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Annual Survey of Virginia Law: Medical Negligence

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MEDICAL NEGLIGENCE

*Gwen M. Schockemoehl**

I. INTRODUCTION

This article examines amendments to the statutes that affect medical negligence actions made by the General Assembly in 1987 and 1988. In addition, this article reviews judicial decisions from 1986, 1987 and early 1988 that will have impact on medical negligence actions in the Commonwealth of Virginia.

In response to the sudden and significant increase in the cost of liability insurance, the Virginia Medical Society and the Joint Subcommittee Studying the Liability Insurance Crisis and the Need for Tort Reform proposed "reform" legislation to the 1987 Virginia General Assembly.[1] Notwithstanding the fact that the causes of the sudden increase in premiums and reduced availability of insurance were hotly disputed and even a finding that insurance losses in Virginia were among the lowest in the nation,[2] most of the proposed "reform" measures were enacted by the General Assembly in 1987. The number of injured persons affected by these reforms is relatively small and is comprised mainly of injured children.[3] However, this legislation represents fundamental changes in the tort system and raises serious questions about the continued grant of tort immunity to those in the health care field, the constitutional-

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1. THE LIABILITY INSURANCE CRISIS AND THE NEED FOR TORT REFORM, REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, S. Doc. No. 11 1987 Sess. (1987) [hereinafter THE LIABILITY INSURANCE CRISIS]; THE LIABILITY INSURANCE CRISIS AND THE NEED FOR TORT REFORM, FINAL REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, S. Doc. No. 20 1988 Sess. (1988) [hereinafter FINAL REPORT]; *Working Together We Made History* (Medical Society of Virginia videotape on 1987 Professional Liability Reform Legislative Campaign) (1987) [hereinafter *Working Together*].

2. THE LIABILITY INSURANCE CRISIS, *supra* note 1, at 7, 11.

3. The Medical Society of Virginia anticipates 40 births per year will come under the Obstetricians' Relief Bill. *See Working Together*, *supra* note 1. Nationally, vaccine-related injuries affected by the new statute immunizing vaccine administrators are predicted to be approximately 70 to 150 per year. *Compensation for Vaccine Injury*, 115 VA. MED. 175 (1988).

ity of the legislation, and the future direction of the tort system.[4] The net effect of the changes in the last two years has been to curtail the ability of injured persons to file suits and to recover for medical and hospital negligence.

The tone for these changes was set when the 1976 General Assembly enacted Virginia's total cap of $750,000 on all damages, economic and non-economic, recoverable in medical negligence cases.[5] The impetus for change at that time was a perceived crisis in the availability and cost of medical negligence insurance.[6]

The constitutionality of the 1976 legislation has yet to be ruled on by the appellate courts.[7] The law of medical and hospital negligence has developed slowly in Virginia. The Virginia Court of Appeals lacks jurisdiction with respect to medical negligence cases. Litigation is a slow process, and the Virginia Supreme Court grants

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4. The Medical Society of Virginia envisions that the Virginia Birth-Related Neurological Injury Act is the precursor to other such legislation that would remove all medical malpractice claims from the tort system. The Medical Society of Virginia also envisions passing to the public the fee levied against all physicians to fund the Act. *Working Together*, *supra* note 1.

5. VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 1984). The statute was amended in 1983 to raise the cap from $750,000 to $1,000,000 for health care providers generally. At the same time, VA. CODE ANN. § 8.01-38 was amended to raise the cap for insured hospitals from $100,000 to $500,000 (or the limits of insurance if greater). Act of March 27, 1983, ch. 496, 1983 Va. Acts 643.

6. THE LIABILITY INSURANCE CRISIS, *supra* note 1, at 5-6; FINAL REPORT, *supra* note 1, at 3.

7. Two cases currently pending in the Virginia Supreme Court include Palmer v. Fulcher, No. 880562 (Va. filed May 10, 1988) and Etheridge v. Medical Center Hosp., No. 860194 (Va. filed Mar. 3, 1986). In *Palmer*, Judge Stevens of the Circuit Court of Fairfax County reversed his original decision that the cap was unconstitutional, but upheld his decision that the cap applies separately to multiple defendants. Palmer v. Fulcher, 8 Va. Cir. 347, *rev'd in part*, 10 Va. Cir. 202 (Fairfax County 1987). The plaintiff in *Palmer* is appealing the circuit court's decision that the cap is constitutional and the court's decision to reduce the jury verdict to the cap.

In Williams v. Van Der Woude, 8 Va. Cir. 263 (Fairfax County 1986), the cap was held unconstitutional. The defendant filed a notice of appeal as to the verdict in excess of the malpractice cap, but allowed the time to lapse for filing the petition for appeal. The plaintiff has filed a bad faith action against the defendant's insurance company and the defendant physician has assigned his rights to the plaintiff.

There are a number of circuit court opinions that have found the malpractice cap constitutional, and various rulings have been made as to its applicability to multiple plaintiffs and multiple defendants.

Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986) *reh'g denied*, 672 F. Supp. 915 (W.D. Va. 1987), a federal district court case holding the "cap" unconstitutional, is pending in the Fourth Circuit Court of Appeals.

Decisions on the constitutionality of the cap from the Virginia Supreme Court or the Fourth Circuit Court of Appeals are not expected until 1989. It is important to note that the Virginia Court of Appeals was not granted jurisdiction over medical negligence cases.

a relatively small number of writs.[8]

As a corollary, circuit court judges exercise considerable discretion. Understandably, their decisions often lack consistency from one area of the state to another, or even within the same geographic area. Moreover, these decisions rarely receive any published appellate review.

II. LEGISLATION

A. *The 1987 General Assembly*

1. The Virginia Birth-Related Neurological Injury Compensation Act

The Virginia Birth-Related Neurological Injury Compensation Act (the "Act")[9] removes infants from the civil claims arena who are (1) unable to walk, (2) without speech, (3) unable to control bladder functions and (4) in need of assistance with all phases of daily life[10] if certain criteria are met. Specifically, the injury must have resulted from a deprivation of oxygen or mechanical injury during labor, delivery or resuscitation.[11] In addition, the injury must have been caused by a participating physician or hospital.[12]

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8. For example, *Palmer*, No. 880562 (Va. filed May 10, 1988) was filed in the Circuit Court of Fairfax County on December 4, 1984. A jury verdict was returned on August 4, 1986 and final judgment was entered by the court on March 14, 1988. The Notice of Appeal was filed on March 18, 1988, and oral argument is anticipated between November of 1988 and February of 1989.

