Personal Injury

Crashworthiness is alive and well in Virginia

by Charles J. Zauzig III and Claire E. Keena

"Crashworthiness" is a term which arises in automobile liability cases and refers to the protection of passengers in an automobile when that automobile is involved in a collision.[1] The notion of "crashworthiness" has grown into a distinct body of law which some attorneys believe greatly expands a manufacturer's duty beyond traditional tort principles. Although some defense attorneys have taken the position that Virginia has not and will not recognize a cause of action based on a lack of crashworthiness,[2] Virginia courts have implicitly accepted the concept, while not expressly embracing that term, through analysis of traditional tort principles which impose a duty of foreseeability of risk on product manufacturers. Since the theory of crashworthiness is not incompatible with existing Virginia law, such claims should not fail as a matter of law in Virginia. This article will outline and discuss Virginia's treatment of the doctrine of crashworthiness and evaluate the acceptance of that concept by Virginia courts.

Overview

The doctrine of crashworthiness was introduced more than twenty five years ago in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).[3] The key to the doctrine is the imposition of a duty of reasonable care in the design of automobiles by manufacturers to eliminate any unreasonable risk of foreseeable injury to a user.[4] The concept embraces the idea of a "second collision" or "enhanced injury" suffered by the occupant of the car after the initial impact in which the occupant's body collides with the interior of the car, causing further injuries which were not caused by the first impact. The idea behind this concept is for the manufacturer to minimize such injury to passengers through the design of the product itself or by the installation of safety equipment to prevent injury.

Leading case law which established the concept of crashworthiness

The two leading cases on the doctrine of crashworthiness come from the federal courts. In the first case, *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966), the Seventh Circuit noted that a manufacturer's duty is merely limited to the production of a product which is "reasonably safe for its intended purposes," and that the use of an automobile did "not include its participation in collisions, despite the manufacturer's ability to foresee the possibility that such collisions may occur." 359 F.2d at 825.[5]

The second decision, *Larsen v. General Motors, Corp., supra*, has been viewed as a rejection of the *Evans* analysis, and is seen as the pivotal case originating what has become known as the crashworthiness doctrine. In *Larsen*, the Eighth Circuit took a broader interpretation of what was an "intended use" of an automobile, and held that injuries resulting from the "second collision" are "readily foreseeable as an incident to the normal and expected use of an automobile." 391 F.2d at 502. While conceding that a manufacturer has no duty to design an accident-proof vehicle, the Court nonetheless ruled that

> where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design. . .Where injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable. *Id.* at 502.

In support of its reasoning, the Court noted that "while automobiles are not made for the purpose of colliding with each other, a frequent and inevitable

contingency of normal automobile use will result in collisions," and that accidents are "statistically inevitable," and manufacturers must consider those risks created by the design of their product. *Id.* The rationale of the *Larsen* decision realistically accepts the notion that the reasonable "use" of automobiles cannot be viewed in a vacuum and that reasonable use must encompass foreseeable risks associated with the use of an automobile on the public highways, which use includes the possibility of accidents.

Analysis under Virginia law

While no Virginia Supreme Court decision has expressly embraced the doctrine of "crashworthiness," there are several cases decided by that court concerning the duty of manufacturers, which illustrate how Virginia applies traditional tort principles in assessing liability against manufacturers in a manner compatible with the doctrine of crashworthiness. In *Turner v. Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975), the plaintiff was injured while using a hoist to dislodge frozen metal. The plaintiff alleged, *inter alia,* negligent design, manufacture, inspection, testing and sale of the hoist by defendant manufacturer Manning in that the hoist did not have a safety latch across its mouth. In addressing the negligent design count against the manufacturer, the court recognized that the "manufacturer is not an insurer and is not required to design and market an accident-proof product. . ." but also added that 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." 216 Va. at 251, 217 S.E.2d at 868. While the *Turner* court declined to impose liability, it did so *only* because there was evidence that the hoist was not being used for its intended purpose, and it was an unforeseeable misuse of the hoist, not the absence of an upper safety hook, that caused the accident. *Id.*

