

(2) He was injured as a result thereof.

Common law defenses of contributory negligence, assumption of risk, and other defenses available in tort, are *not* available in a suit brought in contact.

However,

58.2-719 of the Uniform Commercial Code provides that a seller may modify or limit the buyer's remedy.

§ 8.2-719. Contractual modification or limitation of remedy. (1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section [§ 8.2-718] on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this title and may limit or alter the measure of damages recoverable under this title, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this act.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

While it is difficult for a seller to limit consequential damage under (3), § 8.2-316 allows him to exclude the warranty by following certain simple procedures.

§ 8.2-316. Exclusion or modification of warranties. (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this title on parol or extrinsic evidence (§ 8.2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this title on liquidation or limitation of damages and on contractual modification of remedy (§§ 8.2-718 and 8.2-719).

Thus the statutory law appears to offer substantial remedies to the manufacturer or seller of a products.

PROPOSALS STUDIED

1. CAP AGAINST SUITS COMMENCED MORE THAN SIX YEARS AFTER MANUFACTURER OF A PRODUCT.

The Subcommittee recommends that legislation be adopted carrying out this proposal. Simple equity appears to favor a limitation in this regard. It can reasonably be expected that a product in use, if it is to fail, will fail long before the six year period expires. Absent such a statute, a defendent in such a case is put to an almost insurmountable burden in gathering evidence to defend his product. Legislation to effect this proposal is attached as an appendix to this report.

2. DEFENSE OF ALTERATION OR MODIFICATION BY PURCHASER.

Since Virginia does not have strict liability in tort, this defense is available in the common-law defense of contributory negligence or assumption of the risk.

There can be no implied warranty that the product is fit for the purpose for which sold, if the purchaser finds it necessary to modify it. In any event, the manufacturer or seller may expressly exclude any warranty upon modification or alteration of the product.

3. LIMITATION ON DUTY TO WARN

The principles set out in the draft containing this proposals are already law in Virginia, in the negligence or in the warranty case.

4. REBUTTABLE PRESUMPTION OF SAFETY OF PRODUCT.

Since in any case based upon negligence or breach of warranty, the burden is upon the plaintiff to prove his case by prepondence of the evidence, this proposal is unecessary.

5. STATUTORY PROHIBITION AGAINST STRICT LIABILITY IN TORT.

Virginia courts have not seen fit to adopt this principle, as stated herein before. The Subcommittee sees no need to legislatate where no legislation is needed. To adopt such a principle legislatively would be an invitation to the courts to find exceptions.

6. STATUTORY LIMITATION ON AWARD OF PUNITIVE DAMAGES.

Virginia courts have adopted the principle set out in the draft proposal as a matter of common-law. See Giant of Virginia v. Pigg and other cases therein cited. 207 Virginia 679 .

7. SUBSEQUENT IMPROVEMENT OF PRODUCTS.

The General Assembly, in 1978, adopted § 8.01-418.1 which incorporates this principle into law.

§ 8.01-418.1. Evidence of subsequent measures taken not admissible to prove negligence. When, after the occurrence of an event, measures are taken which, if taken prior to the event would have made the event less likely to occur, evidence of such subsequently taken measures is not admissible to prove negligence or culpable conduct as a cause of the occurrence of the event; provided, that evidence of subsequent measures taken shall not be required to be excluded when offered for

another purpose for which it may be admissible, including, but not limited to, proof of ownership, control, feasibility of precautionary measures if controverted, or for impeachment.

8. MISUSE OF PRODUCT.

Common-law defenses make this proposal unnecessary in Virginia.

9. EXPANSION OF THIRD PARTY PRACTICE RULE.

This is a policy question which goes far beyond the products liablity problem. Bills have been introduced in previous Sessions of the General Assembly to accomplish the objective of this proposal. These bills have not been met with universal enthusiamism. The Bar is divided on the issue. For the limited purpose of a study of products liability, the Joint Subcommittee prefers not take a position for or against this proposal.

Respectfully submitted,

A. L. Philpott, Chairman
George E. Allen, Jr.
*See statement dissenting in part Appendix II
Herbert H. Bateman
Frederick C. Boucher
*See separate statement Appendix III
Dudley J. Emick, Jr.
*See separate statement Appendix IV
Joseph V. Gartlan, Jr.
Joseph A. Leafe
C. Hardaway Marks
Theodore V. Morrison, Jr.
William F. Parkerson, Jr.

APPENDIX I

A BILL to amend the Code of Virginia by adding a section numbered 8.01-246.1, so as to provide a time limitation within which certain actions for damages may be brought.