Etheridge, No. 860194 (Va. filed Mar. 3, 1986) was filed in the Circuit Court of Virginia Beach on February 5, 1982; a jury verdict was returned on October 7, 1985; final judgment was entered by the court on December 3, 1985. A writ was granted in September, 1986 and oral argument before the Virginia Supreme Court is anticipated for October, 1988.

A sampling of civil cases concluded in the Virginia Supreme Court in 1986 shows the average length of time from the date appeal was filed until the Petition was acted upon was 199 days. If the Petition was granted, the average length of time until a final decision on the appeal was 923 days. In 1986, 136 writs were granted on civil cases and 348 appeals were refused (28% of appeals filed were granted). In 1987, 110 writs were granted on civil cases and 309 appeals were refused (26% of appeals filed were granted). Telephone interview with Richard Parker, Executive Secretary's office of the Supreme Court of Virginia, in Richmond (June 7, 1988).

9. VA. CODE ANN. §§ 38.2-5000 to -5021 (Cum. Supp. 1988).

10. *See id.* § 38.2-5001.

11. *Id.*

12. Although the Act does not specifically state this, it is being interpreted as such under the general provisions of § 38.2-5001 which defines participating physicians and hospitals and § 38.2-5008 which provides for the claimant to be notified if the claim is determined not to involve a birth related injury or a participating health care provider. As of January 1988, approximately 60% of eligible hospitals and physicians had elected to participate in the Act. It is anticipated that applications, which must be renewed each year, will rise to approxi-

If these criteria are met, the exclusive remedy under the Act is available through the Industrial Commission (the "Commission").[13] If the criteria are determined by the Commission to be inapplicable to a claim, the claimant may bring a civil suit within the applicable statute of limitations. The statute of limitations for a civil action is tolled by the filing of a claim under the Act for the duration of the time that the claim is pending before the Commission.[14]

There are a number of important features to the Act. The Act creates a rebuttable presumption that claimed injuries are birth-related.[15] A panel of physicians selected by the deans of the medical schools in Virginia must report its opinion to the Commission as to whether or not the injury is a birth-related neurological injury under the Act.[16] The Industrial Commission must consider the panel's opinion but is not bound by it.[17] The statute of limitations pertaining to these infants' claims is ten years.[18] Under the Act, damages are limited to:

> (a) necessary and reasonable medical expenses based upon the claimant's standard of living, excluding all those which have been paid or for which the claimant is entitled to be paid through public and private collateral sources;
>
> (b) loss of earnings from age 18 to age 65 at a rate of fifty percent of the average weekly wage of private, non-farm workers in the Commonwealth;
>
> (c) reasonable expenses and attorney fees relating to the filing of a claim under the Act. However, the amount of attorneys' fees is subject to the approval of the Industrial Commission.[19]

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mately 70%. Telephone interview with Marshall Cook, Assistant Attorney General, in Richmond, Virginia (May 12, 1988).

13. VA. CODE ANN. § 38.2-5002(B) (Cum. Supp. 1988). An exception is made if there is clear and convincing evidence that a birth-related, neurological injury was caused by an intentional or willful act. *Id.* § 38.2-5002(C).

14. *Id.* § 38.2-5005.

15. *Id.* § 38.2-5008(A)(1).

16. *Id.* § 38.2-5008(B).

17. *Id.*

18. *Id.* § 38.2-5013.

19. *Id.* § 38.2-5009. As of July 1, 1988, the weekly wage rates as determined by the Virginia Employment Commission ranged from $90.50 to $361.79. According to Chief Deputy Lawrence D. Tarr, the "average weekly wage in the Commonwealth" would be interpreted as the higher figure. Therefore, 50% of the average weekly wage in 1988 would equal $180.90. Telephone interview with Lawrence D. Tarr, Chief Deputy of the Industrial Commission of Virginia, in Richmond (June 8, 1988).

Under the Act, a claimant must file a petition with the Industrial Commission.[20] A hearing must be held to review the claimant's petition within forty-five to one hundred-twenty days after the filing of the petition.[21] This hearing is held in the city or county where the injury occurred or in a contiguous city or county unless otherwise agreed by the parties and approved by the Industrial Commission.[22] The parties to this hearing are the claimant and the Virginia Birth-Related Neurological Injury Compensation Program.[23]

Within thirty days from the filing of the petition, the Virginia Birth-Related Neurological Injury Compensation Program must file a response.[24] Appeal of a decision is first made to the full Industrial Commission,[25] and there after to the Virginia Court of Appeals.[26]

The intent of the Act was both to relieve physicians from lawsuits and to compensate injured persons quickly and at a reduced cost.[27] However, it is difficult to predict the effect of the Act. At the present time, no claims have been filed under the Act nor have any constitutional challenges been instituted.

On the positive side, participating hospitals and obstetricians may receive a rebate of insurance premiums.[28] For the injured

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20. *Id.* § 38.2-5004.
21. *Id.* § 38.2-5006.
22. *Id.*
23. *Id.* The Virginia Birth-Related Injury Compensation Program is created by the Act. *Id.* § 38.2-5002(A). The Virginia Birth-Related Injury Compensation Program is governed by a five-member Board of Directors, appointed by the Governor. *Id.* § 38.2-5016(A). The Board of Directors consists of one citizen representative, one liability insurance representative, both a participating and non-participating physician representative, and one participating hospital representative. *Id.* § 38.2-5016(C).

The directors are: (1) citizen representative—Gladys Bailey Harris, Esq., ABC Commissioner; (2) participating hospital representative—Houston L. Bell, Jr., Exec. Vice President, Roanoke Memorial Hospital; (3) participating physician representative—L. Daniel Crooks, M.D.; (4) liability insurers representative—Thomas L. Bondurant, Aetna Insurance Co.; and (5) non-participating physicians' representative—C.M. Kinloch Nelson, M.D. Telephone interview with Ken Meadows, Office of the Secretary of the Commonwealth of Virginia, in Richmond (May 2, 1988).

