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RECENT LEGISLATION

Tort Law—VIRGINIA RESTRICTS CHARITABLE IMMUNITY OF HOSPITALS—VA. CODE ANN. § 8-629.2 (Cum. Supp. 1974).

That a master is liable for the torts of his servant committed within the scope of his employment is a principle often inapplicable when the master is a charitable institution. This doctrine of charitable tort immunity[1] evolved from a trio of English cases. In *Foeffees of Heriot's Hospital v. Ross*,[2] the House of Lords enunciated the "trust fund theory"[3] insulating the hospital from liability for a breach of trust by one of its trustees. Immunity for charitable institutions endured in England for only 25 years.[4]

This doctrine was first introduced in the United States in 1876.[5] Although initially finding many followers, the much maligned[6] doctrine is now in full retreat.[7] The most frequently leveled criticism is the general untenability of the theories upon which the charities' exemption is based.[8]

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1. The scope of charitable immunity extends to institutions other than hospitals. However, the purview of this article is restricted to the doctrine as applied to hospitals because of the nature of the statute involved. Horty, *The Status of the Doctrine of Charitable Immunity in Hospital Cases*, 25 OHIO ST. L.J. 343, 344 (1964) [hereinafter cited as Horty].

2. 8 Eng. Rep. 1508 (H.L. 1846). The two more obscure cases are Duncan v. Findlater, 7 Eng. Rep. 934 (H.L. 1839) and Holliday v. St. Leonard's, 142 Eng. Rep. 769 (C.P. 1861).

3. "To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose." Foeffees of Heriot's Hosp. v. Ross, 8 Eng. Rep. 1508, 1510 (H.L. 1846). This is the theory most often proffered by the majority of jurisdictions in support of charitable immunity. Horty, *supra* note 1, at 344.

4. *See* Foreman v. Canterbury, [1871] L.R. 6 Q.B. 214 (discrediting the earlier "trust fund" cases).

5. *See* McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432 (1876).

6. Modern legal writers are in virtual unanimity in favoring liability over immunity. For an extensive but by no means exhaustive list of legal articles attacking the immunity view see Annot., 25 A.L.R.3d 1450-53 (1969, Supp. 1973).

The courts have long been vocal in their criticism of the immunity view. For one of the most eloquent among the many judicial broadsides of immunity see President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

7. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 133, at 996 (4th ed. 1971) [hereinafter cited as PROSSER]. Even those among the rapidly declining number which still adhere to the immunity view are restricting its operation. *Id.* at 995.

8. There are three theories offered to support charitable immunity. The first is the trust fund theory, set forth at note 3 *supra*. Basically, this theory "proves too much," for the jurisdictions proffering this excuse for withholding liability will allow payment out of the trust funds for some tort claims and damages for breach of contract. *See* President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942).

The first pronouncement by the highest court in Virginia[9] rejected total immunity declaring that charities are liable in tort to "strangers"[10] to the institution.[11] The court extended immunity to the institution for injuries inflicted through the negligence of its servants upon paying as well as non-paying[12] beneficiaries[13] unless the servant was negligently hired or being retained after having been proved incompetent.[14] The Virginia Supreme Court never departed from these principles of limited charitable immunity.[15]

The second is inapplicability of *respondeat superior*. This theory states that because the institutions are not profit-seeking, *respondeat superior* does not apply to them. Farrigan v. Pevear, 193 Mass. 147, 78 N.E. 855 (1906). But vicarious liability is imposed because of the master's right to control his servant. Haynes v. Presbyterian Hosp. Ass'n, 241 Iowa 1269, 45 N.W.2d 151 (1950). This should not be limited to profitable businesses. PROSSER, *supra* note 7, at 993.

The third is implied waiver or assumption of risk. This theory is based upon the fiction that the patient or one admitting the patient to a charitable institution impliedly waives his cause of action for negligence or assumes the risk thereof. Weston's Adm'x v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785 (1921).

Finally, some jurisdictions proffer a general public policy argument. "That these great public charities should be maintained for the public good cannot be questioned, and if as a result an individual injury is sometimes suffered, it is equally plain that it is better that the individual should suffer than that the public charity should not be carried on." *Id.* at 602, 107 S.E. at 790. But it is unrealistic to assume that donors will discontinue their support simply because some of their funds must necessarily be directed to settle tort claims. PROSSER, *supra* note 7, at 994.

9. Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S.E. 13 (1914).

10. "Strangers" is a term used by the Virginia court to denote those non-trespassing persons not availing themselves of the medical services of the institution, such as a person accompanying a friend upon his being admitted to a hospital. *See, e.g.*, Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 133 S.E.2d 559 (1963).

