

Products Liability and the New (to you)

Product: Case Example - Firearms

By Madelaine A. Kramer

For any lawyer, young or old, the practice of law is just that, practice. There are local rules and procedures and the general substantive laws applicable to any given “type” of case. A lawyer must also be cognizant of a number of procedural and substantive issues, many of which are likely to be raised (by you or opposing counsel) again and again throughout your products’ cases.

But what remains reassuring is that knowledge of the law (substantive and procedural) will be applicable to *all of your cases*. Whether it be an allegedly defective pole vault pit, tractor, elevator, chair, blood pressure cuff, lamp, or firearm, the same rules – with the

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addition of any pertinent regulations – will generally apply. At the beginning of every case, it is good practice to identify your court, the applicable law, and the theories and defenses alleged (or to be alleged) in the lawsuit. The causes

of action asserted by a plaintiff might vary, but you will quickly learn to identify those which are routinely asserted, in addition to those unrecognized here in Virginia.

Let’s take for example the firearm. In a recent products liability case in the Western District of Virginia, *Putnam v. Savage Arms, Inc.*,¹ suit was filed against a firearm manufacturer seeking to recover for injuries sustained while using a Savage 10ML-II muzzleloader while hunting. The plaintiff claims that when he fired the muzzleloader, the barrel exploded and injured his hand. As is the course for any product liability suit, the plaintiff alleged that the firearm was unreasonably dangerous because it had a faulty barrel and defective parts. In his initial complaint, the plaintiff asserted causes of action for negligence (including negligent failure to warn), breach of express warranty, and breaches of implied warranties of merchantability and fitness for a particular purpose. The plaintiff also claimed a variety of negligence theories, none of which have been independently recognized as a cause of action in Virginia, such as negligent placement of products into the stream of commerce; negligent

failure to test; negligent failure to train; and negligent failure to meet internal corporate guidelines.² It is important to note that products liability case law is continuously developing (in both federal and state courts), and will continue to do so on a number of fronts given product development. For example, in *Keophumihae*, a products case involving a Smith & Wesson handgun, the plaintiff was allowed to pursue a “negligent storage of a handgun” claim. The court explained that storage of a handgun is an aspect of the manner in which a handgun is used, and if a person is negligent in his storage of a handgun, he is negligent in its use. That said, you must not only know the law, you must also know your product.

You need not be the subject matter expert going into the case, but you will certainly be a subject matter expert on the other side. You will need to know your product inside and out for

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Consider the similar allegations of exploding firearm barrels in *King v. Blackpowder Products, Inc.*,³ and *Owens v. Savage Arms, Inc.*⁴ In *Owens*, the plaintiff alleged that upon depressing the trigger of his firearm, the barrel suddenly exploded. In *King*, the plaintiff alleged that after cleaning and loading his Connecticut Valley Arms Staghorn .50 caliber muzzleloader with two 50 grain Pyrodex pellets (black powder substitute) and a .50 caliber bullet, upon pulling the trigger the rifle misfired and its barrel exploded and ripped apart.

Regardless of a plaintiff’s allegations, all parties must remember that injury alone is not enough to make out a products liability claim. Whether proceeding under a negligence or implied warranty theory of liability, the plaintiff must demonstrate that (1) a product contained a defect that rendered it unreasonably dangerous for the use to which it would ordinarily be put or another reasonably foreseeable purpose, and (2) the unreasonably dangerous condition existed when the product left the manufacturer or seller’s hands.⁵ A product may be considered unreasonably dangerous if it is defective in assembly or manufacture, unreasonably dangerous in design, or unaccompanied by adequate warnings concerning its hazardous properties.

