

1999

## Annual Survey of Virginia Law: Damages for Medical Malpractice in Virginia

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### Recommended Citation

Michael L. Goodman, Kathryn Freeman-Jones & Kathleen M. McCauley, *Annual Survey of Virginia Law: Damages for Medical Malpractice in Virginia*, 33 U. Rich. L. Rev. 919 (1999).

Available at: <http://scholarship.richmond.edu/lawreview/vol33/iss3/9>

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# DAMAGES FOR MEDICAL MALPRACTICE IN VIRGINIA

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## I. INTRODUCTION

As a general rule, a plaintiff in actions for personal injury and wrongful death in Virginia, regardless of whether the cause derives from medical malpractice, may state a claim for any medical expenses incurred as a result of the alleged injury or death.<sup>1</sup> By definition, an expense is incurred when it has been paid or one "become[s] legally obligated to pay it."<sup>2</sup> A tortfeasor is bound and obligated to make the plaintiff whole, which means the injured party or his estate must be reasonably compensated for the fair and reasonable value of incurred medical expenses.<sup>3</sup>

The burden always rests with the "plaintiff to prove the elements of [his] damage . . . with reasonable certainty."<sup>4</sup> As a subset of this concept, the damages need not be established with mathematical precision, but the burden rests with the plaintiff to provide evidence of facts and circumstances sufficient to permit the trier of fact to intelligently estimate the degree and amount of damages sustained by the injured party.<sup>5</sup> The defendant's burden throughout is to reduce the amount of those damages that go to the jury for determination. Virginia has chosen, through legislation affirmed by challenges to the supreme court, to regulate damages in medical

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1. See *Sykes v. Brown*, 156 Va. 881, 159 S.E. 202 (1931).

2. *Virginia Farm Bureau Mut. Ins. Co. v. Hodges*, 238 Va. 692, 696, 385 S.E.2d 612, 615 (1989).

3. See *Orebaugh v. Antonious*, 190 Va. 829, 834, 58 S.E.2d 873, 879 (1950).

4. *Bulala v. Boyd*, 239 Va. 218, 232-33, 389 S.E.2d 670, 685 (1990) (citing *Gwaltney v. Reed*, 196 Va. 505, 507, 84 S.E.2d 501, 502 (1954)).

5. See *Gwaltney*, 196 Va. at 507-08, 84 S.E.2d at 503.

malpractice cases in ways it has not applied to other personal injury actions.

## II. DAMAGES GENERALLY

Medical malpractice cases are divided into two categories—personal injury and wrongful death.

In medical malpractice cases in Virginia, plaintiffs may allege both special and general damages. Special damages include medical expenses, lost wages, future lost earnings, future medical expenses, and reasonable funeral and burial expenses, where applicable.

General damages include mental suffering of the beneficiaries,<sup>6</sup> including sorrow, mental anguish and solace, society, companionship, comfort, guidance, kindly offices, and advice of the decedent. In a medical malpractice personal injury action, a plaintiff may recover for personal pain and suffering, embarrassment, inconvenience, and disability, as applicable.

### A. *Theories of Recovery*

#### 1. Wrongful Death

At common law, no action for wrongful death existed in Virginia. In 1871 the General Assembly enacted legislation creating a right of action in a personal representative to enforce the decedent's claim for any personal injury that caused death.<sup>7</sup> It was not the intention of the legislature to continue or to perpetuate the decedent's right of action for the injury, but to substitute it and confer upon his personal representative a new and original right of action.<sup>8</sup> Virginia law allows for the "survival" of a cause of action upon the death of the person in whose favor the cause of action existed.<sup>9</sup> However, the law also requires "that if the cause of action asserted by the decedent in his lifetime was for a personal injury and such decedent dies as a result of the injury complained of," the action shall be amended to a wrongful death action.<sup>10</sup> "[T]he intent of the [wrongful death] statute is not to accumulate an estate for the decedent," but rather "to compensate [the] beneficiaries for their loss occasioned by

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6. See VA. CODE ANN. § 8.01-50 (Repl. Vol. 1992 & Cum. Supp. 1999).

7. See *id.*

8. See *Wilson v. Whittaker*, 207 Va. 1032, 1038, 154 S.E.2d 124, 129 (1967).

9. See VA. CODE ANN. § 8.01-25 (Cum. Supp. 1999).

10. *Id.*; see also *id.* § 8.01-56 (Cum. Supp. 1999).

the decedent's death."<sup>11</sup> The specific elements recoverable in a wrongful death action are:

- (1) mental suffering of beneficiaries;
- (2) loss of income and services;
- (3) expense of decedent's medical care;
- (4) funeral expenses; and
- (5) punitive damages.<sup>12</sup>

Expenses for the decedent's medical care, funeral expenses, and punitive damages must be itemized in the jury's verdict.<sup>13</sup> In medical malpractice wrongful death claims, the statutory cap applies.<sup>14</sup>

## 2. Personal Injury

Damages for personal injury are the "moneys awarded to the person injured by the tort of another."<sup>15</sup> Damages in tort generally include compensatory damages and punitive damages. Compensatory damages are awarded to an individual as compensation for the injury or harm caused by the tortfeasor. They can be pecuniary (medical expenses, lost wages, or diminished earning capacity) or nonpecuniary (pain and suffering or emotional distress).<sup>16</sup> Punitive damages are generally awarded in an effort to punish and deter conduct that is willful, wanton, or egregious in nature. Punitive damages are not recoverable against the Commonwealth of Virginia under the Virginia Tort Claims Act<sup>17</sup> and are inclusive in the Medical Malpractice Cap on recovery.<sup>18</sup>

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11. *Cassady v. Martin*, 220 Va. 1093, 1101, 266 S.E.2d 104, 108 (1980) (citation omitted).