24. *Id.* § 38.2-5004(D). Provisions for interrogations and depositions are set forth in § 38.2-5007.
25. *Id.* § 38.2-5010.
26. *Id.* § 38.2-5011.
27. *See Working Together*, *supra* note 1.
28. One insurer has now agreed to give a yearly rebate of $3,000 to participating obstetricians in consideration of their $5,000 annual payment to the Program's fund as required by §§ 38.2-5019, -5020. *Va. Lawyer's Weekly*, Mar. 14, 1988 at 17. Non-participating physi-

party, all compensable medical expenses, past and future, should be covered. These expenses may not currently be totally covered in cases to which the cap applies because catastrophic injuries frequently result in medical costs which greatly exceed the cap. Although negligence is not relevant to an award of compensation under the Act, provisions are made for either the Board of Medicine, which regulates physicians, or the Department of Health, which regulates hospitals, to investigate negligence and take necessary action on negligent conduct.[29]

On the negative side, non-participating health care providers whose negligence contributes to a birth-related injury caused by a participating physician receive windfall immunity. Those who benefit include not only non-participating obstetricians but also anesthesiologists, nurses, residents, pediatricians and others. The most severely injured children and their parents are denied any compensation for the bulk of their injuries. An injured child would otherwise be entitled to compensation for proven pain, suffering, disfigurement, deformity, associated humiliation and embarrassment, lost wages and loss of earning capacity, loss of life expectancy, and loss of enjoyment of life. A parent would otherwise be entitled to be compensated for expenses, emotional distress, loss of the child's services or damages provided by the Wrongful Death Act for a child who has died.[30]

Since questions will arise concerning the cause of the injury and whether the courts or the Commission has jurisdiction, it is anticipated that there will be a substantial delay associated with resolving cases initially brought in one forum and then transferred to another. There may also be difficulty in obtaining competent representation for claimants due to the time, complexity and uncertainty involved in pursuing a claim to completion. The courts of the Commonwealth will undoubtedly be asked to rule on the constitutionality of this Act.

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cians are required to pay $250 annually. Under the Act participating hospitals are required to pay $50 per delivery annually not to exceed a maximum of $150,000. VA. CODE ANN. § 38.2-5020.

29. *Id.* § 38.2-5004(A)(2), (B), (C) (Cum. Supp. 1988).

30. For damages generally allowed in personal injury suits, *see* 1 MICHIE'S VIRGINIA MODEL JURY INSTRUCTIONS, *Civil*, Instruction No. 9.000 (1984 Repl. Ed. & Supp. 1985, 1986, 1987). For damages allowed in wrongful death suits, see VA. CODE ANN. § 8.01-52 (Repl. Vol. 1984). *See* Reuwer v. Hunter, No. 84-0034-C-H (E.D. Va. May 18, 1988) (medical negligence case permitting recovery for loss of enjoyment of life).

2. Legislation Granting Immunities and Limiting the Right to Compensation for Medical Negligence

The Good Samaritan Act[31] was amended to grant immunity to persons rendering emergency care to obstetrical patients in active labor, exclusive of gross negligence, if neither the health care provider nor anyone with whom he is professionally associated has previously cared for the patient. Presumably, this law will be applied with greater frequency to the children of minority and other socio-economically deprived mothers since they are the ones who most frequently fail to obtain regular prenatal care.

Persons causing vaccine-related injuries or deaths are immune in all cases where a request for compensation under the federal compensation program could have been made, except where gross negligence is present.[32] On its face, this law would appear to represent an absolute bar to those who fail to apply for federal compensation prior to seeking a tort remedy, regardless of whether federal compensation in fact has been or will be awarded.

A new statute of limitations is applicable to minors with medical negligence claims and provides for a maximum of ten years in which to bring a claim for injuries.[33] Although most parents and guardians are diligent, this statute creates an absolute bar to recovery in cases where the child, acting under the dual disabilities created by his injury and his minority, is not assisted by others in bringing suit. This statute, designed to ease the burden on obstetricians, may ultimately burden the state and the taxpayers who will pay to support and treat those who are not compensated by the tort system.

3. "Reform" Legislation Designed to Affect the Tort System

The 1987 General Assembly broadened the base from which jury panel members are selected. Physicians and dentists are no longer automatically excluded.[34] However, one can predict that either a physician or dentist will ask to be excluded from a medical negli-

31. VA. CODE ANN. § 8.01-225 (Cum. Supp. 1988).
32. *Id.* § 8.01-44.2.
33. VA. CODE ANN. § 8.01-243.1 (Cum. Supp. 1988). The statute provides a minimum of two years to commence an action accruing on or after July 1, 1987. Minors less than eight years old have until their tenth birthday to commence the action. *Id.*
34. VA. CODE ANN. § 8.01-341 (Cum. Supp. 1988).

gence trial because of the amount of time required for trial, or he will be stricken from the panel by the plaintiff.

Immunity has been extended to the members of governing bodies of city, county or town boards, commissions and agencies.[35] However, this immunity does not apply to cases involving intentional or willful misconduct or gross negligence.[36] This immunity would extend to medical negligence cases involving local clinics or health departments that provide medical diagnosis and treatment.

Frivolous suits may result in sanctions against the filing attorney.[37] The amount of time and expense involved in the proper evaluation of a claim and in distinguishing the viable claims from the nonviable claims makes medical negligence cases dangerous ground for inexperienced practitioners.[38] Whether sanctions will be imposed for frivolous defenses and objections to discovery remains to be seen.