In a later decision, *Featherall v. Firestone Tire and Rubber Co.*, 219 Va. 949, 252 S.E.2d 358 (1979), the Virginia Supreme Court again addressed a negligent design claim against a manufacturer. *Featherall* involved the explosion of a steel lid from a syrup tank at a soft drink bottling company, and the plaintiff sued the manufacturers of both the lid and the regulators used to monitor pressure in the tank. The evidence revealed that the lid was designed to be used on one type of tank, but was actually being used on a different manufacturer's tank which did not "match" the lid, and further that the regulator was being used without a locknut, a safety feature which was easily removed. The court declined to impose liability on the manufacturer because there was evidence of misuse of the lid which could not have been "foreseen or reasonably anticipated" by the manufacturer. As for the claim against the regulator manufacturer for failure to warn, the court *did* impose liability, since that manufacturer "could have reasonably foreseen the danger. . .that the regulator would likely be used not as manufactured, but without the locknut, given the facility with which the nut could be removed. . ." 219 Va. at 966, 252 S.E. 2d at 369. The court noted that although the regulator was misused, such misuse was foreseeable, and "was in marked contrast to the unanticipated misuse of the Cornelius lid." *Id.*

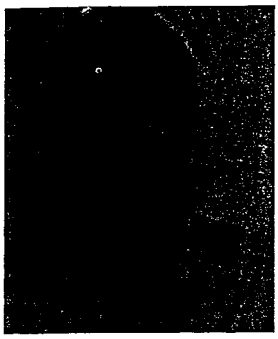
The most recent Virginia decision in this area is *Besser Co. v. Hansen*, 243 Va. 267 415 S.E. 2d 138 (1992). In *Besser*, the plaintiff was injured in his operation of an electrically powered "transfer car" manufactured by Besser when he stepped between two cars to uncouple the racks of blocks towed by the cars. The plaintiff failed to turn off the power to the cars and was injured when the cars pulled the racks forward and pinned him between the rack and a steel pressure chamber. The Court noted that while Besser may have foreseen that an operator would be forced to step between the racks if its automatic coupler was defective, such a defect was not the cause of the accident. The court again declined to impose a duty on the manufacturer, citing *Featherall* and *Turner* in that "a manufacturer is not required to supply an accident-proof product." 243 Va. at 276, 415 S.E.2d at 143. The Court reasoned that Besser had no reason to foresee that an operator would put himself in the path of the racks without turning off the power. Therefore, the injury was due not to any negligent design, but to operator error.

The above cases reveal that the Virginia Supreme Court will not impose liability where a product is being misused in a manner which is unforeseeable. By contrast, these cases also indicate a willingness to hold manufacturers accountable where a product is being used in a foreseeable manner.

Federal courts applying Virginia law

At least two federal courts applying Virginia law have predicted that Virginia would follow the *Larsen* analysis and find a cause of action for crashworthiness.

In *Euler v. American Isuzu Motors, Inc.*, 807 F. Supp. 1232 (W.D.Va. 1992), the United States District Court for the Western District of Virginia noted that the doctrine is actually based on traditional negligence principles and depends on two accepted propositions: that the intended use or purpose of an automobile is safe travel on the streets and highways, and that automobile accidents are foreseeable. 807 F. Supp. at 1234. That court notes that the federal government has specified crashworthiness requirements due to its recognition of motor vehicle crashes, and even the Virginia General Assembly has acknowledged the foreseeablility of such accidents resulting in additional injury to occupants.[6] In predicting that Virginia will recognize a crashworthiness doctrine, the *Euler* court noted that the "clear implication" of the *Turner*, *Featherall*, and *Besser* cases is that in Virginia a "manufacturer may be held liable when his product is foreseeably used or even foreseeably misused." Id. at 1236.



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In accepting that the doctrine of crashworthiness is essentially negligence, the Fourth Circuit also predicted twenty years ago that the *Larsen* crashworthiness doctrine would apply under Virginia law. In *Dreisonstok v. Volkswagenwerk*, 489 F.2d 1066 (4th Cir. 1974), the court recognized that the "general trend of the decisions in Virginia. . .ranges Virginia with those jurisdictions imposing liability for negligent design in failing to take reasonable precautions against unreasonable risks of harm to passengers by reason of a collision." 489 F.2d at 1069-70.