12. *See* VA. CODE ANN. § 8.01-52 (Repl. Vol. 1992).

13. *See id.*

14. *See id.* § 8.01-581.15 (Cum. Supp. 1999).

15. RESTATEMENT (SECOND) OF TORTS § 902 (1977). *See generally* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES, EQUITY, RESTITUTION (2d ed. 1993); MARILYN K. MINZER ET AL., DAMAGES IN TORT ACTIONS (1982).

16. *See Bowers v. Sprouse*, 254 Va. 428, 492 S.E.2d 637 (1997). In personal injury actions, it is inadequate as a matter of law to award the exact amount of plaintiff's medical expenses and other special damages. *See id.*

17. *See* VA. CODE ANN. § 8.01-195 (Cum. Supp. 1999).

18. *See id.* § 8.01-581.1 (Cum. Supp. 1999).

### B. *The Collateral Source Rule*

It is a well-accepted principle under Virginia law that benefits received by a plaintiff from sources wholly independent of and collateral to the tortfeasor will not diminish the damages otherwise recoverable from the tortfeasor. The Collateral Source Rule creates a strategic balance between compensatory damages whose primary objective is to make the plaintiff whole and disallowing the plaintiff a windfall. The plaintiff is not entitled to an award that would improve his or her position over what it would have been prior to the defendant's alleged negligence. Accordingly, the plaintiff is to be compensated fairly. The Collateral Source Rule embodies a public policy judgment that favors the injured party over the tortfeasor. If there is to be a windfall, it is to benefit the plaintiff, not the defendant.

Similar public policy directed the long-standing evidentiary rule that "insurance" is not to be mentioned by the plaintiff, his witnesses, or counsel.<sup>19</sup> It is impermissible and is certain cause for a mistrial or reversible error. Likewise, defendants are prohibited from making direct or indirect reference to any financial burden that might be imposed upon them.<sup>20</sup>

As a corollary to the Collateral Source Rule, rigorous debate has arisen in Virginia over whether a plaintiff in a personal injury action is entitled to recover those portions of the medical bills that have been adjusted or otherwise "written off" by a health maintenance organization, healthcare provider, Medicare/Medicaid, or any private insurer.<sup>21</sup> The Supreme Court of Virginia has not addressed the issue, and legislators have made proposals that currently have not found a statutory mandate. Plaintiffs contend that they have incurred portions of medical bills that were written off by the healthcare provider since they would have been liable for those amounts except for their good fortune to have health insurance.<sup>22</sup>

Defendants on the other hand contend that plaintiffs incur only those medical expenses that the healthcare providers accept as full

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19. See *Medina v. Hegerberg*, 245 Va. 210, 213, 427 S.E.2d 343, 345 (1993).

20. See *id.*

21. See Richard E. Ladd, Jr. & Elizabeth A. Roussel, *Reducing Plaintiff's Medical Expense Damages: How Much Did the Plaintiff Actually Incur?*, 8 J. CIV. LITIG. 213 (1996) (providing an excellent overview of the current posture of the Collateral Source Rule in Virginia).

22. See, e.g., *Hepper v. Mende*, 46 Va. Cir. 395, 395 (Richmond City 1998).

payment.<sup>23</sup> Traditionally, they do not attack the amount paid to the healthcare providers by the collateral source, but rather argue that the Collateral Source Rule is not implicated since no one has paid the written-off portions of the medical bills.<sup>24</sup>

Under Virginia's Collateral Source Rule, a tortfeasor is not relieved of the burden to compensate a plaintiff for losses incurred although those losses are paid by another.<sup>25</sup> The supreme court has held that any expense is "incurred" when it has been paid or one is legally obligated to pay it.<sup>26</sup>

### C. Emotional Distress Claims

It is a well-established rule that there is no claim for negligent infliction of emotional distress in Virginia.<sup>27</sup> Specifically, there is no recovery for emotional distress unless it results directly from a tortiously caused physical injury.<sup>28</sup> There are few exceptions to this general rule. These exceptions have been carved out primarily by three cases: *Hughes v. Moore*,<sup>29</sup> *Womack v. Eldridge*,<sup>30</sup> and most recently, *Naccash v. Burger*.<sup>31</sup>

In the *Hughes* case, the Supreme Court of Virginia held that where there is no evidence of "willful, wanton, or vindictive" conduct and there is no "physical impact . . . there can be no recovery for emotional injury alone."<sup>32</sup> The *Hughes* exception applies where emotional distress and a physical injury are claimed and the physical injury is the natural result of the emotional disturbance.<sup>33</sup> Specifically, the court held that "there may be recovery for negligent conduct, notwithstanding the lack of physical impact, provided the injured party properly pleads and proves by clear and convincing evidence that his physical injury was the natural result of fright or

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23. See Ladd & Roussel, *supra* note 21, at 217.

24. See *id.* at 214-17.

25. See Schickling v. Aspinall, 235 Va. 472, 474, 369 S.E.2d 172, 174 (1988).

26. See Virginia Farm Bureau Mut. Ins. Co. v. Hodges, 238 Va. 692, 696, 385 S.E.2d 612, 615 (1989).

27. See *Naccash v. Burger*, 223 Va. 406, 415, 290 S.E.2d 825, 835 (1982); *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 150 (1974); *Hughes v. Moore*, 214 Va. 27, 36, 197 S.E.2d 214, 227 (1973).