11. 116 Va. at 116, 81 S.E. at 18. Further, in this case the groundwork was laid for the determination of whether an institution is to be considered "charitable" or not for purposes of exempting it from liability. *Id.* at 104, 81 S.E. at 14. This issue, also expounded upon in Memorial Hosp., Inc. v. Oakes, 200 Va. 878, 108 S.E.2d 388 (1959), is beyond the scope of this comment.

12. In pointing out that a paying patient is nevertheless a "charity patient," the Virginia court said in Weston's Adm'x v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785 (1921):

> It is true that he is paying for the privilege he enjoys, and this may entitle him to greater luxuries which his money can supply, but not to any greater care or freedom from negligence on the part of the attendants. The rich and the indigent stand on the same footing as to protection against such negligence. *Id.* at 597, 107 S.E. at 788.

13. "Beneficiaries" is a term of art simply encompassing those persons receiving medical treatment within the institution, whether or not they pay for the services they receive.

14. For an early application of this principle to allow recovery to a beneficiary, *see* Norfolk Protestant Hosp. v. Plunkett, 162 Va. 151, 173 S.E. 363 (1934).

15. *See* Roanoke Hosp. Ass'n v. Hayes, 204 Va. 703, 133 S.E.2d 559 (1963); Hill v. Leigh Memorial Hosp., Inc., 204 Va. 501, 132 S.E.2d 411 (1963); Memorial Hosp., Inc. v. Oakes,

In 1959 Justice Snead, fielding Virginia's first challenge to this doctrine, questioned its continuing validity,[16] but declined to judicially abrogate the rule.[17] At this time, fears of retroactive application of liability[18] "without [having] afford[ed] any opportunity to those affected to indemnify themselves against loss," and a fear of appearing to legislate from the bench,[19] kept Virginia from effecting a transition from immunity to liability.[20]

After several early attempts to restrict charitable immunity,[21] the Virginia General Assembly in 1974 enacted Section 8-629.2.[22] The statute

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200 Va. 878, 108 S.E.2d 388 (1959); Norfolk Protestant Hosp. v. Plunkett, 162 Va. 151, 173 S.E. 363 (1934); Weston's Adm'r v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785 (1921).

16. Memorial Hosp., Inc. v. Oakes, 200 Va. 878, 889, 108 S.E.2d 388, 396 (1959).

17. *Id.*

18. *Id.* This fear may have been unfounded, since charitable hospitals were already liable to "strangers" to the institution they probably had already procured some insurance. Moreover, two courses of action were then open to the court to insure that Virginia would soon be rid of charitable immunity, while guarding against having ruinous judgments inflicted upon uninsured charitable institutions. First it could have, as did the court in Colby v. Carney Hosp., 356 Mass. 527, 254 N.E.2d 407 (1969), upheld the rule in the instant case but stated that the next time the immunity issue was squarely before the court, it intended to abolish it. This would have given fair warning to charities to insure themselves.

Second, it could have abrogated the rule but given its ruling prospective effect only. The Virginia Supreme Court has given tacit approval to this method. *See* Fountain v. Fountain, 214 Va. 347, 200 S.E.2d 513 (1973), declaring that its abrogation of interspousal tort immunity in Surrat, Adm'r v. Thompson, 212 Va. 191, 183 S.E.2d 200 (1971), was to have prospective effect only. For a general discussion of this judicial tool, see 25 MAINE L. REV. 359 (1973).

19. 200 Va. at 889, 108 S.E.2d at 396.

20. Judicial abrogation would have prevented some of the problems possibly arising from ambiguities in the statute discussed below.

21. H.B. No. 145 (1962) (making charitable institutions liable to *paying* patients); H.B. No. 721 (1966); S.J.R. 34 (1970) (establishing joint commission to study and report on "advisability of abolishing or limiting" charitable immunity); H.B. No. 1077 (1972); S.J.R. 54 (1972) (directing the Virginia Advisory Legislative Council to study charitable and soverign immunity).

