

1989

Annual Survey of Virginia Law: Medical Malpractice the Year in Review

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Recommended Citation

Phillip C. Stone & Charles F. Hilton, *Annual Survey of Virginia Law: Medical Malpractice the Year in Review*, 23 U. Rich. L. Rev. 731 (1989).

Available at: <http://scholarship.richmond.edu/lawreview/vol23/iss4/15>

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MEDICAL MALPRACTICE: THE YEAR IN REVIEW*

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I. LEGISLATION

A. Definition of "Health Care Provider"

In its 1989 session, the General Assembly amended several medical malpractice statutes. Perhaps the most important changes expanded the definition of "health care provider"¹ under the Medical Malpractice Act (the "Act"), and clarified the qualification requirements for expert witnesses.²

Only health care providers, as defined by the Act, receive the Act's protection. Such protection includes mandatory notices of claims as a condition precedent to filing suit,³ review panels,⁴ and, most importantly, the limitation on monetary recovery.⁵ Under former section 8.01-581.15 of the Code of Virginia (the "Code"),⁶ a health care provider under the Act was defined as any entity licensed by the Commonwealth to provide health care.⁷ A conflict arose in the circuit courts over whether unlicensed corporations made up of licensed physicians were "health care providers."⁸ The General Assembly resolved the issue by including as health care providers under the Act, "professional corporation[s], all of whose shareholders are . . . licensed to provide health care services."⁹

* The authors would like to acknowledge the assistance of Nathan Smith for his work on this article.

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1. VA. CODE ANN. § 8.01-581.1 (Cum. Supp. 1989).

2. *Id.* § 8.01-581.20.

3. *Id.* § 8.01-581.2 (Repl. Vol. 1984 & Cum. Supp. 1989).

4. *Id.* § 8.01-581.3 (Cum. Supp. 1989).

5. *Id.* § 8.01-581.15.

6. *Id.* § 8.01-581.15 (Repl. Vol. 1984).

7. The former version of section 8.01-581.15 of the Code of Virginia referred to section 8.01-581.1 for a definition of health care provider. *Id.*

8. See *Samuel v. V.C.U. Obstetrics & Gynecology Ass'n.*, 13 Va. Cir. 364 (1988) (ruling that an unlicensed corporation made up of licensed doctors was not a health care provider, but acknowledging that the court in *Francis v. McEntee*, Nos. 86-L-83, 86-L-84 (Henrico County July 15, 1988), held that such a corporation was a health care provider.)

9. VA. CODE ANN. § 8.01-581.1 (Cum. Supp. 1989).

B. *Qualification of Expert Witness*

The General Assembly also simplified the qualification requirements for expert witnesses to testify on the appropriate standard of care.¹⁰ Before 1989, the only statutory requirement for qualification of expert witnesses was that they be "familiar with the state-wide standard of care."¹¹ The 1989 revision created specific presumptions concerning medical experts which make the qualification of expert witnesses easier. The change provides that physicians licensed in Virginia, in the relevant field of medicine, and physicians licensed in another state who are eligible to be licensed in Virginia by endorsement, are presumed to be familiar with the appropriate standard of care.¹² However, what the legislature gave with one hand, it may have taken away with the other. The same statutory amendment added a requirement that, in order to qualify as an expert on the standard of care, a physician must have been engaged in an active clinical practice in the specialty in which he proposes to testify within one year of the alleged act.¹³ The Act does not specify if the required clinical practice must precede or may follow the act of alleged malpractice.

C. *Statutes of Limitation*

Another bill passed by the General Assembly in 1989 clarified the statute of limitation tolling provisions for medical malpractice claims.¹⁴ The usual statute of limitation for medical malpractice actions is two years.¹⁵ A notice of claim for medical malpractice tolls the statute of limitation for 120 days following the filing of the notice of claim.¹⁶ This provision is intended to avoid unfairness to the plaintiff who must wait ninety days after giving notice of claim to file suit.¹⁷ The former statute stated that the filing of the notice of claim would toll the statute of limitations "*for and including* a period of 120 days *from the date such statute of limita-*

10. VA. CODE ANN. § 8.01-581.20(A) (Cum. Supp. 1989).

11. *Id.* § 8.01-581.20(A) (Repl. Vol. 1984).

12. *Id.* § 8.01-581.20(A) (Cum. Supp. 1989).

13. *Id.*

14. VA. CODE ANN. § 8.01-581.9 (Cum. Supp. 1989).

15. *Id.* § 8.01-243 (Repl. Vol. 1984 & Cum. Supp. 1989); *see also* Grubbs v. Rawls, 235 Va. 607, 369 S.E.2d 683 (1988).

16. VA. CODE ANN. § 8.01-581.9 (Repl. Vol. 1984).

17. Baker v. Zirkle, 226 Va. 7, 307 S.E.2d 234 (1983); VA. CODE ANN. § 8.01-581.2 (Repl. Vol. 1984 & Cum. Supp. 1989).

tions would otherwise run.”¹⁸ The emphasized language caused confusion and was construed to mean that regardless of when a notice of claim was filed, the statute of limitation was extended to the maximum two years *plus* 120 days.¹⁹ Additionally, if a medical review panel was requested, the statute of limitation would be extended to two years plus 120 days or until sixty days after rendition of the panel’s opinion, whichever was later.²⁰

The 1989 bill clarified the ambiguities and brought the statute in line with *Horn*²¹ and the General Assembly’s apparent original intent. The amendment deleted the emphasized language, and now states that the statute of limitation is tolled “for a period of 120 days from the date notice is given or for 60 days following the date of issuance of any opinion by the medical review panel, whichever is later.”²²