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 8.01-246.1 as follows:

§ 8.01-246.1. Personal actions based on defective products.—Notwithstanding when the cause of action shall have occurred:

1. No action for the recovery of damages or for contribution or indemnity, for damages for personal injury, death or damage to property which based on negligence or upon Part 2 of Title 8.2 of the Uniform Commercial Code, arising out of the design, inspection, testing, marketing or manufacturing of a product or arising out of any alleged failure to warn or any alleged failure to properly instruct concerning the use of a product or upon any alleged breach of warranty, expressed or implied, shall be commenced later than six years after the manufacturer of the final product parted with its possession and control, or sold it, whichever occurred last.

2. Any action for personal injury, death or damage to property, arising out of a federal or State statute, rule or regulation requiring a manufacturer of a product to alter, repair, recall, inspect or issue warnings or instructions or to otherwise take any action or precaution for the benefit of persons who might be injured or damaged by using the product, which requirement arose after the manufacturer parted with possession and control of the product or sold it, whichever came last, must be commenced no later than six years after the manufacturer first came under the duty to alter, repair, recall, inspect or issue warnings or instructions about the product or otherwise to take any action or precaution for the benefit of persons using the product.

APPENDIX II

Separate Statement of Delegate George E. Allen, Jr.

While I agree in substance to most of the findings stated, I cannot agree or concur in the recommendation of a six year "cap" statute of limitations.

As I understand it, the proposed "cap" would bar any claim against a manufacturer brought more than six years after the date of manufacture. In my opinion, this is too restrictive on consumer rights where injuries are caused by hazardous products. This means that a consumer who is injured more than six years after the date of manufacture, even by a product of the most grossly defective standards, would be barred from any attempt to obtain a remedy. Since under tradtional tor law, a cuase of action does not even arise until an injury occurs, the proposed statute would frequently destroy causes of action before they ever came into existence. Certainly, this is not fair to the innocent injured consumer who may then become the subject of state beneficience at the taxpayer's expense; and such may be an unconstitutional deprivation of due process. Numerous cases around the country have held "outside statute of limitations" violative of constitutional principles.

Many cases upon which consumers should fairly have rights of action against manufacturers would be destroyed by this statute. Frequently, a product is not purchased until a year or two after its manufacturer. From the consumer's standpoint, this may reduce his limiation period to four years. Yet, frequently, the manufacturer advertises his product as one which will last and provide good service for many years more than this. Design defects frequently don't cause injury for a number of years. A machine sold in 1970 may have been defectively designed for failure to follow industry standards in guarding certain moving and dangerous parts, but by fortune for the manufacturer, injury may not have resulted to the operator of the machine until nine years later. Products which cause disease or cancer frequently don't cause observeable problems for years after manufacture and sale, for example, Mer 29, Dalkon Shield IUD, kepone and asbestos. A negligent or reckless manufacturer should not be immune from suits causing such injuries.

It is true that different types of products have different reasonable life expectancies. Perhaps the statute is an arbitrary attempt to establish a life expectancy for all products. As such, I believe it is misguided. The life expectancy of products, from locomotives to lawn mowers, is widely divergent. The defense presently available in products liability cases to Virginia defendants give adequate consideration to this factor. The plaintiff has the burden of proof in these cases and as any lawyer who is involved in them knows, that burden is tough to carry. Moreover, any prejudice to the manufacturer by the passage of time is matched, or more than matched, by the prejudice to the plaintiff in attempting after such time to carry his burden of proof and satisfy the jury that the product was defective at the time of manufacture.

APPENDIX III

Separate Statement of Senator Frederick C. Boucher

I am in agreement with all findings and recommendations of the joint subcommittee with the exception of the recommendation that a statute of limitations be imposed prohibiting the commencement of actions more than six years after the manufacture of a product.

While I am of the opinion that some additional time limitation should be imposed upon suits against manufacturers, a limitation of six years from the date of manufacture would unreasonably restrict the remedy of persons injured by defective products which did not reach the hands of ultimate consumers until a substantial time after the date of manufacture. Under the subcommittee's recommendation, each year that an item is held by a wholesaleer or retailer reduces by a like amount the period within which an action could be brought by an injured party. In an extreme example, a consumer who is injured by a defective product which he purchased seven years after the date of manufacture would be completely foreclosed from a tort remedy.

I would prefer a six year statute of limitations commencing with the purchase of the product by a party other than one who customarily trades in goods of the kind in question. In my judgment, such a provision would provide a definable point in time for the termination of a manufacturer's liability while assuring to ultimate consumers of new products an appropriate tort remedy for injuries arising from defective manufacture.

Very sincerely yours,

Frederick C. Boucher

APPENDIX IV

Separate Statement of Senators Dudley J. Emick and Joseph V. Gartlan, Jr.

Since we did not have the benefit of the discussions at the final meeting, we refrain from either endorsing or dissenting from the Report.