22. VA. CODE ANN. § 8-629.2 (Cum. Supp. 1974) reads:

> **Tort liability of Hospitals.** - Hospital as referred to in this section shall include any institution within the definition of hospital in § 32-298 of the Code of Virginia and maternity hospital as defined in § 32-147 of the Code of Virginia.
>
> No hospital, as defined in this section, shall be immune from liability for negligence or any other tort on the ground that it is a charitable institution unless such hospital renders exclusively charitable medical services for which service no charge is ever made to or on account of the patient or unless the party alleging such negligence or other tort was accepted as a patient by such institution under an express written agreement executed by the hospital and delivered at the time of admission to the patient or the person admitting such patient providing that all medical services furnished such patient are to be supplied on a charitable basis without financial liability to the patient or reimbursement to the hospital for the specific services rendered such patient from

contains four components. First, it defines hospital by reference to the hospital licensing law, which encompasses any place where facilities are maintained for the medical or nursing attention of any two nonrelated physically or mentally ill persons,[23] and includes any maternity hospital.[24]

Second, it provides that no charitable hospital shall have a claim of immunity unless it renders exclusively charitable services for which no charge is ever made *to or on account of the patient*.[25] Two problems are inherent in this clause. One is the ambiguous phrase "the patient." Construed to mean the injured patient who is suing the institution, the charity could still enjoy immunity if it had not made any charge to or on account of that particular patient, even if it had not previously informed him of the fact that he was not being charged.[26] This construction, however, when read in light of the next clause, renders the statute somewhat absurd,[27] and, since statutes are to be construed to avoid absurdity[28] the clause must be given its only other reasonable construction, "any patient."

Construed to mean "any patient," the clause becomes ineffective as a device for allowing charitable institutions in Virginia to retain their immunity. Virtually no institution in the state renders services for which it never charges any patient.[29]

The third component provides that the charitable institution will retain immunity if it delivers to the patient, upon admission, a written agreement that he will not be charged for services. This is designed to eliminate a harsh result from application of the common law rule. Under the statute, persons having the means to and intending to pay will not be left without a cause of action when, unaware that they are receiving gratuitous treat-

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any other source; provided, however, that a hospital which is a charitable institution and which is insured against liability for negligence or other tort in an amount not less than $100,000 for each occurrence shall not be liable for damage in excess of the limits of such insurance.

23. *Id.* § 32-298(2) (Repl. Vol. 1973).

24. *Id.* § 32-147(3).

25. *Id.* § 8-629.2 (Cum. Supp. 1974) (emphasis added).

26. Therefore a person entering an institution fully intending to and having the means to pay may find himself remediless when injured by a servant of the institution, which situation was one of the greatest evils under the Virginia common law rule of immunity.

27. If "the patient" is construed to mean "the patient suing the hospital," and read in conjunction with the clause immediately following, it would render charitable hospitals immune if they informed the patient that he was not being charged, or if they did not, so long as he was not being charged.

28. *See, e.g.*, Whitlock v. Hawkins, 105 Va. 242, 267, 53 S.E. 401, 409 (1906).

29. Of the hospitals that could have hoped to enjoy this exemption, nearly all render at least occasional services to Medicare patients, on whose account a charge *is* made. Telephone conversation with Stuart D. Ogren, Executive Director of the Virginia Hospital Association, Sept. 18, 1974.

ment, they are injured by the negligence of an employee. Moreover, this clause allows a charitable hospital which cannot qualify under the exclusively charitable criterion[30] to maintain its charitable immunity in the case where a non-paying beneficiary is injured.

The fourth component is ostensibly the limiting clause. It states that a charitable hospital carrying insurance against liability in excess of $100,000 for each occurrence *"shall not be liable for damage in excess of the limits of [its] insurance."*[31] Two problems arise. A literal interpretation of this clause would limited the amount recoverable by a "stranger" injured by any servant of the institution, and would also limit the amount recoverable by a "beneficiary" injured by a servant negligently employed or negligently retained. These classes of persons were afforded unlimited recovery for injury under the Virginia common law rule. But, since the statute was purportedly designed to restrict rather than to expand charitable immunity,[32] the courts may well hold the common law rule controlling. Further, it may be that this clause is of little significance to many charitable institutions, because the limits of their insurance are above that which the average injured person would be seeking as damages.[33]

The probable present state of charitable immunity in Virginia would allow:

1) Strangers to have unlimited recovery against any charitable hospital for injury caused by the negligence of any of its servants.

2) Beneficiaries to have:

a) Unlimited recovery against any charitable hospital for injury caused by its servants who were negligently hired or negligently retained.

b) Limited recovery[34] against any "non-exclusively charitable" hospital which admits him without notice that he is not being charged, for injury caused by a non-negligently hired and retained servant.

c) No recovery for injuries against any exclusively charitable hospital.

d) No recovery for injuries against any charitable hospital which admits him with notice that he is not being charged.

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30. It may be that no hospital can qualify as "exclusively charitable." *See* note 29 and accompanying text *supra*.