D. *Miscellaneous*

Two other bills passed by the General Assembly in 1989 modified medical malpractice statutes.²³ One bill amended section 8.01-581.2 of the Code of Virginia²⁴ and now requires that when claims arising from the same incident are made against multiple health care providers, all the health care providers must be named in a single notice of claim and in any subsequent panel proceeding.²⁵ This codifies the present Rule 2(e) of the Medical Malpractice Rules of Practice.²⁶

The other change added psychologists and podiatrists to the list of health care providers granted immunity for testimony given to medical review boards and committees.²⁷

18. VA. CODE ANN. § 8.01-581.9 (Repl. Vol. 1984) (emphasis added).

19. *Horn v. Abernathy*, 231 Va. 228, 343 S.E.2d 318 (1986); *see also* *Dye v. Staley*, 226 Va. 15, 307 S.E.2d 237 (1983); *Baker*, 226 Va. at 7, 307 S.E.2d at 234.

20. VA. CODE ANN. § 8.01-581.9 (Repl. Vol. 1984).

21. 231 Va. at 228, 343 S.E.2d at 318.

22. VA. CODE ANN. § 8.01-581.9 (Cum. Supp. 1989).

23. VA. CODE ANN. §§ 8.01-581.2, -581.16 (Cum. Supp. 1989).

24. *Id.* § 8.01-581.2.

25. *Id.*

26. VA. MEDICAL MALPRACTICE RULES OF PRACTICE CODE R. 2(e) (Repl. Vol. 1989).

27. VA. CODE ANN. § 8.01-581.16 (Cum. Supp. 1989).

II. JUDICIAL DECISIONS

In 1988 and the first half of 1989, the Court of Appeals for the Fourth Circuit and the Supreme Court of Virginia decided several significant issues with regard to medical malpractice. In addition, the Virginia circuit courts continued a steady flow of decisions construing the Medical Malpractice Act.

A. *Notice of Claim*

1. Specificity

Virginia law requires that before a medical malpractice action may be filed, the claimant must give the health care provider a written notice of the claim which states the time and a reasonable description of the alleged act(s) of malpractice.²⁸ Since the Medical Malpractice Act was passed in 1976, the plaintiff and defense bars have litigated the degree of specificity required for a notice of claim for medical malpractice. In 1988, the Supreme Court of Virginia offered some guidance in this area.

In *Grubbs v. Rawls*,²⁹ the notice of claim alleged "negligent treatment and surgery of the . . . patient while under your care."³⁰ The defendants asserted that this language was insufficient to support an allegation of negligent post-operative care in the subsequent motion for judgement. The supreme court held that the notice was "barely sufficient"³¹ under section 8.01-581.2(A) of the Code,³² stating that a notice may be in general terms and need not be a particularized statement of the claim.³³

2. When Required

A notice of claim is required only if (1) the cause of action is for medical malpractice, and (2) the potential defendant is a health care provider.³⁴ A medical malpractice claim is defined as any tort claim against a health care provider arising from health services

28. VA. CODE ANN. § 8.01-581.2 (Repl. Vol. 1984 & Cum. Supp. 1989).

29. 235 Va. 607, 369 S.E.2d 683 (1988).

30. 235 Va. at 614, 369 S.E.2d at 687.

31. *Id.*

32. VA. CODE ANN. § 8.01-581.2(A) (Repl. Vol. 1984).

33. *Grubbs*, 235 Va. at 614, 369 S.E.2d at 687.

34. VA. CODE ANN. § 8.01-581.2 (Repl. Vol. 1984 & Cum. Supp. 1989).

which were rendered or which should have been rendered.³⁵ This is true even if the allegedly negligent act was also a nonmedical tort such as battery³⁶ or adultery.³⁷

Further, the statute provides that a health care provider is any entity *licensed* by the Commonwealth to provide health care services, including all employees and agents of any such health care provider.³⁸ As previously discussed, the licensing requirement portion of the definition of health care provider had led to a split in the circuits on what types of business organizations qualify as health care providers.³⁹ The question was posed, did unlicensed physicians qualify for protection under the Act? Based upon the licensed/unlicensed distinction, some circuit courts had held that professional corporations not licensed by the Commonwealth to provide health care services did not qualify as health care providers and, consequently, were not subject to the provisions of the Act.⁴⁰ Other cases held that professional corporations made up of physicians providing health care services who are licensed by the Commonwealth nevertheless qualified as health care providers under the Act.⁴¹ In a different context, a clinical laboratory which was neither licensed by the Commonwealth nor an agent or employee of licensed physicians was held not to be a health care provider.⁴²

However, as discussed in Section I, in 1989, the General Assembly broadened the scope of the Medical Malpractice Act by adding unlicensed corporations made up of licensed physicians to the definition of "health care provider" in section 8.01-581.1 of the Code.⁴³

In *Brumback v. Horng*,⁴⁴ the plaintiff's attorney gave notice to two unrelated doctors, individually, of a claim for medical malpractice. Upon objection to the notice, the claimant attempted to amend the notice of claim without seeking leave of court and sent

35. *Id.* § 8.01-581.1.

36. *Glisson v. Loxley*, 235 Va. 62, 366 S.E.2d 68 (1988).

37. *Smith v. Teunis*, Nos. L-84329, L-86271 (Fairfax County May 25, 1989).

38. VA. CODE ANN. § 8.01-581.1 (Repl. Vol. 1984 & Cum. Supp. 1989).

39. See *infra* notes 8-9 and accompanying text.

40. *Samuel v. V.C.U. Obstetrics & Gynecology Ass'n*, 13 Va. Cir. 364 (1988); *Gressman v. Peoples Serv. Drug Stores*, 10 Va. Cir. 397 (1988).