Punitive damages are presently capped at $350,000.[39] In Virginia, the number of punitive damage claims which survive a motion to strike and go to the jury is very small. In those cases where punitive damages may be awarded, the claims which survive both motions at the trial court level to take away or reduce punitive damage awards and appellate review, are even more limited.[40] There has been only one medical malpractice case in which punitive damages were awarded in Virginia.[41] Moreover, punitive awards in medical malpractice cases are rare nationwide.[42]

B. *The 1988 General Assembly*

The only statutory change that positively affected medical negligence was the raising of the amount recoverable under the Tort Claims Act from $25,000 to $75,000, or the limits of insurance, whichever is greater.[43] Following the enactment of the $25,000

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35. *Id.* § 15.1-7.01.
36. *Id.*
37. VA. CODE ANN. § 8.01-271.1 (Cum. Supp. 1988).
38. Bengston, *Medical Malpractice Cases: Things are Not Always What They Seem*, 12 VA. B.A.J. 16, 18 (1986).
39. VA. CODE ANN. § 8.01-38.1 (Cum. Supp. 1988).
40. *See, e.g.*, Philip Morris Inc. v. Emerson, 235 Va. 380, 368 S.E.2d 268 (1988).
41. Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986).
42. *See generally Punitive Damages May be Recovered In Medical Malpractice Actions*, 13 MED. LIABILITY REP. 129 (June 1988).
43. Act of April 20, 1988, ch. 884, 1988 Va. Acts 1831 (amending VA. CODE ANN. § 8.01-195.3).

limit in 1982, the Commonwealth reduced its insurance coverage from $1,000,000 to $25,000. The Commonwealth now routinely files a demurrer to any ad damnum in excess of its coverage limits in medical negligence cases brought against it.[44]

III. Judicial Decisions

A. *Notice of Claim*

The notice of claim, which is a prerequisite to filing any suit under the Medical Malpractice Act, must "include the time of the alleged malpractice and a reasonable description of the act or acts of malpractice."[45] Thus, the court held in *Luster v. Isaac*[46] that failure to obtain informed consent was not sufficient to put the defendant on notice that he negligently performed a surgical procedure. In *Voss v. Puray*[47] the court held that information that a forced vaginal delivery was contra-indicated was adequate to put the physician on notice that he should have performed a caesarean section. However, this was not adequate to put the physician on notice that the vaginal delivery was conducted incorrectly.[48]

Generally, a notice of claim is the first step and, as such, does not require the particularity of a motion for judgment and "does not require minutely detailed descriptions of the allegedly wrongful acts of the health care provider."[49] Nevertheless, claim letters pose a real trap for the unwary and decisions regarding what constitutes "adequate" notice vary considerably from one court or judge to another.

Rule 2(e) of the Medical Malpractice Rules of Practice (the "Rules") requires that a single notice name all of the defendants and be sent to all of the defendants.[50] However, this rule is in conflict with section 8.01-581.2 and is therefore void.[51] A claimant

44. This information was obtained from a variety of sources including discovery and motions filed in several of the author's pending cases which involve alleged negligent medical care at the Medical College of Virginia and the University of Virginia Hospital.

45. Va. Code Ann. § 8.01-581.2 (A) (Cum. Supp. 1988).

46. 10 Va. Cir. 109 (Norfolk 1987).

47. 10 Va. Cir. 32 (Warren County 1986).

48. *Id.* at 35.

49. Harter v. Quade, 10 Va. Cir. 388, 390 (Winchester 1988) (citing Boyd v. Bulala, 647 F. Supp. 781 (W.D. Va. 1986)).

50. Med. Malpractice R. 2(e), *reprinted in* 11 Va. Code Ann. 383, 384 (Repl. Vol. 1988).

51. Va. Const. art. VI, § 6.

need only send notice to each defendant within the applicable statute of limitations.[52] Moreover, the statutory notice requirements must still be complied with when medical negligence is alleged in a counterclaim to a suit for medical expenses.[53]

B. *Panel Proceedings*

The relevant statutory provisions and the Rules promulgated by the Chief Justice must be followed if either party requests a medical malpractice review panel following notice of claim. Although amendment to a claim is allowed with approval of court, amendment will not be permitted as to any claims or parties to which the statute of limitations has run or in any cases in which the delay in amendment prejudiced the defendant in his trial preparation or prevented the defendant from requesting a review panel.[54]

There were two major changes made in the Rules in 1987. First, Rule 3 no longer requires the parties to certify the completion of discovery.[55] Instead, the panel chairman designates a discovery cutoff under Rule 4(d).[56] The date must be within ninety days of the chairman's designation.[57] This change limits the length of time allowed for discovery which should decrease the amount of time which elapses before the panel renders a decision.

Second, Rule 4 no longer requires that the claimant submit a statement of facts with all documentary evidence within forty-five days of the designation of the panel or of notice overruling an objection. Nor does it require the health care provider to make its submission within thirty days of the claimant's submission. Instead, new Rule 4(e) requires that the claimant's submission be made within ten days after the date set for the completion of discovery.[58] In addition, new Rule 4(f) requires that the health care provider's submission be made ten days after the claimant's, or at a time designated by the panel chairman if the claimant makes no

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52. Harter v. Quade, 10 Va. Cir. 9 (Winchester 1985) and 10 Va. Cir. 388 (Winchester 1988). In *Harter*, the judge relied on § 8.01-3(d) and § 8.01-4 in determining that the rule 2(e) impermissibly enlarged the notice requirements of § 8.01-581.2.

53. Medical Center Hosp. v. Shaffer, 10 Va. Cir. 95 (Norfolk 1987).

54. VA. CODE ANN. § 8.01-581.2:1 (Cum. Supp. 1988); *see* Deasy v. Hill, 833 F.2d 38 (4th Cir. 1987).

55. MED. MALPRACTICE R. 3, *reprinted in* 11 VA. CODE ANN. 383, 386 (Repl. Vol. 1988).

56. *Id.* 4(d) at 387.

57. *Id.*

58. *Id.* 4(e) at 388.

submission.[59] This change ensures that the material obtained during discovery by the claimant and health care provider may be submitted to the panel and not excluded from consideration by the time limits of the old Rules.

In a civil action for medical malpractice, the written opinion rendered by the panel is insufficient, standing alone, to qualify as expert testimony on the standard of care, deviation from the standard and causation.[60] The jury is entitled to disagree with the panel's opinion.[61] Hence, the jury's function as an objective fact finder is safeguarded by requiring evidence to be presented on the material issues.