31. VA. CODE. ANN. § 8-629.2 (Cum. Supp. 1974) (emphasis added).

32. Comm. Substitute for H.B. No. 188 (1974) is prefaced: "A BILL . . . to partially abolish the common law doctrine of charitable immunity."

33. Most major hospitals in Virginia are insured for up to $50,000 for each occurrence of negligently-inflicted injury, with aggregate coverage of $1,000,000. Telephone conversation with Stuart D. Ogren, Executive Director of the Virginia Hospital Association, November 11, 1974 [hereinafter cited as Ogren].

34. Recovery in this instance will be limited to the amount of the hospital's liability insurance if the hospital carries insurance covering over $100,000 in damages for each occurrence. *See* statute cited note 22 *supra*.

Thus construed, the only new cause of action created by the statute is 2(b), that of beneficiaries without notice in a "non-exclusively charitable" hospital injured by a competent employee.

In addition to problems of construction, the statute's partial repeal of charitable immunity may well result in imposing an economic hardship on many hospitals. It is estimated that, as a result of this statute, all basic per bed hospital insurance rates will increase 772%.[35]

Tort Law—VIRGINIA DISCARDS DOLLAR LIMITATION ON WRONGFUL DEATH RECOVERY—VA. CODE ANN. § 8-636.1 (Cum. Supp. 1974).

The placing of a dollar value limit on the life of a human being in a wrongful death action is arguably arbitrary, since this is generally considered to be within the province of the jury upon due consideration of the facts in each particular case. The Virginia General Assembly has seen fit to reverse its stand on this issue by abolishing the limitation on recovery imposed on beneficiaries of decedents whose death was caused by the wrongful act of another.

The first wrongful death act appeared in England in 1846[1] in response to the common law rule refusing the right to recovery.[2] Subsequently virtually every American jurisdiction[3] adopted either a "survival statute"[4] or a "death act"[5] to allow for such recovery.

The death acts normally provide for recovery measured by loss to the beneficiaries[6] under one or more of the following categories: (1) pecuniary loss, (2) loss of services, (3) loss of consortium, (4) mental anguish, (5)

35. Ogren, *supra* note 33. In addition many major hospital liability insurance companies are already abandoning the Virginia market. *Id.*

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1. Lord Campbell's Act, 9 & 10 Vict., c. 93 (1846).

2. Baker v. Bolton, 170 Eng. Rep. 1033 (K.B. 1808) (in civil court the death of a human being is not an "injury").

3. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 24.1 (1956, Supp. 1968) [hereinafter cited as HARPER & JAMES].

4. This type of statute preserves the cause of action of the deceased beyond his death. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 127, at 902 (4th ed. 1971).

5. These statutes, modeled after Lord Campbell's Act, create a new cause of action in the deceased's personal representative for the benefit of certain designated persons. *Id.*

6. Thirty-nine states, including Virginia, use this "loss to beneficiaries" measure of damages. *See* Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 408 (1966).

medical expenses, and (6) funeral expenses.[7] Fearing that sympathetic juries would return excessive verdicts,[8] many states responded by placing a dollar limitation on recovery.[9]

The first wrongful death act enacted in Virginia provided that the jury shall award damages which they feel are fair and just, "not exceeding ten thousand dollars."[10] It was modeled after Lord Campbell's Act and was interpreted as not restricting recovery to strictly pecuniary loss.[11] This statute remained in its basic form, except for changes in classification of beneficiaries and increases in the amount of recovery allowable, until 1968.[12]

It would seem that the 1968 Virginia General Assembly would have followed the lead of its legislative predecessors[13] and continued to liberalize recovery under Virginia's wrongful death act. Perhaps they so intended,[14] but in increasing the total amount recoverable to $75,000 they encumbered two-thirds of it by requiring proof of dependency,[15] later construed to mean actual dependency.[16] Therefore, if the deceased had no dependents, the maximum recovery allowed his beneficiaries would be $25,000. Faced with this impediment to liberalization of the Virginia death act, the next session of the General Assembly began a series of unsuccessful attempts to amend it.[17] It was not until 1974 that the General Assembly was successful.

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7. *See* S. SPEISER, RECOVERY FOR WRONGFUL DEATH §§ 3:3 *et seq.* (1966) [hereinafter cited as SPEISER].

8. *Id.* § 7:4.

9. In 1968, 13 states had dollar limitations ranging from $10,000 to $100,000. HARPER & JAMES, *supra* note 3, at § 25.13 n.2.