28. See *Naccash*, 223 Va. at 415, 290 S.E.2d at 835.

29. 214 Va. 27, 197 S.E.2d 214 (1973).

30. 215 Va. 338, 210 S.E.2d 145 (1974).

31. 223 Va. 406, 290 S.E.2d 825 (1982).

32. *Hughes*, 214 Va. at 34, 197 S.E.2d at 220.

33. See *id.*

shock proximately caused by the defendant's negligence."<sup>34</sup> The court made it clear, however, that this new rule does not allow recovery "for physical injuries resulting from fright or shock caused by witnessing injury to another, allegedly occasioned by the negligence of a defendant toward a third person."<sup>35</sup>

The second exception to the general rule regarding recovery for emotional distress was carved out by the supreme court in *Womack*. In order to recover for emotional distress unaccompanied by a physical injury, the *Womack* court held that the plaintiff must prove the following elements:

- (1) the conduct was intentional or reckless;
- (2) the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality;
- (3) there was a causal connection between the defendant's conduct and the emotional distress; and
- (4) the emotional distress was severe.<sup>36</sup>

The third exception to the general rule in Virginia has been carved out by the supreme court in *Naccash*. In *Naccash*, the court held that parents of an infant with Tay-Sachs disease were entitled to recover for emotional damages as a result of the defendant health care providers' negligence.<sup>37</sup> However, in *Naccash*, which was a case for wrongful birth, the parents were compensated for emotional distress because they were deprived of the opportunity to reject or accept the continuance of a pregnancy that resulted in the birth of their fatally defective child.<sup>38</sup>

The court held that there are four essential elements to the recognition of a cause of action for emotional distress:

- (1) the plaintiff must prove the defendant owed him a duty;
- (2) there was a breach of the duty owed;
- (3) plaintiff must show a causal connection between the breach of the duty and the injury itself; and

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34. *Id.*

35. *Id.* at 34-35.

36. *See Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 150 (1974).

37. *See Naccash v. Burger*, 223 Va. 406, 414-15, 290 S.E.2d 825, 829-30 (1982).

38. *See id.* at 415, 290 S.E.2d at 830.

(4) there must exist an actionable direct injury.<sup>39</sup>

The first element of this cause of action was satisfied in the *Naccash* case because the defendant healthcare providers owed a duty to Mr. Burger as he, himself, was a patient.<sup>40</sup> The second element required that the plaintiff prove a breach of the duty owed. Because the testing performed on Mr. Burger was done negligently, plaintiff satisfied this second element.<sup>41</sup>

Finally, the *Naccash* court required that the plaintiff prove a direct injury as a result of the alleged negligence. The direct injury to the Burgers was the loss of a chance to decide whether to proceed with a pregnancy or terminate it due to defects in the fetus.<sup>42</sup> In essence, this case was one for wrongful birth and allowed recovery for any emotional distress causally connected to the wrongful birth.

Most recently, the supreme court unequivocally decided that there is no cause of action for negligent infliction of emotional distress when a parent merely witnesses an alleged tortious act committed upon her child.<sup>43</sup> The court opined that the threshold issue is whether the tortfeasor owed a duty to the parent plaintiff, a third-party bystander.<sup>44</sup> Unlike the facts in *Naccash*, the healthcare provider in the *Gray* case had no physician-patient relationship with Mrs. Gray. She was merely witnessing the care and treatment provided to her three-year-old daughter, and therefore, the healthcare provider owed no duty of care to her.<sup>45</sup> Accordingly, there existed no cause of action for negligent infliction of emotional distress for witnessing a tortious act, and defendant INOVA's demurrer was properly sustained by the trial court.<sup>46</sup>

Despite the three limited exceptions to the general rule, there is generally no recovery for negligent infliction of emotional distress in Virginia—once again, further evidence that Virginia takes a very conservative approach to recovery in tort, which extends to recovery in actions for medical negligence.

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39. *See id.*

40. *See id.* The defendant physician performed an invasive procedure and genetic testing on Mr. Burger. *See id.*

41. *See id.*

42. *See id.* at 416, 290 S.E.2d at 831.

43. *See Gray v. INOVA Health Care Servs.*, 257 Va. 597, 598, 514 S.E.2d 355, 356 (1999).

44. *See id.*

45. *See id.*

46. *See id.*



#### D. Breach of Confidentiality

There has been “much ado” in recent years with respect to breach of confidentiality claims in the healthcare setting. In 1997, the Supreme Court of Virginia recognized a cause of action for breach of confidentiality against a healthcare provider who disseminated a patient’s medical records to third parties without the patient’s express authorization.<sup>47</sup> While there are statutes in Virginia that set forth what information can be disseminated and when,<sup>48</sup> the supreme court has held that absent such statutory authority to the contrary, a healthcare provider owes a duty to his patient not to disclose confidential medical information without the patient’s permission.<sup>49</sup>

In *Fairfax Hospital v. Curtis*,<sup>50</sup> Patricia Curtis’s medical records were disseminated attendant to a pending malpractice litigation.<sup>51</sup> She filed a Motion for Judgment against Fairfax Hospital and others.<sup>52</sup> In response, defendant filed a demurrer and plea in bar, asserting that the plaintiff waived any right to privacy when she filed the civil lawsuit.<sup>53</sup> Curtis’s medical condition, however was not at issue in the pending litigation. Instead, it was the physical condition of and medical treatment rendered to her infant that were at issue in the underlying malpractice case.<sup>54</sup> Accordingly, the trial court overruled the demurrer and held that Curtis had not waived her right to privacy and was entitled to damages.<sup>55</sup> The parties stipulated the relevant facts and damages at \$100,000, and the trial court entered judgment in plaintiff’s favor.<sup>56</sup>

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47. See *Fairfax Hosp. v. Curtis*, 254 Va. 437, 445, 492 S.E.2d 642, 645-46 (1997).