C. *Statutes of Limitation*

If the health care provider does not make a timely request for a review panel after notification by the claimant, any subsequent request does not toll the statute of limitations for filing the motion for judgment even if the claimant is not notified that the health care provider's request was denied.[62] For example, in *Irvin v. Burton*,[63] the plaintiff's malpractice claim was barred even though she did not discover a negligently performed sterilization procedure until she became pregnant after the expiration of the two-year statute of limitations.

The continuing treatment exception tolls the statute of limitations for as long as the health-care professional's continuing services are needed to attend to the particular undertaking or circumstance that eventually gives rise to the cause of action.[64] The

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59. *Id.* 4(f) at 388.
60. Raines v. Lutz, 231 Va. 110, 341 S.E.2d 194 (1986).
61. *Id.* at 115, 341 S.E.2d at 197.
62. Horn v. Abernathy, 231 Va. 228, 343 S.E.2d 318 (1986).
63. 635 F. Supp. 366 (W.D. Va. 1986). However, the rule followed in Virginia does not apply in Federal Tort Claims cases where the statute of limitations begins to run when the claimant knows both the existence and the cause of his injury. Otto v. National Inst. of Health, 815 F.2d 985 (4th Cir. 1987). Federal judges sitting in Virginia have "felt bound by good conscience" to comment on the harshness and unfairness of the Virginia rule. *Irvin*, 635 F. Supp. at 369 n.3. In a recent federal decision, the transfer of a case properly filed in Virginia was allowed so that the plaintiff could have an adjudication on the merits in another jurisdiction rather than a dismissal on statute of limitations grounds in Virginia. Porter v. Groat, 840 F.2d 255 (4th Cir. 1988).
64. Boone v. C. Arthur Weaver Co., 235 Va. 157, 365 S.E.2d 764 (1988) (accountant malpractice); *cf.* Justice v. Natvig, 10 Va. Cir. 236 (Richmond 1987). Judge Markow opined in this medical negligence case that two separate rules applied: in property damages cases, a continuous treatment rule; and in personal injury cases, a last negligent act or omission rule.

particular undertaking that gives rise to the cause of action may occur within the context of a larger undertaking by the health-care professional or additional undertakings. However, the tolling of the statute of limitations is not extended beyond the time when the particular undertaking is complete even though the professional relationship may continue.[65]

The "particular undertaking" limitation is not logical because the purpose of the continuing treatment rule is to foster both the patient's trust in the health care provider and the expectation that any needed remedial services will be provided.[66] Instead, the current interpretation of this rule creates a situation in which the patient must cross examine the physician about his care during the particular undertaking. The patient may also need a second or third opinion and legal advice as to that care while the patient is still receiving care from the original physician for other health problems. However, without the "particular undertaking" limitation of the continuing treatment exception, a defendant might be required to defend a stale claim for negligent treatment at the end of a lifetime relationship. The Virginia Supreme Court believes that on balance the "particular undertaking" approach prevents substantial injustice to either the patient or the health care provider.[67]

D. *Pleading Alternative Theories of Recovery: Survivor's Action for Personal Injury and Wrongful Death*

Although a party may recover under only one theory, he may plead and litigate both a survivors' personal injury and a wrongful death action without making an election as to which he will pursue. The jury may determine whether the negligent conduct of the defendant caused injury or death and award damages accordingly.[68]

A writ has been granted for appeal in the Virginia Supreme Court (Record No. 88-0077).

65. *Boone*, 235 Va. at 162, 365 S.E.2d at 767 (quoting Keller v. Denny, 232 Va. 512, 518, 352 S.E.2d 327, 330 (1987) (attorney malpractice)).

66. A comparison of cases decided on an "agency" theory provides that the statute is tolled until the end of the professional relationship due to the client or patient's reliance. *See Boone*, 235 Va. at 163, 365 S.E.2d at 767.

67. For a discussion by the court on the balancing of competing interests, see *Keller*, 232 Va. at 516-18, 352 S.E.2d at 330-31.

68. Tucker v. Ware, 10 Va. Cir. 454 (Richmond 1988). To rule otherwise would result in a defeat of the plaintiff's medical negligence suit if he elected to pursue the incorrect recovery theory. *Id.* at 456-57.

E. *Affirmative Defenses: Contributory Negligence*

In keeping with *Lawrence v. Wirth*,[69] which held that a plaintiff's subsequent negligence does not bar recovery, the Virginia Supreme Court held in *Eiss v. Lillis*[70] that the plaintiff's negligence, which preceded that of the defendant, did not bar recovery in a medical negligence case. Therefore, unless the plaintiff's negligence is contemporaneous with that of the defendant, the granting of a contributory negligence instruction constitutes reversible error.[71]

F. *Discovery*

Incident reports, routinely completed in hospitals when a patient experiences an unusual incident are discoverable as an exception to the statute pertaining to the privileged communications of certain hospital committees. In general, evidence relating to the hospitalization or treatment of a patient is excluded from the privilege.[72] Similarly, hospital policy and procedure manuals, health care provider job descriptions, bylaws and related documents may also be discoverable according to the interpretation given to section 8.01-581.17 of the Code of Virginia by the various circuits.[73] At least for

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69. 226 Va. 408, 309 S.E.2d 315 (1983).

70. 233 Va. 545, 357 S.E.2d 539 (1987).

71. *Id.* at 553, 357 S.E.2d at 544.

72. Atkinson v. Thomas, 9 Va. Cir. 21 (Va. Beach 1986); Benedict v. Community Hosp. of Roanoke Valley, 10 Va. Cir. 430 (Medical Malpractice Review Panel 1988).

73. In Johnson v. Roanoke Memorial Hosps., Inc., 9 Va. Cir. 196 (Roanoke 1987), the court stated that the test for discoverability is whether the documents are (1) privileged, (2) relevant, (3) if inadmissible, are they reasonably calculated to lead to the discovery of evidence that is admissable. The *Johnson* court held that Emergency Room Policy Manuals were discoverable. *Accord*, Shifflett v. Rodgers, No. 3111-L (Albemarle County Cir. 1987); Samuel v. Commonwealth, Medical Malpractice Review Panel (Richmond Cir. 1988); *cf.* Francis v. McEntee, 10 Va. Cir. 126 (Henrico County 1987) (documents were held to be privileged under a broad interpretation of the privileges statute in order to support the statute's purpose to encourage frank discussions by committees designed to improve health care services).