10. Va. Acts of Assembly 1870-71, ch. 29, at 27.

11. *See* Matthews v. Warner's Adm'r, 70 Va. (29 Gratt.) 570 (1877). Later pronouncements by the court portrayed further their intent to give liberal construction to the words "fair and just." *See, e.g.*, Ratcliffe v. McDonald's Adm'r, 123 Va. 781, 97 S.E. 307 (1918) (pecuniary loss, solace and loss of society).

12. *See* Va. Acts of Assembly 1920, ch. 26, at 27; Va. Acts of Assembly 1942, ch. 228, at 337 ($15,000 maximum); Va. Acts of Assembly 1952, ch. 60, at 83 ($25,000 maximum); Va. Acts of Assembly 1958, ch. 387, at 510 ($30,000 maximum); Va. Acts of Assembly 1962, ch. 430, at 702 ($35,000 maximum); Va. Acts of Assembly 1966, ch. 583, at 787 ($40,000 or $50,000 maximum — language contradictory).

13. See materials cited note 12 *supra*.

14. *Cf.* Craig, *Damages Recoverable for Wrongful Death*, 5 U. RICH. L. REV. 213, 222 (1971).

15. Va. Acts of Assembly 1968, ch. 485, at 698. Under this amendment, beneficiaries could recover up to $25,000 for "solace" and $50,000 for pecuniary loss only after proof of dependency.

16. This actual dependency need not have been total. Pugh v. Yearout, 212 Va. 591, 186 S.E.2d 58 (1972).

17. Four bills were offered at the 1970 session: H.B. No. 396, "fair and just" recovery not to exceed $75,000 with no dependency requirement; H.B. No. 344, "fair and just" recovery

The act[18] retains the "fair and just" language which will allow the decedent's beneficiaries to have the benefit of a plethora of favorable decisional law developed throughout the history of Virginia's act.[19] Moreover, it provides no maximum amount which the beneficiaries may recover. This nonprovision will clearly foreclose the possibility of inadequate compensation for pecuniary loss to beneficiaries of wealthy decedents, and may even affect a lightening of the court's case load.[20] The amendment contains a non-exclusive listing of elements which the jury may take into consideration in determining the amount to which the beneficiaries are entitled. With one exception,[21] this listing includes virtually all elements which have ever been deemed pertinent to recovery for wrongful death in other states.[22]

The last provision in the amendment provides for pro rata distribution among creditors of moneys recovered by the beneficiaries for medical and

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with no maximum; Conf. Substitute for H.B. No. 344, "fair and just" recovery with enumeration of elements to be considered in determining amount and no maximum; H.B. No. 982, "fair and just" recovery limited to $25,000 solace, and $75,000 pecuniary loss only upon proof of dependency.

Two bills were offered at the 1972 session: S.B. No. 173, "fair and just" recovery limited to $25,000 solace, and $100,000 pecuniary loss only upon proof of dependency; H.B. No. 384, "fair and just" recovery with $100,000 maximum.

18. VA. CODE ANN. § 8-636.1 (Cum. Supp. 1974) reads:

> **Amount and distribution of damages.** - The jury in any such action may award such damages as to it may seem fair and just, and may direct in what proportion they shall be distributed to the surviving spouse, children, and grandchildren of the deceased, or if there shall be none such, then to the parents, brothers and sisters of the deceased. As to members of the same class, the jury shall have discretion as to who shall receive the whole or any part of the recovery.
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> The verdict of the jury shall include, but may not be limited to, damages for the following: (a) sorrow, mental anguish, and solace which may include society, companionship, comfort, guidance, kindly offices and advise of the decedent; (b) compensation for reasonably expected loss of (i) income of the decedent, and (ii) services, protection, care and assistance provided by the decedent; (c) expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in death; and (d) reasonable funeral expenses.
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> Damages recoverable under (c) and (d) above shall be apportioned pro rata among the creditors who rendered such services, as their respective interests may appear.
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> The court shall apportion the costs of the action as it shall deem proper.

19. Cases cited note 11 *supra*.

20. If defendants know that the beneficiaries are constrained by a maximum amount of recovery, they are less prone to settle out of court. Chapman, *Should Compensation in Wrongful Death Actions be Limited?*, 50 ILL. B.J. 782 (1962).

21. A few states adhering to the "loss to beneficiaries" criterion have allowed recovery for the mental and physical pain and suffering experienced by the decedent between the infliction of the injury and death. But consideration of the decedent's mental anguish is clearly incongruous with the purpose of loss to the beneficiaries statutes in general, and should be excluded from consideration by the jury under Virginia's death act.