48. See VA. CODE ANN. § 8.01-399 (Cum. Supp. 1999) (addressing communications between physicians and patients); *id.* § 8.01-413 (addressing certain copies of healthcare provider’s records or papers of patient); *id.* § 32.1-36.1 (Repl. Vol. 1997) (addressing confidentiality of test for HIV); *id.* § 32.1-116.3 (Repl. Vol. 1997) (addressing the reporting of communicable diseases); *id.* § 32.1-127.1:03 (Cum. Supp. 1999) (addressing patient health records privacy); *id.* § 53.1-133.03 (Repl. Vol. 1998) (addressing the exchange of medical and mental health information and records by the Department of Corrections); Confidentiality of Alcohol and Drug Abuse Patient Records, 42 C.F.R. §§ 2.1 to .67 (1998).

49. See *Curtis*, 254 Va. at 442, 492 S.E.2d at 645.

50. 254 Va. 437, 492 S.E.2d 642 (1997).

51. See *id.* at 439, 492 S.E.2d at 643.

52. See *id.*

53. See *id.*

54. See *id.* at 445, 492 S.E.2d at 646.

55. See *id.* at 440-41, 492 S.E.2d at 643.

56. See *id.*

The supreme court heard the case on appeal and held that included in a healthcare provider's duty to his patient is the provider's obligation to keep confidential all information learned from the patient directly or during the course of care and treatment of the patient.<sup>57</sup> Accordingly, absent statutory authority to the contrary or serious danger to the patient or others, a healthcare provider may not disclose confidential information about a patient without authorization.<sup>58</sup> A breach of this duty gives rise to an action in tort. Damages in such a breach of confidentiality case consist of emotional distress and related general damages.<sup>59</sup>

### III. THE STATUTORY CAP

Virginia law limits recovery for damages associated with medical malpractice litigation in accordance with the Medical Malpractice Act.<sup>60</sup> The Medical Malpractice Act provided for a \$1 million cap on recovery until this year, when the Virginia General Assembly and Governor James S. Gilmore signed legislation raising the cap on recovery.<sup>61</sup> As of August 1, 1999, the medical malpractice cap increased to \$1,500,000. Each subsequent year, the cap will be raised by \$50,000, until 2007 and 2008 when it will increase by \$75,000, and the total damages recoverable under Virginia law in a medical malpractice action will be \$2,000,000.<sup>62</sup> This statutory cap applies to alleged acts of medical negligence occurring on or after the effective date of the increase.<sup>63</sup> All causes of action accruing before August 1, 1999, will remain subject to the \$1,000,000 cap.<sup>64</sup>

The medical malpractice cap limits the total amount recoverable for any injury or death regardless of the number of defendant healthcare providers. Prejudgment interest and punitive damages continue to be subject to the cap. The medical malpractice cap only

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57. *See id.* at 442, 492 S.E.2d at 644.

58. *See id.* at 442, 492 S.E.2d at 645.

59. *See id.* at 446, 492 S.E.2d at 647.

60. VA. CODE ANN. §§ 8.01-581.1 to -581.19:1 (Repl. Vol. 1992 & Cum. Supp. 1999).

61. *See id.* § 8.01-581.15 (Repl. Vol. 1992 & Cum. Supp. 1999). This section was amended by the 1999 Virginia General Assembly, raising the statutory cap to \$1,500,000. *See id.* (Cum. Supp. 1999). In 1983, the General Assembly amended the cap raising the limit from \$750,000 to \$1,000,000. *See id.* (Rep. Vol. 1992).

62. *See id.* (Cum. Supp. 1999).

63. *See id.*

64. *See id.*

applies to a verdict against a healthcare provider as defined by the General Assembly.<sup>65</sup>

### A. *Punitive Damages*

In Virginia, punitive damages awards are limited to \$350,000.<sup>66</sup> While a jury may award more than \$350,000, a judge will reduce the *total* verdict in a medical malpractice case to the statutory cap of \$1,500,000, including the punitive damages award<sup>67</sup>. The statutory limitation is for punitive damages against all defendants.<sup>68</sup>

### B. *Prejudgment Interest*

Historically, there was no Virginia state or federal court decision that definitively stated whether prejudgment interest was included within the medical malpractice cap; however, a comparison of the two statutes was instructive. Comparing the language of the prejudgment interest statute<sup>69</sup> to that of Virginia Code section 8.01-581.15, practitioners concluded that by its very terms, prejudgment interest is included within the limits of the cap.<sup>70</sup>

65. See *id.* § 8.01-581.1 (Cum. Supp. 1999).

"Health care provider" means (i) a person, corporation, facility or institution licensed by this Commonwealth to provide health care or professional services as a physician or hospital, dentist, pharmacist, registered nurse or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, physical therapy assistant, clinical psychologist, clinical social worker, professional counselor, licensed dental hygienist or health maintenance organization, (ii) a professional corporation, all of whose shareholders or members are so licensed, (iii) a partnership, all of whose partners are so licensed, (iv) a nursing home as defined in § 54.1-3100 except those nursing institutions conducted by and for those who rely upon treatment by spiritual means alone through prayer in accordance with a recognized church or religious denomination, (v) a professional limited liability company comprised of members as described in § 13.1-1102 A 2, or an officer, employee or agent thereof acting in the course and scope of his employment, or (vi) a corporation, partnership, limited liability company or any other entity, except a state-operated facility, which employs or engages a licensed health care provider and which primarily renders health care services.