41. *Francis v. McEntee*, Nos. 86-L-83, 86-L-84 (Henrico County July 15, 1988); *Harter v. McAllister*, No. 87-L-119 (City of Winchester May 10, 1988).

42. *Richman v. National Health Labs, Inc.*, 235 Va. 353, 367 S.E.2d 508 (1988).

43. VA. CODE ANN. § 8.01-581.1 (Cum. Supp. 1989).

44. No. 88-L-124 (City of Winchester Apr. 28, 1989).

a "supplementary" notice of claim.⁴⁵ Neither notice gave any indication of a claim against the partners or the partnership of one of the physicians, nor was the notice sent to them. The subsequent motion for judgment included the two physicians and the partners and the partnership of one of the defendant physicians.⁴⁶

The partners and partnership pleaded the statute of limitation since they never received statutory notice, and claimed that the plaintiff could not benefit from the tolling provisions of the Act. Thus, they argued that the action was time barred. The claimant countered by citing section 50-12 of the Code of Virginia,⁴⁷ which provides that notice to one partner, of partnership matters, is notice to all partners and to the partnership. The partners and the partnership argued that the Medical Malpractice Act requires specific notice to each individual health care provider, and that the notice required by section 8.01-581.2 of the Code.⁴⁸ is in addition to what otherwise would be required by section 50-12 of the Code.⁴⁹ The trial judge adopted the argument of the unnoticed partners and the partnership and sustained the plea of the statute of limitation as to the partners and partnership who had not been listed in the original notice.⁵⁰ This appears to be the first judicial ruling in Virginia which construes the relationship between the notice provisions of the Medical Malpractice Act and the Uniform Partnership Act.

3. Amendments to Notices of Claim

The significance of amendments to such notices is that acts of malpractice which have not been so noticed may not later be included in an action at law.⁵¹ In *Francis v. McEntee*,⁵² the trial judge refused to permit amendments to notices of claim on the basis that approximately six years had passed since the incident alleged to constitute medical malpractice, and at the time of the hearing on the motion to amend, the action had been pending for

45. See VA. CODE ANN. § 8.01-581.2:1 (Repl. Vol. 1984).

46. *Brumback*, No. 88-L-124, slip op. at 2.

47. VA. CODE ANN. § 50-12 (Repl. Vol. 1986) (part of the Uniform Partnership Act).

48. *Id.* § 8.01-581.2 (Repl. Vol. 1984).

49. *Id.* § 50-12 (Repl. Vol. 1986 & Cum. Supp. 1988).

50. *Brumback*, No. 88-L-124, slip op. at 7-8.

51. See *Grubbs v. Rawls*, 235 Va. 607, 614, 369 S.E.2d 683, 687 (1988); *Voss v. Puray*, 10 Va. Cir. 32, 34-35 (1986); VA. CODE ANN. § 8.01-581.2 (Repl. Vol. 1984 & Cum. Supp. 1989).

52. 13 Va. Cir. 357 (1988).

over two years.⁵³ The court stated that granting leave to amend the notice of claim after the expiration of such an extended period of time would not further the ends of justice,⁵⁴ as required in section 8.01-581.2:1 of the Code of Virginia.⁵⁵ The court did not discuss the application of a provision in section 8.01-581.2:1 of the Code⁵⁶ which prohibits amendment of notice after expiration of the statute of limitation, even though the limitation period for the parents' claims for emotional distress had expired.⁵⁷

4. Tolling the Statute of Limitation

The notice of claim is also significant because it activates a ninety-day period within which the plaintiff is forbidden from filing suit,⁵⁸ and because it activates the tolling provision for the statute of limitation.⁵⁹

In *Edwards v. City of Portsmouth*,⁶⁰ the plaintiff in a medical malpractice action filed suit against a health care provider three days after having given notice of claim to the health care provider. The decision of the circuit court dismissed the claim for lack of jurisdiction.⁶¹ *Edwards* was appealed to the Supreme Court of Virginia which affirmed the circuit court, holding that the filing of the suit three days after giving notice was "untimely" under section 8.01-581.2 of the Code.⁶²

In *Scarpa v. Melziq*,⁶³ the supreme court considered the issue of when a statute of limitation begins to run. In *Scarpa*, the plaintiff underwent a faulty tubal ligation in which her left fallopian tube was not severed, allegedly due to medical negligence.⁶⁴ Four years

53. *Francis*, 13 Va. Cir. at 358-59.

54. *Id.* at 358.

55. VA. CODE ANN. § 8.01-581.2:1 (Cum. Supp. 1989).

56. *Id.*

57. *Francis*, 13 Va. Cir. at 358-59.

58. *Baker v. Zirkle*, 226 Va. 7, 13, 307 S.E.2d 234, 236 (1983); VA. CODE ANN. § 8.01-581.2 (Repl. Vol. 1984 & Cum. Supp. 1989).

59. VA. CODE ANN. § 8.01-581.9 (Repl. Vol. 1984 & Cum. Supp. 1989).

60. *Edwards v. City of Portsmouth*, L-86-171 (City of Portsmouth May 6, 1986).

61. *Id.*; see also *Morrison v. Bestler*, 8 Va. Cir. 456 (1987); *Equino v. Jefferson Indus. Medical Clinic, P.C.*, 9 Va. Cir. 80 (1987).

62. *Edwards v. City of Portsmouth*, 237 Va. 167, 172, 375 S.E.2d 747, 750 (1989); see VA. CODE ANN. § 8.01-581.2 (Repl. Vol. 1984); see also *Villatoro v. Solano*, No. L-88-768 (Arlington County Mar. 1, 1989).