An issue frequently raised is whether such documents are relevant to the standard of care. *Compare* Bly v. Rhoads, 216 Va. 645, 222 S.E.2d 783 (1976) (evidence contained in written standards of care was insufficient to meet the plaintiff's burden of proof in a medical malpractice case) *with* Gordon Harper Harley-Davidson v. Cutchin, 232 Va. 320, 350 S.E.2d 609 (1986) (service bulletin in a products liability case was relevant as corroborative evidence tending to show proximate cause in that the defendant knew of the danger and violated a duty to warn).

Another issue is whether such documents should be excluded as private rules to which the plaintiff is not privy. *See* Pullen v. Nickens, 226 Va. 342, 310 S.E.2d 452 (1983) (Highway Department's employee rules were excluded for a variety of reasons); *cf.* Schockemoehl, *Admissibility of Written Standards as Evidence of the Standard of Care in Medical and Hos-*

the purposes of the review panel, other oral and written factual statements made by hospital employees which relate to the events surrounding the malpractice suit must be produced if the statements were made before the notice of claim was filed. However, these need not be produced if they were made afterwards at the request of the hospital's attorney or insurance carrier.[74]

A discovery issue likely to be litigated with increased frequency is whether the Virginia Supreme Court Rules of Discovery preclude ex parte communication between a physician who has treated a plaintiff in a medical negligence case and the defendant or his representatives.[75] The law provides for a waiver of the statutory physician-patient privilege when the patient's physical or mental condition is at issue in a civil action.[76] However, it is silent as to both the proper scope and means of discovery of otherwise privileged information in the absence of a valid consent for release of information. One circuit court has held that a treating physician's interests are in conflict with his patient's interests, and thus prohibit the physician from testifying as an expert for the defense.[77]

G. *Proof of Violation of Duty and Proximate Cause*

In order to prevail in a medical negligence case the plaintiff must produce expert testimony that the standard of care was violated and that the violation was the proximate cause of the plaintiff's injuries and damages.[78] One potential way to avoid the use of ex-

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pital Negligence Actions in Virginia, 18 U. RICH. L. REV. 725 (1984) (expressing the view that a hospital's internal documents are public because mandated by state and federal law and regulations, as well as by the hospital's accrediting body, the Joint Commission on the Accreditation of Hospitals).

74. *Benedict*, 10 Va. Cir. at 431-32, 440-41.

75. Rule 4:1(a) of the Rules of the Virginia Supreme Court provides that discovery may be obtained by deposition, production of documents, interrogatories, request for admission and physical or mental examination. Each of these permissible methods necessarily involves an opportunity for the patient's attorney to protect the patient-plaintiff's interests which does not occur with ex parte communications. The involvement of the patient's attorney can ensure that confidential information unrelated to the civil action is not released and that the treating doctor is not harassed or intimidated. For a discussion of arguments for and against ex parte communication, *see* Hayes and Monahan, *Do Ex Parte Interviews Threaten Patient Privacy?* 17 THE BRIEF 6 (1987).

76. VA. CODE ANN. § 8.01-399 (Repl. Vol. 1984).

77. Singh v. Mai, No. 74774 (Fairfax County Cir. 1987).

78. Young v. United States, 648 F. Supp. 146, 150 (E.D. Va. 1986) (citing Fitzgerald v. Manning, 679 F.2d 341, 346-47 (4th Cir. 1982)) (medical negligence case interpreting Virginia law). Although *Fitzgerald* has at times been used to support the proposition that opin-

pert testimony, especially where the plaintiff has no idea how the injury occurred, is the use of the res ipsa loquitur doctrine.[79] Res ipsa loquitur, however, will not aid the plaintiff if evidence is introduced at trial that the injury could have happened in the absence of negligence and that the defendant utilized due care.[80]

Informed consent, a theory utilized in some jurisdictions to avoid the need for expert testimony, cannot be proven in Virginia unless an expert testifies that the standard of care requires a health care provider to disclose particular information.[81] Evidence that an expert does not practice medicine in the same manner as the defendant or that the defendant's conduct did not comport with the usual custom is insufficient to prove negligence.[82]

H. *Statewide Standard of Care*

A statewide standard of care applies to medical negligence cases unless evidence is offered that local practices and facilities make another standard more appropriate. In *Rhoades v. Painter*,[83] the court held that allowing a jury to apply a locality standard based only on evidence that a local standard would be more appropriate than the standard practiced at teaching hospitals constitutes reversible error.[84]

The statewide standard of care in Virginia must be proven by an expert witness who satisfies the court that he is familiar with the "Virginia standard of care."[85] Therefore, a health care provider may qualify as an expert witness even though the health care provider does not practice in Virginia and is not licensed in Virginia or has no professional contacts with Virginia.

In *Henning v. Thomas*,[86] the expert satisfied the court that he possessed sufficient familiarity with Virginia's standard of care by

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ions of causation must be given with reasonable medical certainty, Judge Merhige's opinion corrects this misunderstanding. *Young*, 648 F. Supp. at 152. *See also* Roche, *The Standard for Expert Testimony Is Not Reasonable Degree of Certainty*, 36 VA. B. NEWS 19 (1987).

79. *See* PROSSER, LAW OF TORTS § 39 (4th ed. 1971).

80. *Young*, 648 F. Supp. at 149.

81. *Id.* at 152.

82. *Id.* at 151.

83. 234 Va. 20, 360 S.E.2d 174 (1987).

84. *Id.* at 24, 360 S.E.2d at 176.