*Id.*

66. See *id.* § 8.01-38.1 (Repl. Vol. 1992 & Cum. Supp. 1999).

67. See *id.*

68. See *id.*

69. *Id.* § 8.01-382 (Cum. Supp. 1999).

70. VA. CODE ANN. section 8.01-382 (Cum. Supp. 1999) provides that "the *verdict* of the jury . . . may provide for interest on any principal sum awarded." *Id.* (emphasis added). VA. CODE ANN. section 8.01-581.15 (Repl. Vol. 1995 & Cum. Supp. 1999) provides that:

[i]n any *verdict* returned against a health care provider in an action for malpractice . . . which is tried by a jury or in any judgment entered against a health care provider in such an action which is tried without a jury, the total amount recoverable for any injury to, or death of, a patient shall not exceed \$1,500,000.

*Id.* § 8.01-581.15 (Cum. Supp. 1999) (emphasis added).

Because Virginia Code section 8.01-581.15 expressly limits the verdict in a malpractice case to \$1,500,000, and because Virginia Code section 8.01-382 provides that the verdict of the jury may include prejudgment interest, the statutory language supported the conclusion that the malpractice cap includes such prejudgment interest. The issue was resolved in January 1999, when the Supreme Court of Virginia ruled that prejudgment interest was in fact included within the limit imposed by section 8.01-581.15.<sup>71</sup> The 1999 amendments to Virginia Code section 8.01-581.15 recognize the inclusion of both punitive damages and prejudgment interest in the limit on liability.

### C. *The Constitutionality of the Medical Malpractice Cap*

The constitutionality of the cap has been challenged several times. Most recently, the Supreme Court of Virginia upheld the constitutionality of the cap in *Pulliam v. Coastal Emergency Services*.<sup>72</sup> In the *Pulliam* opinion, the court upheld its previous decision in *Etheridge v. Medical Center Hospitals*,<sup>73</sup> stating that the cap does not violate procedural due process, substantive due process, the Equal Protection Clause,<sup>74</sup> the right to a jury trial,<sup>75</sup> the province of the judiciary,<sup>76</sup> or constitute the taking of property.<sup>77</sup> With respect to the issue of prohibition against special legislation, the court refused to consider plaintiff's argument as the issue was raised for the first time at oral argument.<sup>78</sup> Plaintiff failed to address the issue in the record at the trial court level, in his petition for appeal, or in the appellate briefs.<sup>79</sup> Accordingly, the issue was not decided by the *Pulliam* court.<sup>80</sup>

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71. See *Pulliam v. Coastal Emergency Servs.*, 257 Va. 1, 25, 509 S.E.2d 307, 321 (1999).

72. See *id.* at 7, 509 S.E. 2d at 310.

73. 237 Va. 87, 376 S.E.2d 525 (1989).

74. See *Pulliam*, 257 Va. at 21, 509 S.E.2d at 318.

75. See *id.* at 15, 509 S.E.2d at 315.

76. See *id.* at 23, 509 S.E.2d at 319.

77. See *id.* at 20, 509 S.E.2d at 318.

78. See *id.* at 16, 509 S.E.2d at 316.

79. See *id.*

80. See *id.*

#### IV. STATE AND FEDERAL STATUTES AFFECTING A MEDICAL MALPRACTICE CLAIM

##### A. *Virginia Tort Claims Act*

The doctrine of sovereign immunity is firmly rooted in the law of the Commonwealth of Virginia.<sup>81</sup> This doctrine states that absent statutory (or constitutional) language to the contrary, the Commonwealth, its agencies, entities, counties, cities, and towns, are immune from liability for the tortious acts of its agents, servants, and employees.<sup>82</sup> Under the doctrine of sovereign immunity, physicians and other healthcare providers may be immune from liability for acts of simple negligence,<sup>83</sup> if they are employed by the Commonwealth and meet certain criteria established through the judicial system.<sup>84</sup> The criterion examined by the courts have been set forth as a four-prong test as follows:

- (1) [t]he nature of the function performed by the employee;
- (2) the extent of the state's interest and involvement in the function;
- (3) the degree of control and direction exercised by the state over the employee; and
- (4) whether the act complained of involved the use of judgment and discretion.<sup>85</sup>

In 1982, the Virginia General Assembly enacted the Virginia Tort Claims Act,<sup>86</sup> which provides, in limited circumstances, the waiver of the Commonwealth's immunity from civil liability for the tortious conduct of its employees.<sup>87</sup> The Act provides that:

the Commonwealth shall be liable for claims for money only accruing on or after July 1, 1982, and any transportation district shall be liable for claims for money only accruing on or after July 1, 1986, on account

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81. See *Messina v. Burden*, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984).

82. See VA. CODE ANN. § 8.01-195.2 (Repl. Vol. 1992). "*Employee*' means any officer, employee, or agent of any agency, or any person acting on behalf of any agency in an official capacity, temporarily or permanently in the service of the Commonwealth, or any transportation district, whether with or without compensation." *Id.*

83. Healthcare providers are not immune from intentional torts. See *James v. Jane*, 221 Va. 43, 51-54, 282 S.E.2d 864, 868-70 (1980).