22. *See generally* SPEISER, *supra* note 7, at §§ 3:3 *et seq*.

burial expenses. This will eliminate the possibility, present under the 1968 amendment,[23] that one creditor will be reimbursed completely while another will not if the jury sees fit not to award the full amount of those expenses.

The recovery now allowed under Virginia's death act is extremely liberal. Critics of such a liberal approach fear that the lifting of the dollar limitation on recovery and the exhaustive listing of elements to be considered in determining recovery will foster excessive jury verdicts. But this fear may not be well-founded.[24] Nevertheless, it is the province of the bench and the reviewing court to ferret out excessiveness,[25] and recovery should not be limited simply because the courts may be less adept at perceiving excessiveness in death actions than they are in personal injury actions, upon which no recovery limits are placed.[26]

Tort Law—VIRGINIA ABROGATES AUTOMOBILE GUEST STATUTE—VA. CODE ANN. § 8-646.1 (Cum. Supp. 1974).

As long as there have been motor vehicles, there have been accidents involving injuries to passengers. Case law in the vast majority of states did not distinguish between paying and non-paying passengers for purposes of allowing recovery for personal injury occurring as a result of their host's ordinary negligence.[1] However, either as a result of adverse public sentiment against hitch-hiking,[2] or of persistent and effective lobbying by auto-

23. *See* Craig, *Damages Recoverable for Wrongful Death*, 5 U. RICH. L. REV. 213, 223 (1971).

24. It is not at all clear that imposing a ceiling on recovery in death actions results in non-excessive verdicts, for the fixed amount may become somewhat of a "standard" rather than a maximum. *See* SPEISER, *supra* note 7, at § 3:46.

25. Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 427 (1966).

26. *See* HARPER & JAMES, *supra* note 3, § 25.13, at 1328; SPEISER, *supra* note 7, § 7:4, at 491-92; Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402, 427 (1966); Note, *Wrongful Death Damages in Virginia*, 12 WM. & MARY L. REV. 396, 412-13 (1970).

1. *See, e.g.*, Sheean v. Foster, 80 Cal. App. 56, 251 P. 235 (3d Dist. Ct. App. 1926); Jacobs v. Jacobs, 141 La. 272, 74 So. 992 (1917). Virginia, however, did not subscribe to this majority view. *See* note 8 and accompanying text *infra*.

2. Tipton, *Florida's Automobile Guest Statute*, 11 U. FLA. L. REV. 287, 287-88 (1958) [hereinafter cited as Tipton]. Attacking this theory as having been an invalid rationale for withholding recovery from the average guest, Prosser has commented that, "[i]n the legislative hearings there is frequent mention of the hitch-hiker, who gets little sympathy. The

mobile liability insurance companies,[3] many states[4] passed automobile guest statutes. These statutes lowered the standard of care[5] owed by an operator to his guest. By making it more difficult for guests to recover, the enacting legislatures hoped to curtail collusive lawsuits brought by a guest and his host against the host's liability insurance carrier, and to promote hospitality by insuring that persons who may have otherwise offered another a gratuitous ride would not be deterred by fearing liability for a negligently inflicted injury.[6]

Virginia was one of only four states[7] which, at common law, declared the duty of the automobile driver to his non-paying guest to be less than ordinary care.[8] The legislature in 1938 adopted an automobile guest statute[9] which simply added its stamp of approval to a principle already judicially recognized.[10] The act allowed a "guest without payment" recovery for personal injury or property damage only upon proof that it resulted from his host's gross negligence or willful and wanton misconduct.[11] Not-

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writer once found a hitch-hiker case, but has mislaid it. He has been unable to find another." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 34, at 187 n.8 (4th ed. 1971) [hereinafter cited as PROSSER].

3. *See, e.g.*, White, *The Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326, 332-33 (1934) [hereinafter cited as White]. One commentator acutely observed that, " . . . it is perhaps more than mere coincidence that one of the first guest statutes was enacted in the nation's 'insurance capital,' Connecticut." Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659, 664-65 n.37 (1974).

Connecticut, in 1927, was the first state to enact a guest statute. Significantly, no state has enacted a guest statute since 1939. Tipton, *supra* note 2, at 288.

4. Twenty-eight states have at one time or another had a guest act in force. Note, *The Present Status of Automobile Guest Statutes*, 59 CORNELL L. REV. 659 (1974).

5. The statutory standard of care may be to refrain from injuring one's guest by gross negligence, recklessness, willful and wanton misconduct, intentional misconduct or intoxication. Some employ the foregoing in various combinations. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 16.15, at 952-53 (1956, Supp. 1968) [hereinafter cited as HARPER & JAMES].