63. 237 Va. ___, 379 S.E.2d 307 (1989).

64. *Id.* at ___, 379 S.E.2d at 308.

later she became pregnant. She filed suit within two years of becoming pregnant arguing that her cause of action accrued when she became pregnant because until then she had not been damaged. She contended that no injury had occurred at the time of the operation because her left fallopian tube had not been injured, and she had consented to the operation. The court found, however, that an injury had occurred at the time of the operation by the "tortious" omission of neglecting to sever a fallopian tube.⁶⁵ The court further reasoned that she "had consented to an adequate, effective sterilization procedure, not to an inadequate and ineffective one."⁶⁶ For these reasons, the court ruled that the statute of limitation began to run at the time of the operation, which rendered the plaintiff's claim untimely.⁶⁷

5. Informed Consent

Lastly, in the case of *DeRosa v. Meloni*,⁶⁸ the circuit court held that failure of a physician to obtain informed consent is an independent act of malpractice and subject to dismissal from a motion for judgment if not specifically included in a notice of claim.

B. *Limitation of Actions*

Prior to 1988, it was not clear whether Virginia followed the continuing treatment rule with respect to the accrual of a cause of action in relation to the statute of limitation for medical malpractice.⁶⁹ *Farley v. Danaceau*⁷⁰ and *Fenton v. Goode*⁷¹ suggest that a medical malpractice plaintiff's cause of action accrue at the time of the alleged act of malpractice, regardless of whether the patient continued treatment with the defendant physician or when the act of negligence was discovered. In *Grubbs v. Rawls*,⁷² the Supreme Court of Virginia explained that the *Farley-Fenton* rule is actually one of continuing treatment,⁷³ dispelling any remaining doubt by

65. *Id.* at ____, 379 S.E.2d at 310.

66. *Id.*

67. *Id.*

68. *DeRosa v. Meloni*, 14 Va. Cir. 62, 64 (1988).

69. See *Farley v. Danaceau*, 220 Va. 1, 255 S.E.2d 349 (1979); *Farley v. Goode*, 219 Va. 969, 252 S.E.2d 594 (1979).

70. 220 Va. at 2, 255 S.E.2d at 350.

71. 219 Va. at 976, 252 S.E.2d at 599.

72. 235 Va. 607, 369 S.E.2d 683 (1988).

73. *Id.* at 613, 369 S.E.2d at 687.

stating that "Virginia has a true continuing treatment rule."⁷⁴ Thus, the statute of limitation for acts of medical malpractice⁷⁵ does not begin to run until the course of treatment on that same or related illness or injury terminates.⁷⁶ This is true even if there is no allegation that additional or continuing negligence occurred in the course of subsequent treatment.⁷⁷

In *Justice v. Natvig*,⁷⁸ the Supreme Court of Virginia followed *Grubbs* and applied the continuing treatment rule, even though the defendant physician had performed eight years of proper treatment since the alleged negligent operation.⁷⁹

C. Sovereign Immunity

"The doctrine of sovereign immunity is 'alive and well' in Virginia."⁸⁰

In *Edwards v. City of Portsmouth*,⁸¹ the Supreme Court of Virginia was called upon to decide whether the cloak of sovereign immunity protected a city government from the alleged negligence of ambulance personnel with whom the city had contracted to provide ambulance services to city residents. The plaintiffs argued that the provision of ambulance services by the city was not a governmental function because the ambulance services were provided for a fee to the company, were unavailable to citizens who did not pay a fee, were not historically provided by governmental entities, and were concurrently provided by private entities.⁸² Nevertheless, the Supreme Court of Virginia held that the provision of ambulance services was an exercise of the government's police power to protect the public health and safety, and thus qualified as a governmental function.⁸³ From this it followed that the city was protected by the doctrine of sovereign immunity.⁸⁴

74. *Id.*

75. VA. CODE ANN. § 8.01-243(A) (Repl. Vol. 1984 & Cum. Supp. 1989).

76. *Grubbs*, 235 Va. at 613, 369 S.E.2d at 687.

77. *Id.*

78. No. 880077 (City of Richmond June 9, 1989).

79. *Justice*, No. 88007, slip op. at 3,5.

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

81. *Edwards v. City of Portsmouth*, 237 Va. 167, 375 S.E.2d 747 (1989).

82. *Id.* at 170, 375 S.E.2d at 749.

83. *Id.* at 171-72, 375 S.E.2d at 749-50.

84. *Id.* at 170-72, 375 S.E.2d at 749.

Prior to enactment of the Virginia Tort Claims Act in 1981,⁸⁵ there seemed to be little doubt in the medical malpractice context that under the doctrine of sovereign immunity most employees of state hospitals exercising supervisory functions and discretionary judgment within the scope of their employment were immune from suit for simple negligence.⁸⁶ In 1980, the Supreme Court of Virginia restricted the protection of sovereign immunity to certain physicians by holding that attending physicians at state hospitals are not entitled to the protection of sovereign immunity largely because of their extensive discretionary power, as compared with the relatively small interest and involvement of the state.⁸⁷ The Supreme Court of Virginia has yet to decide whether resident physicians in training at state hospitals are protected by sovereign immunity. However, in the recent case of *Gargiulo v. Ohar*,⁸⁸ the Circuit Court of the City of Richmond held that a medical research "fellow" at the Medical College of Virginia was entitled to sovereign immunity.⁸⁹ The court based its decision on the facts that the physician in question was in training, was carefully supervised in her work, and did not enjoy the same freedoms with regard to selection of patients, billing, and methods of treatment as did attending physicians.⁹⁰ The court reasoned that these factors so significantly restricted the defendant's right to practice medicine, unlike the attending physician in *James v. Jane*,⁹¹ that she should be accorded the protection of sovereign immunity.⁹² The *Gargiulo* decision is currently on appeal to the Supreme Court of Virginia.