84. See *id.*

85. See *id.* at 53, 282 S.E.2d at 869.

86. VA. CODE ANN. §§ 8.01-195.1 to 195.9 (Repl. Vol. 1992 & Cum. Supp. 1999).

87. For a definition of employee, see *supra* note 82.

of damage to or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee while acting within the scope of his employment under circumstances where the Commonwealth or transportation district, if a private person, would be liable to the claimant for such damage, loss, injury, or death.<sup>88</sup>

The statute limits each claimant's recovery to \$100,000 (for all claims arising after July 1, 1993), including claims for medical malpractice.<sup>89</sup> Claims against the Commonwealth involving medical malpractice are subject to the provisions of Virginia Code sections 8.01-581.1 to -581.20.<sup>90</sup> Recovery in medical malpractice claims brought against employees of the Commonwealth who are not entitled to sovereign immunity are limited by the provisions of section 8.01-581.15.<sup>91</sup> The Commonwealth is not liable for prejudgment interest or for punitive damages.<sup>92</sup>

In order to proceed against the Commonwealth, certain procedural requirements must be met. First, the claimant must file a written statement of the nature of the claim, which includes the time and place at which the injury is alleged to have occurred and the agencies alleged to be liable.<sup>93</sup> This statement must be filed with the Director of the Division of Risk Management or the Attorney General within one year after such cause of action accrued.<sup>94</sup> However, if the claimant was under a disability at the time the cause of action accrued, the tolling provisions of section 8.01-229 apply.<sup>95</sup>

The notice of claim must be mailed by certified mail to the Director of the Division of Risk Management or the Attorney General in Richmond.<sup>96</sup> The date on which the return receipt is signed by the Director or the Attorney General is *prima facie* evidence of the date of filing for purposes of compliance with this section.<sup>97</sup> Thereafter, an action may be commenced either (1) upon denial of the claim by the Attorney General or the Director of the Division of Risk Management or (2) after the expiration of six

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88. VA. CODE ANN. § 8.01-195.3 (Cum. Supp. 1999).

89. *See id.*

90. *See id.* § 8.01-195.6 (Repl. Vol. 1992 & Cum. Supp. 1999).

91. *See id.* § 8.01-581.15 (Repl. Vol. 1992 & Cum. Supp. 1999).

92. *See id.* § 8.01-195.3 (Cum. Supp. 1999).

93. *See id.* § 8.01-195.6 (Repl. Vol. 1992 & Cum. Supp. 1999).

94. *See id.*

95. *See id.*; *see also id.* § 8.01-229 (Repl. Vol. 1992 & Cum. Supp. 1999).

96. *See id.* § 8.01-195.6 (Repl. Vol. 1992 & Cum. Supp. 1999).

97. *See id.*

months from the date of filing of the notice of claim unless, within that period, the claim has been compromised and discharged.<sup>98</sup> "All claims against the Commonwealth . . . are forever barred unless such action is commenced within eighteen months of the filing of the notice of claim."<sup>99</sup> Claims against the Commonwealth involving medical malpractice shall be subject to the provisions of the Virginia Tort Claims Act.<sup>100</sup> The recovery in such a claim involving medical malpractice shall not exceed the limits imposed by section 8.01-195.3.<sup>101</sup>

### B. *Charitable Hospitals in Virginia*

Tort liability of hospitals is controlled by Virginia Code section 8.01-38, which states that no hospital shall be immune from liability unless (1) the hospital renders exclusively charitable medical care and treatment or (2) the individual alleging tortious conduct on behalf of the hospital was accepted as a patient at the institution under an "express written agreement executed by the hospital and delivered at the time of admission to the patient . . . providing that all medical services furnished such patient are to be supplied on a charitable basis without financial liability to the patient."<sup>102</sup>

However, with respect to the medical malpractice cap and the provisions of Virginia Code section 8.01-581.15, hospitals that are exempt from taxation in accordance with section 501(c)(3) of title 26 of the U.S. Code shall not be liable for damages in excess of the limits of its insurance coverage.<sup>103</sup> These facilities are only liable for damages totaling the lesser of the limits of its insurance policy or \$1,000,000.<sup>104</sup> Interestingly, when the General Assembly amended Virginia Code section 8.01-581.15, it did not consider the effect on Virginia Code section 8.01-38. Accordingly, the medical malpractice cap remains \$1,000,000 as to all U.S. Code section 501(c)(3) facilities.<sup>105</sup>

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98. *See id.*

99. *Id.* § 8.01-195.7 (Repl. Vol. 1992 & Cum. Supp. 1999).

100. *See id.* § 8.01-195.3 (Cum. Supp. 1999).

101. *See id.* § 8.01-195.6 (Repl. Vol. 1992 & Cum. Supp. 1999).

102. *Id.* § 8.01-38 (Repl. Vol. 1992 & Cum. Supp. 1999).

103. *See id.*

104. *See id.* § 8.01-581.15 (Repl. Vol. 1992 & Cum. Supp. 1999).

105. According to the Virginia Hospital and Health Care Association, there are 95 acute care facilities in the Commonwealth of Virginia. Of these 95 facilities, 81 are United States Code section 501(c)(3) hospitals. Therefore, Virginia Code section 8.01-581.15, as amended, applies to only 14 hospitals in Virginia. The remaining 81 are subject to the \$1,000,000 limit on liability.