Indeed, at least one Virginia Circuit Court has recently expressly held that Virginia law would impose upon an automobile manufacturer a duty to exercise ordinary care to design a vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a foreseeable collision, relying directly on the *Larsen* doctrine.[7] The Larsen court overruled the defendant's demurrer to the cause of action, and citing *Euler*, noted that "whether called 'crashworthiness,' 'second collision,' or 'enhanced injury,' the cause of action is simply negligence. The plaintiff still must prove the elements thereof."[8]

Problems with possible preemption

A glitch in a plaintiff's claim under a crashworthiness doctrine is whether such a claim may be preempted by the manufacturer's compliance with federal safety regulations. The Eleventh Circuit[9] addressed such a claim of the manufacturer that such claims were preempted by federal law under the National Traffic and Motor Vehicle Safety Act of 1966, either expressly or implicitly. While the Eleventh Circuit rejected the argument that the claims were expressly preempted by the Act's preemption clause by noting that the Act's savings clause provides that compliance with the safety standard issued under the Act did not exempt any person from liability under common law, it did find that it was possible for such claims to be implicitly preempted by the effect they may have on the federal regulatory scheme.

In examining the effect that permitting common law claims would have on the federal regulatory scheme (which in this case gave the manufacturers the option of complying with the Act by installing manual seat belts instead of airbags), the Eleventh Circuit agreed that a state common law rule cannot take away the flexibility provided by a federal regulation. Since the claims in that case would in effect remove the element of choice authorized in the Act and frustrate the federal regulatory scheme, the court held the plaintiff's theory of recovery in that case was impliedly preempted by the Act. It is therefore incumbent upon a plaintiff's counsel to evaluate a claim of negligent design against the standards allowed by federal law to ensure that such a claim does not frustrate or remove any options granted to manufacturers by federal law or regulation.

Conclusion

Crashworthiness, while a relatively new term, is not a new concept to tort law, and a careful look at the analysis behind that doctrine will reveal that it is certainly not foreign to Virginia law. Given that Virginia applied traditional negligence principles, and given that in this day and age automobile accidents are foreseeable as a risk involved in the use of an automobile, it is clear that Virginia law will impose a duty on a manufacturer to exercise ordinary care to design a vehicle to protect its user from unreasonable risk of injury. Such is the underpinning of the crashworthiness doctrine, which is alive and well in Virginia.

Endnotes

1. *Dreisonstok v. Volkswagenwerk*, 489 F.2d 1066, 1069 n.3 (4th Cir. 1974).
2. See James W. Jennings & Harry M. Johnson, III, *Crashworthiness in Virginia: Is There a Duty to Design a Product That Will Prevent Injury?*, 5 J. Civ. Litig. 145 (1993).
3. *Larsen* noted that the "duty of reasonable care in design rests on common law negligence. . ." and that "[w]hile all risks cannot be eliminated. . . there are many common sense factors in design, which are or should be well known to the manufacturer that will minimize or lessen the injurious effects of a collision." 391 F.2d at 503.
4. *Euler v. American Isuzu Motors, Inc.*, 807 F. Supp. 1232 (W.D. Va. 1992).
5. *Evans* was later overruled by *Huff v. White Motor Corporation*, 565 F.2d 104 (7th Cir. 1977), although that decision was based on subsequent statutory changes.
6. 49 C.F.R. 571.201 states the purpose of federal standards are to afford impact protection for occupants and Virginia Code §46.2-1093 dictates that seat belts shall be "designed and installed in such a manner as to prevent or materially reduce movement of any person. . .in the event of collision or upset of the vehicle." 807 F. Supp. at 1236.
7. *Ward v. Honda Motor Company*, Law No. 118739, Fairfax County Circuit Court, 4/18/94).
8. *Id.*, Slp. Op. at 6.
9. *See Taylor v. General Motors Corporation*, 875 F.2d 816 (11th Cir. 1989).