D. *Discovery*

Trial courts are occasionally called upon to rule on the discoverability of certain hospital documents ranging from policies and protocols to specific incident reports. When plaintiffs request these documents, health care providers often oppose disclosure under various theories. These theories include statutory privilege,⁹³ the argument being that disclosure of such information is not "reasona-

85. VA. CODE ANN. §§ 8.01-195.1-9 (Repl. Vol. 1984 & Cum. Supp. 1989).

86. See *Lawhorne v. Harlan*, 214 Va. 405, 200 S.E.2d 569 (1973).

87. *James v. Jane*, 221 Va. 43, 282 S.E.2d 864 (1980).

88. *Gargiulo v. Ohar*, 13 Va. Cir. 225 (1988).

89. *Id.* at 228.

90. *Id.* at 227-28.

91. 221 Va. 43, 282 S.E.2d 864 (1980).

92. *Gargiulo*, 13 Va. Cir. at 228.

93. VA. CODE ANN. §§ 8.01-581.16-17 (Repl. Vol. 1984 & Cum. Supp. 1989).

bly calculated to lead to the discovery of admissible evidence,"⁹⁴ and public policy. Within the last year several decisions denied discovery of certain hospital documents.

In *Hedgepeth v. Jesudian*,⁹⁵ the plaintiff was admitted to the hospital for a tonsillectomy and experienced oxygen deprivation from an unknown cause. Hospital personnel near his location, when his condition was discovered made notes about their observations. These notes were not made on incident report forms provided by the hospital's insurance carrier. The plaintiffs' attorneys sought production of these statements. The trial court acknowledged that Virginia law does not accord a privileged status to records which relate to the hospitalization or treatment of a patient and which are kept in the ordinary course of business.⁹⁶ However, the court noted that the incident reports were not created to aid in the treatment of the patient, but were prepared for litigation or potential litigation and for quality assurance purposes.⁹⁷ On this basis and for reasons of public policy, the court held that the documents were privileged under sections 8.01-581.16⁹⁸ and 581.17⁹⁹ of the Code of Virginia.¹⁰⁰ Similarly, in *Leslie v. Alexander*,¹⁰¹ *Rior-dan v. Fairfax Hospital System, Inc.*¹⁰² and *Francis v. McEntee*¹⁰³ courts ruled that incident reports, hospital policy and procedure manuals and hospital by-laws are not discoverable.¹⁰⁴

Moreover, the Circuit Court of the City of Richmond refused to order disclosure of a psychiatrist's interview summaries and notes with the plaintiff and her family, even though the psychiatrist had been retained to testify concerning the standard of care.¹⁰⁵

94. VA. SUP. CT. R. 4:1(b)(1).

95. *Hedgepeth v. Jesudian*, Nos. LM-754, LM-755 (City of Richmond Mar. 8, 1989).

96. *See id.* at 6; *see also* VA. CODE ANN. § 8.01-581.17 (Repl. Vol. 1984).

97. *Hedgepeth*, Nos. LM-754, LM-755, slip op. at 6.

98. VA. CODE ANN. § 8.01-581.16 (Repl. Vol. 1984 & Cum. Supp. 1989).

99. *Id.* § 8.01-581.17 (Repl. Vol. 1984).

100. *Hedgepeth*, Nos. LM-754, LM-755, slip op. at 5-6.

101. 14 Va. Cir. 127 (1988).

102. No. 83762 (Fairfax County July 15, 1988).

103. 10 Va. Cir. 126 (1987).

104. *But see* *Atkinson v. Thomas*, 9 Va. Cir. 21 (1986) (incident reports prepared by hospital in ordinary course of business are discoverable).

105. *Reynolds v. St. Mary's Hosp.*, No. LL-2131-2 (City of Richmond June 27, 1988).

E. Evidence

In general, when a defendant moves to strike the plaintiff's evidence a court should grant the motion only if reasonable people could agree that the plaintiff's evidence is insufficient to support his claim.¹⁰⁶ In the context of a medical malpractice trial, in 1989, the Supreme Court of Virginia said that testimony by plaintiff's two experts that the defendant's care of the patient fell beneath the applicable standard of care, was sufficient by itself to defeat a motion to strike the plaintiff's evidence.¹⁰⁷

Expert witnesses may rely on inadmissible evidence to form their opinions if the evidence is normally relied upon in the expert's particular field of expertise.¹⁰⁸ However, the Supreme Court of Virginia in *McMunn v. Tatum*,¹⁰⁹ ruled that such inadmissible evidence is not itself admissible. Therefore, on direct examination an expert may not state inadmissible evidence upon which he relied in reaching his opinion, although he may state his own opinions.¹¹⁰

F. Voir Dire

Plaintiffs' attorneys have occasionally attempted to ask potential jurors about their opinions of the "insurance crisis" or the "medical malpractice crisis" during voir dire. The defense bar has objected that this as an attempt to inject the subject of insurance into the trial. Plaintiffs' counsel claim that jurors should be unbiased and that voir dire should permit sufficient questioning in this area to disclose any latent bias. These competing principles were reviewed in *Speet v. Bacaj*¹¹¹ in which the Supreme Court of Virginia affirmed the trial court's refusal to allow the plaintiff to ask potential jurors about their opinions concerning the liability insurance crisis. The basis for the decision was that such questioning would improperly introduce the subject of insurance into the trial and could use the voir dire process "as a sword rather than as a shield."¹¹²

106. *Walton v. Walton*, 168 Va. 418, 422, 191 S.E. 768, 770 (1937).