### C. *The Virginia Birth Related Neurological Injury Compensation Act*

In 1987, the Virginia General Assembly enacted the Virginia Birth-Related Neurological Injury Compensation Act (the "Act").<sup>106</sup> The purpose of the Act is to limit the liability exposure of obstetricians and hospitals<sup>107</sup> to medical malpractice claims arising out of birth-related disabilities caused by oxygen deprivation or mechanical injury.<sup>108</sup> The Act expressly excludes cases arising from genetic abnormalities, degenerative neurological diseases, or maternal substance abuse.<sup>109</sup> The Act became effective on January 1, 1988, and created the Birth-Related Neurological Injury Program (the "Program").<sup>110</sup>

The Act is the exclusive remedy for a child filing suit against a particular participating physician or hospital.<sup>111</sup> Like the medical malpractice cap, the Supreme Court of Virginia has upheld the Act's constitutionality.<sup>112</sup>

The Workers' Compensation Commission hears individual claims under the Act. Claimants may retain counsel for purposes of this petition and the Program is represented by the Attorney General's office. Each claim is reviewed by a panel of medical school faculty physicians. The panel hears evidence and submits a report to the Workers' Compensation Commission concluding that the infant's injuries were or were not birth-related. The parties are bound by the Commission's finding.<sup>113</sup>

While the Act covers both participating physicians and participating hospitals, it does not cover private or professional corporations. Accordingly, a participating physician (an individual covered by the

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106. VA. CODE ANN. §§ 38.2-5000 to -5021 (Repl. Vol. 1999).

107. VA. CODE ANN. section 38.2-5001 (Repl. Vol. 1999) defines "participating hospital." This definition was amended in 1995 to include "employees of such hospitals, excluding physicians or nurse mid-wives who are eligible to qualify as participating physicians, acting in the course of and in the scope of their employment." *Id.* § 38.2-5001 (Repl. Vol. 1999). In addition to obstetricians, the statute includes family practitioners and nurse-midwives who provide obstetrical services. *See id.* §§ 38.2-5000 to -5021 (Repl. Vol. 1999).

108. *See id.*

109. *See id.* § 38.2-5001 (Repl. Vol. 1999).

110. *See id.* § 38.2-5014 (Repl. Vol. 1999).

111. *See id.* § 38.2-5002(B) (Repl. Vol. 1999).

112. *See King v. Virginia Birth-Related Neurological Injury Compensation Program*, 242 Va. 404, 412, 410 S.E.2d 656, 661 (1991).

113. *See VA. CODE ANN. § 38.2-5008(A)(6)* (Repl. Vol. 1999).



Act) does not shield the corporation (an uncovered employer). Virginia Code section 38.2-5001 defines "participating physician" and "participating hospital"; however, the definition does not include a physician's professional corporation.<sup>114</sup> While a professional corporation is a legally distinct health care provider as defined in Virginia Code section 8.01-581.1, as the Act presently reads, such an entity is not eligible for participation in the Program. Support for this proposition is found in the Act itself, which restricts and conditions all awards to those who had "services rendered by a participating doctor or hospital."<sup>115</sup> While coverage is afforded to those physicians and hospitals that participate in the Program, many physicians have not become participants because they do not want to pay, or cannot afford to pay, the annual assessment fee, which is currently set at \$5,000.<sup>116</sup>

Unlike damage awards in medical negligence cases, there is no cap on recovery for damages awarded by the Workers' Compensation Commission under the Act.<sup>117</sup> The Act does exclude third-party payments.<sup>118</sup> However, the Commission's award should include all medical and rehabilitation expenses, other expenses associated with the infant's condition, and loss of earnings (50 percent of average private, non-farm worker earnings) calculated from age eighteen to age sixty-five. The claimant may also recover attorneys' fees.<sup>119</sup>

The statute of limitations for claims under the Act is ten years from the date of birth.<sup>120</sup> Unlike medical malpractice claims, the continuing treatment rule does not apply to claims made under the Program. It is important to remember, however, that the treating physician must have participated in the Program during the year of the claimant's birth.<sup>121</sup> Because recovery under the Act is an exclusive remedy, claimants may not sue a participating physician or a participating hospital in court once he has elected a remedy under the Program.<sup>122</sup> However, the claimant may sue a nonpartici-

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114. *See id.* § 38.2-5001 (Repl. Vol. 1999).

115. *Id.* § 38.2-5009 (Repl. Vol. 1999); *see also* King v. Virginia Birth-Related Neurological Injury Compensation Program, 242 Va. 404, 410 S.E.2d 656 (1991).

116. *See* VA. CODE ANN. § 38.2-5020(A) (Repl. Vol. 1999).

117. *See id.* § 38.2-5009 (Repl. Vol. 1999).

118. *See id.*

119. *See id.* § 38.2-5009(4) (Repl. Vol. 1999).

120. *See id.* § 38.2-5013 (Repl. Vol. 1999).

121. *See id.* § 38.2-5009 (Repl. Vol. 1999).

122. *See id.* § 38.2-5002(B) (Repl. Vol. 1999).

pating physician or hospital for damages allegedly arising out of medical negligence.<sup>123</sup>

Because the Program operates under the auspices of the Industrial Commission, the process is a no-fault system. Accordingly, if a payment is made to a claimant based on the Commission's findings, there is no report generated to the National Practitioner Data Bank.<sup>124</sup> The statutory definition that determines whether a neurologically impaired child may participate in the Fund is so narrow that most children do not meet the criteria, and the claim is adjudicated in court as a medical malpractice suit.

#### D. COBRA/EMTALA

Congress passed the Consolidated Omnibus Budget Reconciliation Act ("COBRA")<sup>125</sup> on April 7, 1986. Its provisions were remedial in nature and amended the Medicare statute<sup>126</sup> requiring all hospitals enrolled in the Medicare program to treat and stabilize all patients regardless of their ability to pay for services. In short, COBRA imposes liability for failure to treat or stabilize a patient brought to a facility in an emergency medical condition.<sup>127</sup> The statute is now more commonly known as the Emergency Treatment and Active Labor Act ("EMTALA").<sup>128</sup>

The Act applies to any hospital that participates and receives payments through the federal Medicare program. EMTALA's requirements apply to any patient whether or not he/she is eligible to receive Medicare benefits.<sup>129</sup> It strictly prohibits hospitals from delaying or denying treatment until inquiries regarding healthcare insurance coverage are made.<sup>130</sup> It also prohibits hospitals from denying medical testing or screening for conditions of a medically emergent nature due to lack of insurance coverage.<sup>131</sup> The Act should be construed liberally.<sup>132</sup>

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123. *See id.* § 38.2-5002(D) (Repl. Vol. 1999).