85. Henning v. Thomas, 235 Va. 181, 186, 366 S.E.2d 109, 112 (1988).

86. *Id.* The *Henning* court held that: (1) an expert witness could be cross-examined concerning his affiliation with, and income from, a professional service for expert witnesses, and (2) the deposition of a treating physician can be used as rebuttal evidence. *Id.* at 188-91, 366 S.E.2d at 112-14.

the following testimony: the requirements for board certification in the defendant's field were the same in all states; recognition of the medical problem causing the injury was the same in all states; and furthermore, a review of depositions of Virginia physicians and a discussion with a Virginia physician led to the conclusion that there is no difference between the standard of care in Virginia and that elsewhere.[87] Knowledge of the standard of care does not fall within a rigid formula and may be gained by study or experience or both.[88]

I. *Damages*

1. The Constitutionality of Virginia's "Cap" on the Total Amount of Damages Recoverable for Medical Negligence

Judge Michael in the 1986 landmark decision, *Boyd v. Bulala*[89] held that the cap was unconstitutional on the basis of the seventh amendment's right to trial by jury on the issue of damages. Following intervention by both the state and federal governments, a rehearing was held and both the result and rationale of the first opinion were upheld.[90] Judge Michael's opinion was followed by two decisions from the Circuit Court of Fairfax County holding the cap unconstitutional on both equal protection and seventh amendment grounds.[91] However, one of the decisions was reversed on rehearing by the trial judge.[92]

Numerous circuit court judges in Virginia have upheld the constitutionality of the cap.[93] The constitutionality of the cap is presently pending in both the Virginia Supreme Court and in the Fourth Circuit Court of Appeals.[94] Some judges have sustained demurrers to the *ad damnum*, requiring the plaintiff's *ad damnum* to be reduced in advance of trial and prohibiting the injured person from arguing the amount sued for to the jury.[95]

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87. *Id.* at 184-85, 366 S.E.2d at 111-12.
88. *See id.* at 186, 366 S.E.2d at 112.
89. 647 F. Supp. 781 (W.D. Va. 1986).
90. Boyd v. Bulala, 672 F. Supp. 915 (W.D. Va. 1987).
91. *See* Palmer v. Fulcher, 8 Va. Cir. 347 (Fairfax County 1987); Williams v. Van Der Woude, 8 Va. Cir. 263 (Fairfax County 1986).
92. *See Palmer*, No. 880562 (Va. filed May 10, 1988).
93. *See, e.g.*, Tucker v. Ware, 10 Va. Cir. 454 (Richmond 1988); Harter v. Quade, 10 Va. Cir. 388 (Winchester 1988); Voss v. Puray, 10 Va. Cir. 32 (Warren County 1986).
94. *See supra* note 7.
95. *See, e.g.*, *Tucker*, 10 Va. Cir. at 459.

2. Stacking of Plaintiffs or Defendants to Allow for the Recovery of Multiple "Caps"

Although opinions vary, at least two circuits have held that if there are two plaintiffs the caps may be applied separately to each patient.[96] For example, in an obstetrics case, the mother and child would be considered separate patients. However, when there are two or more defendants, the circuit courts disagree on whether or not the cap may be applied separately to each defendant.[97] The application of separate caps is based on the statutory language which refers to a maximum cap on a verdict against *a* health care provider.[98] In addition, since insurance premiums are charged to defendants separately, the statutory purpose of holding down insurance costs is better served by a separate application.[99]

3. Limited Applicability of The Medical Malpractice Act

In *Glisson v. Loxley*,[100] the Virginia Supreme Court held that an allegation by a patient in a medical negligence action that a physician breached an oral agreement to perform a specific surgical procedure did not constitute a tort based on health care under the Medical Malpractice Act.[101] This being the case, no notice of claim had to be made; there was no entitlement to a review panel, and there was no statutory limit on damages. The court declined to rule on whether pain and suffering damages were recoverable in a contract action.[102] However, the *Glisson* court held that an action brought by a patient for a battery within the medical negligence context is a tort.[103] An action for intentional infliction of emotional distress is not included in the Medical Malpractice Act as a tort based on health care.[104] However, an action for negligent hiring

96. Voss v. Puray, 10 Va. Cir. 32 (Warren County 1986); Taylor v. Richmond Memorial Hosp., Law No. 85-1278 (Richmond Cir. 1985).

97. Palmer v. Fulcher, 10 Va. Cir. 202 (Fairfax County 1987) (holding that the cap applies separately). Tucker v. Ware, 10 Va. Cir. 454 (Richmond 1988); (holding that the cap does not apply separately); Harter v. Quade, 10 Va. Cir. 388 (Winchester 1988) (holding that the cap does not apply separately).

98. *Palmer*, 10 Va. Cir. at 203.

99. *Id.*

100. 235 Va. 62, 366 S.E.2d 68 (1988).

101. *Id.* at 68-69, 366 S.E.2d at 71-72. *But see* Williams v. Kendall, 10 Va. Cir. 84 (Winchester 1987) (holding that the contract must be express, not implied).

102. *Glisson*, 235 Va. at 69, 366 S.E.2d at 72.

103. *Id.*

104. Equino v. Jefferson Indus. Medical Clinic, 9 Va. Cir. 80, 81 (Alexandria 1987).

and supervision of employees by a health care provider is within the Act.[105]

In *Gressman v. Peoples Service Drug Stores*,[106] the Circuit Court of the City of Richmond held that a pharmacy is not a health care provider within the meaning of the Medical Malpractice Act because it is not a corporation licensed by the Commonwealth to provide health care. Therefore, the Medical Malpractice Act did not apply to the vicarious negligence of a pharmacy for the act of its pharmacist in negligently dispensing medication.[107]

In *Richman v. National Health Laboratories, Inc.*,[108] the Virginia Supreme Court held that a clinical laboratory which examines patient specimens and reports results to physicians does not come within the Medical Malpractice Act. It is neither a health care provider under the Medical Malpractice Act, nor a facility licensed by the Commonwealth to provide health care.[109] An issue yet to be decided is whether a physicians' corporation constitutes a "health care provider" under the Medical Malpractice Act.

Failure to file a notice of claim before bringing a medical malpractice action may result in dismissal of the action.[110] Filing a notice of claim when neither the injury nor the defendants come within the Medical Malpractice Act may also result in dismissal on statute of limitations grounds since the filing of the notice of claim does not toll the statute.[111] Thus the practitioner who brings a medical malpractice action is advised to file *both* notice of a claim, with a provision that the filer does not concede that filing is required prior to filing suit, *and* a motion for judgment. Both filings are especially advised when there is uncertainty as to whether the defendant is a health care provider.