107. *Hadeed v. Medic-24 Ltd.*, 237 Va. 277, 377 S.E.2d 589 (1989).

108. VA. CODE ANN. § 8.01-401.1 (Repl. Vol. 1984).

109. 237 Va. ___, 379 S.E.2d 908 (1989).

110. *Id.* at ___, 379 S.E.2d at 912.

111. 237 Va. 290, 377 S.E.2d 397 (1989).

112. *Id.* at 295, 377 S.E.2d at 399.

G. *Medical Malpractice Review Panels*

*Speet v. Bacaj*¹¹³ also discussed use at trial of a medical malpractice review panel opinion. Such opinions are limited by law to four options which are, essentially, that there was or was not malpractice, which was or was not a proximate cause of alleged injury; the panel may also defer decision of factual questions to a court or jury.¹¹⁴ The panel opinion is later admissible at any trial concerning the alleged malpractice. The panel may not rule on issues of law such as sovereign immunity¹¹⁵ or jurisdiction.¹¹⁶ In *Speet*, the trial court admitted the review panel's opinion under the provisions of section 8.01-581.8 of the Code of Virginia,¹¹⁷ and the plaintiffs challenged such evidentiary admission on the basis that it was unconstitutional because it violated their rights to a jury trial, and that it violated the longstanding rule that expert testimony is required in a medical malpractice case to prove the standard of care.¹¹⁸ The Supreme Court of Virginia overruled both challenges to introduction of the opinion.¹¹⁹ The court concluded that section 8.01-581.8 of the Code¹²⁰ is constitutional and does not violate the requirement of expert testimony.¹²¹ The court noted that panel opinions are not conclusive evidence, but that both parties had relied on expert witness testimony as to the standard of care and that neither party relied solely on the panel opinion.¹²²

The Act provides statutory authorization for rescission of a panel request.¹²³ Generally, the party which requested the panel may rescind the request at almost any stage of the proceeding.¹²⁴ However, occasionally a party to a medical malpractice panel hearing who did not request the panel, because his opponent did so first, may nevertheless desire the panel. If the requesting party later rescinds the request and sixty days have expired since the notice of claim, the other party may find that he is therefore not

113. 237 Va. 290, 377 S.E.2d 397 (1989).

114. VA. CODE ANN. § 8.01-581.7 (Repl. Vol. 1984 & Cum. Supp. 1989).

115. *Samuel v. Commonwealth*, 14 Va. Cir. 185 (1988).

116. *Falat v. MCV*, 14 Va. Cir. 318 (1989).

117. VA. CODE ANN. § 8.01-581.8 (Repl. Vol. 1984).

118. *Speet*, 237 Va. at 295-97, 377 S.E.2d at 399-400.

119. *Id.*

120. VA. CODE ANN. § 8.01-581.8 (Repl. Vol. 1984).

121. 237 Va. at 295-97, 377 S.E.2d at 399-400.

122. *Id.* at 297, 377 S.E.2d at 400.

123. VA. CODE ANN. § 8.01-581.2(B) (Repl. Vol. 1984).

124. *Id.*

entitled to request a panel.¹²⁵ In *Reagan v. Bucur*,¹²⁶ the panel chairman ruled that once a review panel is requested it can be rescinded only with consent of all the parties who relied upon the initial request as a basis for not making a duplicate request.¹²⁷

H. Medical Malpractice Damage Cap

1. Constitutionality of the Cap

The most significant medical malpractice decisions in recent years came in 1989 with the cases of *Etheridge v. Medical Center Hospitals*¹²⁸ and *Boyd v. Bulala*.¹²⁹ In *Etheridge*,¹³⁰ by a four-to-three margin, the Supreme Court of Virginia upheld the constitutionality of the Virginia cap on medical malpractice damages¹³¹ rejecting an opinion by the federal district court in *Bulala*, that the cap unconstitutionally violated federal and state jury trial guarantees.¹³² In *Bulala*, the Fourth Circuit, on appeal, concurred with the Supreme Court of Virginia and reversed the district court's decision.¹³³

After hearing the evidence, the jury in *Etheridge* returned a verdict of \$2,750,000 against the defendant health care providers. The trial court applied section 8.01-581.15 of the Code,¹³⁴ reduced the verdict to the cap at the time of the alleged act of malpractice (\$750,000), and entered judgment for that amount.¹³⁵ The plaintiff attacked the trial court's action on the basis that it was unconstitutional because it violated her rights to a jury trial, due process of law, and equal protection under the law. The plaintiff also asserted that the medical malpractice cap violated the prohibition against special legislation and the doctrine of the separation of powers of the Virginia Constitution.¹³⁶

125. *Id.* § 8.01-581.2.

126. Medical Malpractice Review Panel (Arlington Co. Mar. 21, 1988).

127. See *id.* at 3; *Buscher v. Teja*, Medical Malpractice Review Panel (Augusta Co. Apr. 28, 1983).

128. 237 Va. 87, 376 S.E.2d 525 (1989).

129. Nos. 88-2055, 88-2056 (4th Cir. June 12, 1989).

130. 237 Va. at 95-104, 376 S.E.2d at 529-34 (upholding the statute against federal and state constitutional challenges).

131. VA. CODE ANN. § 8.01-58.15 (Repl. Vol. 1984). The Virginia limitation on monetary recovery from medical malpractice actions is commonly known as the "cap," and is found in section 8.01-581.15 of the Code of Virginia. That section originally limited recovery to \$750,000, but was later amended in 1983 to limit recovery to \$1,000,000.

132. *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986).