6. *See, e.g.*, Truitt v. Gaines, 199 F. Supp. 143, 148 (D. Del. 1961), *aff'd*, 318 F.2d 461 (3d Cir. 1963); Henry v. Bauder, 518 P.2d 362 (Kan. 1974); 23 CATHOLIC U.L. REV. 402 (1973). These rationales came under attack from the outset. *See* White, *supra* note 3; 14 IOWA L. REV. 243 (1929).

7. Massachusetts, Georgia and Washington were the others. White, *supra* note 3, at 326.

8. Virginia "deliberately adopted" the Massachusetts rule enunciated in Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917), which found the duty of care owed a guest to be the same as that which a gratuitous bailee owed his bailor: to refrain from "gross negligence." Thomas v. Snow, 162 Va. 654, 659-60, 174 S.E. 837, 838-39 (1934). *See, e.g.*, Boggs v. Plybon, 157 Va. 30, 160 S.E. 77 (1931).

9. Va. Acts of Assembly 1938, ch. 285, at 417.

10. *See* cases cited note 8 *supra*.

11. Va. Acts of Assembly 1938, ch. 285, at 417.

withstanding the General Assembly's attempts to amend[12] and repeal[13] Virginia's guest statute, it remained in force until 1974 when it was substantially amended.

The first clause of the amendment[14] eliminated proof of gross negligence making the host liable to a guest for ordinary negligence. In order to rid guests of the prior impediment to recovery, it was necessary for the legislature to amend rather than simply repeal Virginia's guest act because of Virginia's common law background.[15] The second clause retained all defenses otherwise available to the host[16] to guard against the statute being construed as imposing strict liability for mere negligence. In short, the statute simply calls into play the well-established rules of negligence.[17]

The legislators' effective "repeal" of the guest act appears particularly appropriate when viewed in light of several developments, which may or may not have been causally related.[18] First, is the widespread belief that automobile guest statutes were fundamentally ill-conceived.[19] Three courts have recently held that the classification embodied in this type of statute is violative of both state and federal constitutional guarantees of equal protection of the laws.[20] Perhaps the most eloquent expression of contemporary disgust appears in *Brown v. Merlo*.[21] Justice Tobriner, speaking for the California Supreme Court, held the classifications created between those denied and those permitted recovery for negligently inflicted injuries could not be rationally justified by the purposes of the statute: collusion

12. Comm. Substitute for H.B. No. 293 (1972); S.B. No. 469 (1970); H.B. No. 261 (1970); H.B. No. 594 (1973).

13. H.B. No. 293 (1972).

14. VA. CODE ANN. § 8-646.1 (Cum. Supp. 1974). The statute reads:

> Any person transported by the owner or operator of any motor vehicle as a guest without payment for such transportation and any personal representative of any such guest so transported shall be entitled to recover damages against such owner or operator for death or injuries to the person or property of such guest resulting from the negligent operation of such motor vehicle. However, this statute does not limit any defense otherwise available to the owner or operator.

15. See note 8 and accompanying text *surpa*.

16. VA. CODE ANN. § 8-646.1 (Cum. Supp. 1974). See note 14 *supra*.

17. If the intent of the legislature was to allow a non-paying passenger recovery under the laws of negligence, then it is well written. Thus interpreted any problems brought about by its adoption will necessarily be limited to problems inherent in the law of negligence.

18. The lack of legislative history makes it virtually impossible to pinpoint the force or forces which triggered the passage of the amendment.

19. *Cf.* cases cited note 20 *infra*; Cohen v. Kaminetsky, 36 N.J. 276, 176 A.2d 483 (1961); PROSSER, *supra* note 2, at 383; Tipton, *supra* note 2, at 307; White, *supra* note 3, at 355.

20. *See* Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973); Henry v. Bauder, 518 P.2d 362 (Kan. 1974); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974).

21. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

prevention[22] and promotion of hospitality.[23] Following the *Brown* rationale, the guest statutes of Kansas[24] and North Dakota[25] have recently suffered a similar fate, while those of Iowa[26] and Utah,[27] rejecting *Brown*, have weathered constitutional attack.[28]

Another development which substantiates the appropriateness of Vir-

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22. *Id.* at 872-78, 506 P.2d at 224-28, 106 Cal. Rptr. at 400-04. Because it denied recovery to an entire class simply because some undefined portion of that class might collude, the statute "present[ed] a classic case of an impermissibly overinclusive classification . . . ." *Id.* at 876, 506 P.2d at 227, 106 Cal. Rptr. at 403.