Will the plaintiff meet their burden of proof in a firearm products case? In these “exploding barrel” cases, there are a number of questions to ask and issues to flush out in discovery. It is not reasonably foreseeable that a muzzleloader – when used properly and in accordance with the instructions of the manufacturer – would simply explode. What went wrong? Were there modifications (and was the specific modification reasonably foreseeable) that would implicate a component part manufacturer? Or was it simply operator error or unforeseeable misuse? Did the user clean, maintain, and store his firearm properly? Did he modify the trigger assembly? Did he use appropriate ammunition? Did he mix powders or propellants of different brands or with different lot numbers?⁶

While firearm cases may be plenty, reported firearm products decisions in Virginia are far and few between. In addressing a handgun without a safety, the Richmond City Circuit Court ruled in *Puryear v. Tanfoglio Company, S. p A.* that “[w]hen a person is shot with a properly functioning gun, no cause of action arises against the manufacturer of the gun.”⁷ *Puryear* arose out of an incident where a minor picked up a .22 caliber handgun and, thinking it was a toy pulled the trigger, resulting in injuries to another minor. The plaintiff theorized the firearm was unreasonably dangerous simply because it lacked a safety mechanism. The court dismissed the plaintiff’s negligent design, failure to warn, and breach of warranty claims against both the manufacturer and retailer, holding these claims amounted to “strict liability.” Virginia jurisprudence sets forth that a firearm performing exactly as it is expected and intended to perform is not defective. The Fairfax Circuit Court has explained that “[h]istorically, the Virginia Legislature has given no indication that it considers handguns defective or inherently and abnormally dangerous” and a gun manufacturer “should not be subjected to liability for doing what they are permitted to do under the laws of Virginia and the United States of America.”⁸ Moreover, it is well established that an instrumentality which is

self-evidently dangerous when used in the manner for which it was designed requires no warning: the “propensity of a loaded firearm to injure severely or kill is open and obvious.”⁹

And, as in any products case, do not forget to look at safety standards promulgated by the government or relevant industry. The court will consider such safety standards to determine if a product is unreasonably dangerous.¹⁰ Indeed, courts routinely cite American National Standards Institute (“ANSI”) standards and safety specifications as authoritative safety standards across a range of industries and products. In a firearms case, be sure to review the Sporting Arms and Ammunition Manufacturers’ Institute (“SAAMI”) standards. SAAMI, founded at the request of the federal government, is an association of the nation’s leading manufacturers of firearms, ammunition and components that publishes industry standards for safety, interchangeability, reliability, and quality. SAAMI is an accredited standards developer for ANSI and, as such, many of the SAAMI standards are also published as ANSI standards. ■

Endnotes

1. No. 7:17-cv-00168 (W.D. Va. 2017).
2. See also *Keophumihae v. Brewer*, 6 Va. Cir. 80, 88 (Fairfax Cir. Ct. 1983) (firearm products case explaining Virginia does not recognize strict liability).
3. No. 7:15-cv-00212 (W.D. Va. 2015).
4. No. 3:15-cv-00109 (S.D. Ind. 2015).
5. See *Logan v. Montgomery Ward & Co.*, 216 Va. 425, 219 S.E. 2d 685 (1975).
6. See, e.g., *Blakey v. USS Iowa, United States Dep’t of Navy*, 780 F. Supp. 350, 353 (E.D. Va. 1991) (involving allegations that gun was loaded with ammunition assemblies not authorized for that particular type of gun; independent investigation lab found explosion could have been caused by “inexperienced rammer-man who may have over-rammed the propellant in a 16-inch gun”).
7. *Puryear v. Tanfoglio Company, S. p A.*, 19 Va. Cir. 213, 213 (Richmond Cir. Ct. 1990).
8. *Keophumihae*, 6 Va. Cir. at 88.
9. *Puryear*, 19 Va. Cir. at 215.
10. See *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420 (4th Cir. 1993); *Norris v. Excel Indus.*, 139 F. Supp. 3d 742, 751 & n.2 (W.D. Va. 2015) (holding American National Standard Institute (“ANSI”) standards are formally promulgated industry standards).