133. *Boyd v. Bulala*, Nos. 88-2055, 88-2056, slip op. at 8-12 (4th Cir. June 12, 1989).

134. VA. CODE ANN. § 8.01-581.15 (Repl. Vol. 1984).

135. *Etheridge*, 237 Va. at 92, 376 S.E.2d at 527.

136. *Id.* at 100-03, 376 S.E.2d at 531-33.

The *Bulala* trial court entered judgment for \$8,300,000 on a jury verdict in that amount.¹³⁷ This included substantial damages for loss of enjoyment of life and future medical care of a brain injured infant who died before entry of judgment. The judgment also included punitive damages and compensatory damages over \$750,000 (the cap at the time of the alleged malpractice) to three separate plaintiffs (a new-born and her parents).¹³⁸ The district court declined to apply the cap on the basis that it violated the plaintiffs' right to jury trial.¹³⁹

In *Etheridge*, the Supreme Court of Virginia found that the medical malpractice cap does not violate a plaintiff's right to jury trial because the jury's function is only to resolve disputed facts.¹⁴⁰ The remedy to be applied afterward is a matter of law which may be prescribed by the legislature.¹⁴¹ The court also found that the statutory cap complies with the requirements of due process because such guarantee mandates only that a party be afforded reasonable notice and a meaningful opportunity to be heard, which are not denied by the cap.¹⁴² The court found the cap in compliance with the doctrine of the separation of powers on the basis that the remedy afforded to medical malpractice plaintiffs is a common law remedy, the modification of which is a proper exercise of legislative authority.¹⁴³ The court further found that the cap is not special legislation, and does not violate principles of equal protection because it bears a reasonable and substantial relation to the object sought to be accomplished by the legislation, the alleviation of the medical malpractice insurance crisis.¹⁴⁴ The court also found that the requirements of equal protection were satisfied because the cap neither infringed upon a fundamental right nor created a suspect class of affected persons.¹⁴⁵ In dispensing with the equal protection claim, the court applied a rational basis test and

137. *Bulala*, 647 F. Supp. at 784.

138. *Id.*

139. *Id.* at 789-90.

140. *Etheridge*, 237 Va. at 96-97, 376 S.E.2d at 529. *Etheridge* was decided after oral argument in *Bulala* but before a decision was rendered by the Fourth Circuit.

141. *Id.* at 95-97, 376 S.E.2d at 529.

142. *Id.* at 97-100, 376 S.E.2d at 529-31.

143. *Id.* at 100-01, 376 S.E.2d at 531-32.

144. *Id.* at 101-03, 376 S.E.2d at 532-33.

145. *Id.* at 103, 376 S.E.2d at 533-34.

since the court determined that the legislation promoted a legitimate state purpose, held the cap to be constitutional.¹⁴⁶

In light of *Etheridge*, the Fourth Circuit in *Bulala* took the Virginia constitutional issues as settled¹⁴⁷ and, with regard to federal constitutional issues, also agreed that the cap offends no federal constitutional proscriptions.¹⁴⁸

2. Stacking of Parties

In *Etheridge*, the Supreme Court of Virginia also found that the cap prohibits the stacking of defendants to permit more than one cap in a case.¹⁴⁹ The court ruled that the cap defines the maximum amount of damages recoverable by a plaintiff in a medical malpractice action regardless of the number of defendants.¹⁵⁰ Therefore, a single plaintiff can recover a maximum of one million dollars regardless of the number of defendants.

There are still several remaining questions. One such question is whether the Act permits the stacking of plaintiffs: for instance, if a mother, father, and child have claims arising from the birth and delivery of the child, may each potential plaintiff recover the full amount of the cap? If such stacking is not allowed under the cap statute, how should the limited award be distributed among multiple plaintiffs? These issues were not addressed by the Supreme Court of Virginia in *Etheridge*, but in *Bulala* the Fourth Circuit certified these questions to the Supreme Court of Virginia for resolution.¹⁵¹ The Fourth Circuit also certified the questions of whether the cap applies to damages for emotional distress, and punitive damages.¹⁵²

3. Recovery for Emotional Distress

Virginia law generally does not permit recovery of damages for emotional distress that are not directly caused by physical injury.¹⁵³ It was not until 1974 that Virginia permitted maintenance

146. *Id.* at 103, 376 S.E.2d at 534.

147. *Bulala*, Nos. 88-2055, 88-2056, slip op. at 4.

148. *Id.* at 9.

149. *Etheridge v. Medical Center Hosp.*, 237 Va. 105, 107, 376 S.E.2d 534, 535 (1989).

150. *Id.*

151. *Boyd v. Bulala*, Nos. 88-2055, 88-2056, slip op. at 6 (4th Cir. June 12, 1989).

152. *Id.* at 21.

153. *See Boyd v. Bulala*, Nos. 88-2055, 88-2056, slip op. at 14 (4th Cir. June 12, 1989); *see*

of a suit for infliction of emotional distress without the physical manifestation of injury.¹⁵⁴ It is important to note, however, that in both *Moore* and *Womack* the wrongful conduct of the defendant was directed at the *plaintiff*, not at a *third party*. In *Womack*, the Supreme Court of Virginia, quoting with approval from *Samms v. Eccles*¹⁵⁵ noted that the cause of action exists "where the defendant intentionally engaged in some conduct toward the *plaintiff*"¹⁵⁶

The above line of cases continued with *Hughes v. Moore*.¹⁵⁷ In *Hughes*, the defendant crashed his car into the plaintiff's house which allegedly caused the plaintiff great emotional distress and resulting physical injuries. The court held that, "where the claim is for emotional disturbance *and* physical injury resulting therefrom, there may be recovery for negligent conduct, notwithstanding the lack of physical impact"¹⁵⁸ The court said:

Under the rule adopted today we are not saying that a plaintiff, in an action for negligence, may recover damages for physical injuries resulting from fright or shock caused by witnessing injury to another, allegedly occasioned by the negligence of a defendant toward a third person, or caused by seeing the resulting injury to a third person after it has been inflicted through defendant's negligence.¹⁵⁹

In *Naccash v. Burger*,¹⁶⁰ the Supreme Court of Virginia relied on the foregoing cases to permit recovery for third parties' emotional distress on the basis that the physician who had allegedly committed malpractice owed a duty to the parents of a child that developed Tay-Sachs syndrome after birth. No Virginia decision has yet stated that a plaintiff may recover for his or her own purely emotional distress at witnessing intentional or negligent acts directed at a third party. As stated by the Fourth Circuit, "Virginia law does not as an independent goal try to restore mental tranquility shaken by witnessing or contemplating negligently inflicted injury."¹⁶¹

also *Moore v. Jefferson Hosp.*, 208 Va. 438, 158 S.E.2d 124 (1967).

154. *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974).

155. 11 Utah 2d 289, 293, 358 P.2d 344, 346-47 (1961).

156. *Womack*, 215 Va. at 341, 210 S.E.2d at 148 (emphasis added).

157. 214 Va. 27, 197 S.E.2d 214 (1973).

158. *Id.* at 34, 197 S.E.2d at 219.

159. *Id.* at 34-35, 197 S.E.2d at 219-20.

160. 223 Va. 406, 290 S.E.2d 825 (1982).

161. *El-Meswari v. Washington Gas Light Co.*, 785 F.2d 483, 488 (4th Cir. 1986).

Based on the *Naccash* holding, the Fourth Circuit ruled in *Bulala* that a father who had not even witnessed the birth of his subsequently brain injured child could state a cause of action for emotional distress.¹⁶² However, the Fourth Circuit seems to have misinterpreted *Naccash* by concluding that the emotional distress complained of in that case had been sustained upon the birth of the defective child.¹⁶³ To the contrary, the infant in *Naccash* had not been obviously defective at birth and only later was it discovered that the infant suffered from a congenital condition known as Tay-Sachs syndrome.¹⁶⁴ In so ruling, the Fourth Circuit seem to have overlooked its previous holding in the case of *El-Meswari v. Washington Gas Light Co.*,¹⁶⁵ where the Fourth Circuit stated:

To confer a cause of action for distressful contemplation of negligently inflicted injury, even upon an intimate relation of the injured party, would be a portentous step. When the state supreme court has so unmistakably announced its position, the duty of a federal court in diversity jurisdiction is to apply the expressed law.¹⁶⁶

4. *Bulala* Issues Certified to Supreme Court of Virginia

The Fourth Circuit decision in *Bulala* certified a total of six questions to the Supreme Court of Virginia, three of which concern the cap.¹⁶⁷ These questions are: 1) Does the medical malpractice cap permit stacking of plaintiffs and, if so, how should any recovery be apportioned; 2) Does the damages cap apply to claims of emotional distress arising from acts of medical malpractice; 3) Does the damages cap apply to punitive damages based on acts of medical malpractice?¹⁶⁸ The Fourth Circuit certified three other questions not unique to medical malpractice cases: 1) Does Virginia permit damages for loss of enjoyment of life when death results from acts of medical malpractice; 2) Does Virginia permit loss of earning capacity for a person who would never have worked and

162. *Bulala*, Nos. 88-2055, 88-2056, slip op. at 14-15.

163. *Id.* at 14.

164. *Naccash*, 223 Va. at 409-10, 290 S.E.2d at 827.

165. 785 F.2d 483 (4th Cir. 1986).

166. *Id.* at 488-89.

167. *Boyd v. Bulala*, Nos. 88-2055, 88-2056, slip op. at 20-21 (4th Cir. June 12, 1989).

168. *Id.*

who died before entry of judgment; 3) How does the death of a party after verdict but before entry of judgment affect the nature of the action in terms of the wrongful death statute?¹⁶⁹

III. ADMINISTRATIVE DEVELOPMENTS

The Virginia Birth-Related Neurological Injury Compensation Act,¹⁷⁰ which establishes a no-fault compensation system for infants with certain neurological injuries, was the subject of a study funded by the Medical Society of Virginia.¹⁷¹ The study found that the injuries covered by the act occurred infrequently, amounting to 0.01 percent of births statewide in 1986, and 0.003 percent of births statewide in 1987. It also found that these injuries were likely to be associated with normal health care problems such as prematurity and maternal complications, rather than with problems in treatment by physicians in hospitals. The study concluded that it is questionable whether the act, which took effect on January 1, 1988, effectively compensates families who sue to recover the cost of caring for their living, neurologically injured child.¹⁷²

IV. CONCLUSION

The last year brought many long awaited developments in the area of medical malpractice litigation. The upcoming year promises equally important developments from pending decisions,¹⁷³ and it is encouraging to see the courts continuing to deal with difficult but important issues concerning medical malpractice. Through the efforts of the courts, the legislature and the Bar, Virginia is developing a mature body of medical malpractice law that will, hopefully, continue to be refined and improved.

169. *Id.* at 21.

170. VA. CODE ANN. §§ 38.2-5000 to -5021 (Repl. Vol. 1984 & Cum. Supp. 1989).

171. *Injured Infant Research Completed*, 5 V.S.B. Sec. Health L. News 3 (P. Swisher ed. 1989).

172. *Id.*

173. Most notably, the certified questions in *Boyd*.