By enacting such statutes, the legislators ostensibly hoped to thwart the conjuring up, by hosts and guests, of collusive lawsuits. They reasoned that non-paying passengers will likely be sufficiently familiar with their host that this relationship could prove a breeding ground for collusion. Therefore, by withholding recovery from gratuituous guests for injuries caused by simple negligence of the operator, the cause of collusion prevention will be served.

This reasoning is basically unsound. For example, will a hitch-hiker who is offered a gratuitous ride by a total stranger be sufficiently familiar with his host to be likely to collude with him? Conversely, will the paying member of a car pool who rides to work with his "host" everyday be unlikely to collude with him? Further, it is clear that if a guest-host combination were bent upon concocting a fraudulent lawsuit in a state having an automobile guest statute they could falsely state that the guest had paid for the ride, or that the injury-causing misconduct was of the type for which a non-paying passenger could recover.

23. *Id.* at 864-72, 506 P.2d at 218-24, 106 Cal. Rptr. at 394-400. The *Brown* court doubted that it was ever rational to promote hospitality by withholding recovery from negligently injured non-paying passengers. But, it said, whatever credence this idea might once have had has been destroyed by the development of near universal liability insurance because "there is simply no notion of 'ingratitude' in suing your host's insurer." *Id.* at 868, 506 P.2d at 221, 106 Cal. Rptr. at 397.

24. Henry v. Bauder, 518 P.2d 362 (Kan. 1974) (unconstitutional under state and federal constitutions).

25. Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974) (unconstitutional under state constitution).

26. Keasling v. Thompson, 217 N.W.2d 687 (Iowa 1974) (withstanding challenge asserting both state and federal unconstitutionality).

27. Cannon v. Oviatt, 520 P.2d 883 (Utah 1974) (withstanding challenge asserting both state and federal unconstitutionality).

28. The challenged statutes in all five cases were neither substantially dissimilar to each other nor to that of Virginia. *Compare* Va. Acts of Assembly 1938, ch. 285, at 417, *as amended* VA. CODE ANN. § 8-646.1 (Cum. Supp. 1974) *with* CAL. VEHICLE CODE § 17158 (West, Cum. Supp. 1974); IOWA CODE ANN. § 321.494 (Cum. Supp. 1974); KAN. STAT. ANN. § 8-122(b) (1974); N.D. CENTURY CODE ch. 39-15-02 (1972); and UTAH CODE ANN. § 41-9-1 (1953). Whether Virginia's unamended guest act could have passed constitutional muster is probably dependent upon the degree of scrutiny the reviewing court would have engaged in. Because the Virginia Supreme Court has displayed a reluctance to overturn statutes as violative of equal protection unless the classification is extremely irrational, as evidenced in Miller v. Ayres, 213 Va. 251, 264-66, 191 S.E.2d 261, 272-73 (1972), the unamended guest statute might well have survived a constitutional challenge. This does not, however, dilute the appropriateness of the action taken by the 1974 General Assembly in light of enduring criticism leveled at automobile guest statutes generally.

ginia's effective repeal is the difficulty that the Virginia courts have had in interpreting the provisions of its guest act, and the probability that enfranchising non-paying passengers will not result in any legal or economic hardship. Under the amended statute, no longer will our courts become entangled in time-consuming[29] problems such as who is a guest;[30] what constitutes payment;[31] and what constitutes gross negligence.[32] Further, it is highly unlikely that liability insurance rates will increase appreciably as a result of this action by the 1974 General Assembly.[33]

R.S.E.

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29. While the number of suits may be increased by negligently injured non-paying passengers exercising their newly-found cause of action, there may not be a concomitant increase in the amount of time actually spent litigating these claims, since consideration of the "knotty little problems" has been obviated.

30. *See, e.g.*, Smith v. Tatum, 199 Va. 85, 97 S.E.2d 820 (1957) (father-in-law giving daughter-in-law a driving lesson was a "guest" within meaning of statute).

31. *See, e.g.*, Groome v. Birkhead, 214 Va. 429, 201 S.E.2d 789 (1974) (mother's undertaking to purchase gasoline was not considered payment sufficient to elevate her to status of a paying passenger).

32. *See, e.g.*, Scott v. Foley, 205 Va. 382, 136 S.E.2d 849 (1964).

33. *See* Tipton, *supra* note 2, at 305; Comment, *The Ohio Guest Statute*, 22 OHIO ST. L.J. 629, 642-43 (1961).