4. "Loss of a Chance to Survive" is an Actionable Harm

In *Waffen v. United States*,[112] the court of appeals held that loss of a substantial possibility of survival is an actionable harm in

105. *Id.*
106. 10 Va. Cir. 397 (Richmond 1988).
107. *Id.*
108. 235 Va. 353, 367 S.E.2d 508 (1988).
109. *Id.* at 356-57, 367 S.E.2d at 510-12.
110. Equino v. Jefferson Indus. Medical Clinic, 9 Va. Cir. 80, 81-82 (Alexandria 1987).
111. *See Richman*, 235 Va. at 359, 367 S.E.2d at 512.
112. 799 F.2d 911 (4th Cir. 1986). Although the Fourth Circuit referred in its opinion to Maryland law, it also referred to a series of Fourth Circuit cases including Hicks v. United

medical negligence cases when proven to be caused by a negligent delay in diagnosis or treatment. The gauges for determining whether legal harm has been proved are: (1) the chance of survival if properly treated and (2) the extent to which the patient's chances of survival were reduced by the health care provider's departure from the standard of care.[113] Whether there was a substantial possibility of survival is a matter for the jury to determine. However, it need not be the fifty-one percent probability required by the plaintiff in order to prove his overall cause of malpractice against the defendant.[114]

5. Damages Recoverable for the Death of a Fetus, Wrongful Pregnancy, and Parental Distress

Virginia is among a minority of jurisdictions that do not recognize a fetus as a person[115] for the purpose of personal injury and wrongful death actions.[116] The mother, however, may recover for her injuries while the fetus was a part of her body and for related mental anguish.[117] Damages also include medical expenses, pain and suffering, lost wages, and emotional distress.[118]

In wrongful birth actions, if a child is born following a failed abortion or a failed sterilization procedure, the same damages are recoverable as those recoverable by the mother in the event of injury or death of a fetus.[119] However, the cost of raising a healthy child cannot be recovered.[120] If injury to a child occurs at birth and

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States, 368 F.2d 626 (4th Cir. 1966) which has been followed in a series of Virginia cases. *See* Whitfield v. Whittaker Memorial Hosp., 210 Va. 176, 169 S.E.2d 563 (1969) (adopting the Fourth Circuit's "loss of a chance" theory). Therefore, *Waffen* would likely be followed in Virginia.

113. *Waffen*, 799 F.2d at 920.

114. *Id.* at 922-23.

115. *See* Modaber v. Kelley, 232 Va. 60, 66, 348 S.E.2d 233, 236 (1986). For a discussion of recent cases following both the majority and minority views, *see generally Parents May Not Recover For Malpractice-Related Death Of Unborn Child*, 13 MED. LIABILITY REP. 137 (June 1988).

116. *Modaber*, 232 Va. at 66-67, 348 S.E.2d at 236-37.

117. *Id.*

118. *Id.* at 67, 348 S.E.2d at 237 (citing Miller v. Johnson, 231 Va. 177, 184, 343 S.E.2d 301, 305 (1986)). The defendant's negligence need not have caused all of plaintiff's injuries for plaintiff to recover damages. In Gaalaas v. Morrison, 233 Va. 148, 353 S.E.2d 898 (1987), a confusing jury instruction suggested to the jury that they must return a verdict for the defendant unless they found that the defendant caused *all* of plaintiff's injuries. Therefore, the court reversed the jury's verdict for the defendant.

119. *See Miller*, 231 Va. at 183-84, 343 S.E.2d at 305.

120. *Id.* at 186, 343 S.E.2d at 307.

the father is present and is a witness to the injury and subsequent suffering of his child, the father may recover damages for emotional distress.[121]

J. *Public Access to Judicial Records and Secrecy Orders*

Judicial records, defined as "pleadings and any exhibits or motions filed by the parties and all orders entered by the trial court in the judicial proceedings leading to the judgment"[122] may not generally be sealed or protected from public access, even if all parties agree. A party seeking to prevent access must establish a compelling interest that cannot be protected by some other measure.[123] In *Shenandoah Publishing House v. Fanning*,[124] the fact that the claims in the pleadings of the medical negligence suit would adversely affect the reputations of the physician defendants, with related financial and emotional consequences, was insufficient to justify sealing the records. The public has an interest in learning whether compromise settlements, as approved by courts, are equitable. There is also a vital personal, familial, and community concern about the actions of licensed health care providers.[125] However, pretrial discovery documents are treated differently than judicial records and may be protected "for good cause shown"[126] if they are not filed with the court in connection with a motion or incident to trial.[127]

IV. CONCLUSION

In the last two years, the key statutory changes regarding medical negligence have removed severely injured infants from the tort system, limited the time period in which infants may initiate claims of negligence, and extended the scope of immunity or limited liability applicable to certain negligence actions.

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121. Voss v. Puray, 10 Va. Cir. 32 (Warren County 1986); *see generally* Bradley v. Forrest, 9 Va. Cir. 157 (Richmond 1987); Johnson v. Cooksey, No. LJ 1401-4, 1402-4, 1403-4 (Richmond Cir. 1986).

122. Shenandoah Publishing House, Inc. v. Fanning, 235 Va. 253, 368 S.E.2d 253, 255 (1988).

123. *Id.* at 257, 368 S.E.2d at 256.

124. *Id.* at 253, 368 S.E.2d at 253.

125. *Id.* at 260, 368 S.E.2d at 256.

126. *Id.* at 261, 368 S.E.2d at 257.

127. *Id.* at 260, 368 S.E.2d at 257; *see also* Rushford v. New Yorker Magazine, No. 87-1617 (4th Cir. May 6, 1988).

Key judicial decisions have yet to be made regarding the constitutionality of Virginia's total cap on damages and whether if constitutional, the cap applies to plaintiffs and defendants separately. These decisions, which are anticipated within the next year, should make it easier for parties to achieve out-of-court settlements.[128] Resolution of these issues will aid in predicting the court's response to anticipated constitutional challenges to the Obstetricians' Relief Bill and the reduction in the statutes of limitation affecting medical negligence claims of minors.

128. Although court approval is required for settlements of infants' and wrongful death claims, a court cannot force a settlement when none has been agreed to by the parties. *See, e.g.*, Gunn v. Richmond Community Hosp., 235 Va. 282, 367 S.E.2d 480 (1988).