124. *See id.* § 38.2-5009 (Repl. Vol. 1999).

125. 42 U.S.C. § 1395dd(b)(1) (1992).

126. *See id.* § 1395.

127. *See id.* § 1395dd(c)(1), (e)(1).

128. *See id.* § 1395dd(d)(1)(a), (d)(2)(a).

129. *See id.* § 1395dd(a), (b)(1).

130. *See id.* § 1395dd(b)(1).

131. *See id.*

132. *See McGee v. Funderburg*, 17 F.3d 1122, 1124 (8th Cir. 1994).

EMTALA imposes two types of duties that give rise to two separate types of claims. First, if a patient arrives at an emergency room and requests treatment, the hospital must provide an "appropriate medical screening examination" to identify whether a medical emergency exists.<sup>133</sup> Second, a hospital may not transfer a patient who has an "emergency medical condition which has not been stabilized" unless certain conditions have been met.<sup>134</sup>

When a hospital fails to comply with its own internal standards and refuses to treat a patient for economic reasons, liability is clear. However, most EMTALA claims are less obvious. In order to prevail on a COBRA/EMTALA claim, the plaintiff must prove three elements:

(1) that failure to treat the patient was directly related to the patient's lack of insurance coverage;<sup>135</sup>

(2) that the underlying violation relates to allegations of substandard care and treatment including, but not limited to, improper transfer, failure to perform requisite screening and other diagnostic tests, or discharge from the facility that was not medically indicated; and

(3) an injury.<sup>136</sup>

It remains unclear whether damage awards for EMTALA violations are limited by Virginia's statutory cap on medical malpractice damages. Courts are divided on the issue and have generally adopted three positions. First, some courts have held that since the federal standard incorporates general personal injury principles on recovery, and not those specifically applicable in medical malpractice actions, EMTALA claimants may recover over and above the state limit.<sup>137</sup> This approach is premised on the fact that EMTALA is not designed to replicate the Medical Malpractice Act.<sup>138</sup> Second, some courts have held that because federal law claims rely on state law damage principles, and EMTALA claims

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133. See 42 U.S.C. § 1395dd(a) (1991).

134. *Id.* § 1395dd(c)(1).

135. See *Stewart v. Myrick*, 731 F. Supp. 433, 435 (D. Kan. 1990).

136. See *Smith v. Richmond Mem'l Hosp.*, 243 Va. 445, 449-55, 416 S.E.2d 689, 691-94 (1992).

137. See *Power v. Arlington Hosp.*, 800 F. Supp. 1384, 1388-89 (E.D. Va. 1992), *aff'd in part, rev'd in part*, *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851 (4th Cir. 1994).

138. See *Power*, 800 F. Supp. at 1388-89.

arise out of medical care and treatment, the malpractice cap should apply to recovery in EMTALA claims.<sup>139</sup>

Finally, the third approach relies on whether state malpractice caps are interpreted broadly or limited in their application. The Fourth Circuit held in *Power v. Arlington Hospital Association* that Virginia's malpractice cap has been broadly applied and even limits recovery in cases involving battery and sexual harassment claims against healthcare providers.<sup>140</sup> Therefore, the Court held that the cap should also include claims brought in Virginia under COBRA/EMTALA.<sup>141</sup> In a case related to *Power v. Arlington Hospital*, the plaintiff sued additional healthcare providers not named in the original suit.<sup>142</sup> The court held that EMTALA does not permit stacking of multiple defendants for multiple caps that defeat plaintiff's limit on recovery under Virginia Code section 8.01-581.15.<sup>143</sup>

#### V. CONCLUSION

Historically, substantive tort law has not dwelled upon the issue of damages, but in recent years, legislatures, courts, the public, and the media have focused increasingly on medical malpractice damages. Reform statutes, particularly where insurance premiums have been an issue, have capped recoveries. While Virginia has limited recovery for punitive and medical malpractice damages, other states have restricted recoveries on all noneconomic damages in personal injury actions.<sup>144</sup> Suffice it to say that the controversy has just begun to address monetary compensation for pain, suffering, mental distress, and the imposition of quasi-criminal punitive damages for alleged medical negligence. Virginia, far from the cutting edge, has taken a conservative and measured approach to addressing damages for personal injury.

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139. See *Lee v. Allegheny Reg'l Hosp. Corp.*, 778 F. Supp. 900, 904 (W.D. Va. 1991).

140. See *Power*, 42 F.3d at 861.

141. See *id.*

142. See *Power v. Alexandria Physicians Group*, 887 F. Supp. 845 (E.D. Va. 1995), *aff'd*, 91 F.3d 132 (4th Cir. 1996).

143. See *id.* at 852; see also VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 1992 & Cum. Supp. 1999).

144. See, e.g., CAL. CIV. CODE § 3333.2 (West 1997) (limiting noneconomic damages in medical malpractice claims to \$250,000); MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (Repl. Vol. 1998) (limiting noneconomic damages in personal injury actions to \$500,000 for causes of action arising on or after October 1, 1994).

